REGULAR ARBITRATION

In the Matter of the Arbitration	( )	
between	( )	Grievant: Craig Boyce
UNITED STATES POSTAL SERVICE	( )	Post Office: Main Post Office, Cheyenne, WY
and	( )	USPS No. E06N-4E-C 09370199
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	( )	NALC No. 555082909

BEFORE: Kathy L. Eisenmenger, J.D., Labor Arbitrator

APPEARANCES:

For the U. S. Postal Service: Shirley T. Pointer

For the Union: Coby Jones

Place of Hearing: Cheyenne, WY

Date of Hearing: February 18, 2010[1]

AWARD:

Date of Award: April 22, 2010

PANEL: Colorado/Wyoming or Arizona

Award Summary

The grievance is sustained. The Postal Service violated the National Agreement and applicable Postal Service regulations incorporated under Article 19 when the Service failed to provide Limited Duty to the Grievant, Craig Boyce.

Kathy L. Eisenmenger, J.D.

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[1] The parties elected to submit post-hearing briefs. Briefs were scheduled to be postmarked no later than March 18, 2010. The Postal Service's brief was received on March 18, 2010, and the Union's brief was delivered to this Arbitrator on March 20, 2010. I closed the arbitration record on March 20, 2010.

Issues

The parties agreed to the following statement of the issue: "Did the Postal Service violate the National Agreement when it failed to provide Limited Duty to the grievant? If so, what is the appropriate remedy?"

Pertinent Contractual Provisions

Article 2
Non-Discrimination and Civil Rights

Section 1. Statement of Principle

The Employer and the Union agree that there shall be no discrimination by the Employer or the Union against employees because of race, color, creed, religion, national origin, sex, age, or marital status.

In addition, consistent with the other provisions of this Agreement, there shall be no unlawful discrimination against handicapped employees, as prohibited by the Rehabilitation Act.

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Section 3. Grievances

Grievances arising under this Article may be filed at Formal Step A of the grievance procedure . . ..

JCAM 2.3 . . . . Article 2 also gives letter carriers the contractual right to object to and remedy alleged violations of the Rehabilitation Act through the grievance procedure. Postal Service guidelines concerning reasonable accommodation are contained in Handbook EL-307, Guidelines on Reasonable Accommodation.

* * * *

Article 3
Management Rights

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

A. To direct employees of the Employer in the performance of official duties;

B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;

C. To maintain the efficiency of the operations entrusted to it;

D. To determine the methods, means, and personnel by which such operations are to be conducted;

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Article 5
Prohibition of Unilateral Action

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

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Article 13
Assignment of Ill or Injured Regular Workforce Employees

JCAM, Page 13-10

Limited Duty *work is work provided for an employee who is temporarily or permanently incapable of performing his/her normal duties as a result of a compensable illness or injury. The term limited duty work was established by Title 5 Code of Federal Regulations, Part 353 – the O.P.M. regulation implementing 5 U.S.C. 8151(b), that portion of the Federal Employees' Compensation Act (FECA) pertaining to the resumption of employment following compensable injury or illness. USPS procedures regarding limited duty are found in Part 540 of the* Employee & Labor Relations Manual (ELM). *The Office of Workers' Compensation Programs has the exclusive authority to adjudicate compensation claims and to determine the medical suitability of proposed limited duty work.*

Article 15
Grievance-Arbitration Procedure

Section 1. Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of

the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

JCAM, Section 15.1

Broad Grievance Clause. *Article 15.1 sets forth a broad definition of a grievance. . . . Other types of disputes that may be handled within the grievance procedure may include:*

- *Alleged violations of postal handbooks or manuals (see Article 19);*

* * * *

- *Disputes concerning the rights of ill or injured employees, such as . . . compliance with the provisions of ELM Section 540 and other regulations concerning OWCP claims. . . . However, decisions of the Office of Workers' Compensation Programs (OWCP) are not grievable matters. OWCP has the exclusive authority to adjudicate compensation claims, and to determine the medical suitability of proposed limited duty assignments.*

* * * *

Article 21
Benefit Plans

Section 4. Injury Compensation

Employees covered by this Agreement shall be covered by Subchapter I 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.

Pertinent Postal Service Regulatory Provisions

Employee and Labor Manual (ELM)

546 Reassignment or Reemployment of Employees Injured on Duty

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Section 546.14 Disability Partially Overcome

Section 546.141 General

The procedures for current employees cover both limited duty and rehabilitation assignments. Limited duty assignments are provided to employees during the recovery process when the effects of the injury are considered temporary. A rehabilitation assignment is provided when the effects of the injury are considered permanent and/or the employee has reached maximum medical improvement. Persons in permanent rehabilitation positions have the same rights to pursue promotional and advancement opportunities as other employees.

Section 546.142

When an employee has partially overcome the injury or disability, the Postal Service has the following obligation:

a. *Current Employees.* When an employee has partially overcome a compensable disability, the Postal Service must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerances (see 546.611). In assigning such limited duty, the Postal Service should minimize any adverse or disruptive impact on the employee. The following considerations must be made in effecting such limited duty assignments:

1. To the extent 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 constitutes the limited duty to which the employee is assigned.

2. 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.

3. If adequate work is not available at the facility within the employee's regular hours of duty, work outside the employee's regular schedule may be assigned as limited duty. However, all reasonable efforts must be made to assign the employee to limited duty within the employee's craft and to keep the hours of limited duty as close as possible to the employee's regular schedule.

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.

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Handbook EL 307
Reasonable Accommodation, an Interactive Process

13 Applicable Laws

Section 131 The Rehabilitation Act

The Rehabilitation Act prohibits discrimination against qualified employees . . . with disabilities in the federal government, including the United States Postal Service.®
The Rehabilitation Act also imposes an obligation on the Postal Service to find reasonable ways to accommodate a qualified individual with a disability. In other words, the Rehabilitation Act requires the Postal Service to consider ways to change the manner of doing a job to allow a qualified person with a disability to perform the essential functions of a particular job, ...

* * * *

Section 542 Reassignment as a Reasonable Accommodation

Reassignment is a form of reasonable accommodation which may be required if no other accommodation will allow the employee to perform the essential functions of the position and the proposed reassignment does not violate seniority provisions of a collective bargaining agreement. Barring undue hardship, reassignment will be required as a reasonable accommodation of last resort if it is determined that no other reasonable accommodation will permit the employee with a disability to perform the essential functions of his or her current position.

Handbook EL-505
Injury Compensation

Limited Duty Assignment Guidelines
Basic Considerations

The USPS should minimize any adverse or disruptive impact on the employee in assigning limited duty. (ELM 546.141)
Consider the following when making limited duty assignments:

— Match the limited duty job as closely as possible to the regular job. Do not make the limited duty job more desirable than the employee's regular job.
— The limited duty work environment should be similar to that of the regular job. If the limited duty environment is more attractive, it may seem like a reward. If the environment is less attractive, it may seem like a punishment.
— The limited duty job should have similar pay. To put an injured employee in a job that pays more than the regular job creates a problem, especially if the employee performs well. To put an injured employee in a lower paying job (i.e., a job that requires less skill) makes poor use of resources.
— Little or no training should be required. Don't expect supervisors to train someone in a skilled assignment when they know he or she will only be there a short time.
— The assignment should result in a tangible product and should not be a "make work" job.
— The assignment should be a function where temporary additional help is useful. This will help ensure that injured employees make a useful contribution to the organization.

Statement of Facts

The Grievant, Mr. Craig Boyce, has been employed with the Postal Service since March 31, 1984. He sustained an injury on November 1, 1999, while handling mail containers and working as a City Letter Carrier. Documentation pertaining to his injury describes it as involving a sprain or strain to the ligament, muscle and/or tendon in his right elbow. The Grievant applied for injury compensation benefits with the Office of Workers Compensation Program (OWCP) administered by the U.S. Department of Labor (DoL). The OWCP accepted his claim, but the claim was closed as of April 26, 2004. The record indicates that the Grievant did not lose any work time due to his injury.

In August 2000, almost a year after the Grievant's injury, he underwent a functional capacity evaluation by a private medical concern. The examining physician found that the Grievant was unlimited in his sitting, walking, standing, twisting and operating a motor vehicle with wrist activities. The physician recommended limitations of reaching no more than two (2) to two and a half (2.5) hours per day, including above the shoulder; repetitive use of his right elbow no more than four (4) to five (5) minutes at one time and no more than fifteen (15) minutes per hour nor greater than a total of one and a half (1.5) hours per an eight (8) hour work day; pushing and pulling up to thirty (30) pounds and no more than ten (10) pound lifting with his right arm at one time. The physician also found the Grievant employable in a light duty work

category on a full time basis. Lastly, the examining physician opined that the Grievant had reached maximum medical improvement. (Joint Exhibit [JX] 2, pages [pp.] 55-57).

The record contains a number of rehabilitation assignments made for the Grievant as a result of his limitations due to his on-the-job injury. On or about April 13, 2001, the Postal Service issued the Grievant a "Reassignment Job Offer" as a Modified Letter Carrier with work hours from 1:00 a.m. to 9:30 a.m. The reassignment offer included the duties to analyze S999 mail, to analyze Quality Carrier/Quality Case mail, to analyze Machine rejected and residue mail, to assist with firm delivery confirmation scanning, to review mail pieces/parcels in OTR for accuracy, to answer telephones, to take hold mail to customers in the lobby, to review firm holdouts for accuracy and other duties within his physical restrictions. The Grievant accepted this modified letter carrier job but objected to the shift hours as creating a burden on him and his family and as a form of punishment because of his injury. JX 2, pp. 30-32.

On or about March 12, 2007, a supervisor certified that the Grievant was performing duties under a "Rehabilitation Position" as a city carrier that included delivery of Express Mail, delivering of hot case mail and growth management but no casing or carrying mail. JX 2, p. 29. On or about April 9, 2008, Management at the Cheyenne MPO made the Grievant an Offer of Modified Assignment (Limited Duty). The proposed duties for the limited duty work involved one (1) to three (3) hours to deliver Express Mail, up to thirty (30) minutes to deliver hot case mail and to perform growth management up to three (3) hours. The offer noted the physical requirements for the modified assignment as lifting up to twenty (20) pounds for three (3) hours intermittently, simple grasping for one (1) hour intermittently and no casing or delivery of mail except Express Mail and no driving an LLV for more than four (4) stops per day. The Offer pertained to the Grievant's OWCP claim. The Grievant accepted the offer on April 25, 2008. JX 2, p. 28

On August 28, 2009, Supervisor Marie Pitt issued the Grievant an "Employee Leave Information Letter, Complete Day" that informed him he was being sent home inasmuch as Management's search for "necessary tasks" meeting his medical restrictions in all crafts and on all tours within the Grievant's facility and throughout the Local Commuting Area could not identify "any available necessary tasks within [the Grievant's] medical restrictions." JX 2, p. 23. Mr. Paul Davis, a regular letter carrier and the Local Branch President for the Union, was present when the Grievant received his letter. Mr. Davis testified that the Grievant was told there was no

necessary work available for him. Mr. Davis further stated that the Grievant had not been apprised prior to the issuance of the letter of the action. The parties stipulated at the Formal A grievance process that the National Reassessment Process (NRP) had been implemented at the Cheyenne Main Office. Joint Exhibit (JX) 2, page (p.) 2. Mr. Davis filed the informal grievance and the Step A grievance on behalf of the Grievant on September 9, 2009. The grievance alleged violations of the parties' Joint Contract Administrative Manual (JCAM) and National Agreement, Articles 2.1, 3, 5, 13.6, 14.3.C, 15.1, 19, 21.4 and postal regulations/guidelines EL-307, EL-505, ELM 546.11, ELM 546.14, Title 4 Chapter 81 of the United States Code (USC), Title 29 of the USC (the Rehabilitation Act of 1973) and M-[0]1550.

The document M-01500 constitutes a Pre-arbitration settlement dated October 8, 2003 at the parties' National level to resolve the issue whether Management violated Article 41.2.B.4. of the National Agreement when a part-time flexible (PTF) city letter carrier was taken off a "hold-down" assignment to provide work to a full-time city letter carrier on limited duty. The parties agreed to the following:

> Full-time employees when on limited duty as a result of a job-related illness or injury, may "bump" a PTF on a "hold down" assignment (or portion of hold down assignment) only if the duties on the "hold down" assignment are included in the written/verbal (see ELM 545.32) limited duty assignment and there is no other work available to satisfy the terms of the limited duty assignment.

The Grievant testified that he had performed a variety of duties prior to his receipt of the August 28, 2009, letter. The list is contained at JX 2, p. 25. His Express Mail duties involved sorting the Express Mail after the first dispatch arrived between 10:00 a.m. and 10:30 a.m. He added that he did this each morning unless he was given delivery cuts to take to a route or routes. He added that a regular letter carrier did not take the Express Mail because that type of mail did not arrive until after the carriers had left the office for their deliveries. The Grievant stated that his Express Mail deliveries took on an average of three (3) to four (4) hours per day, sometimes up to five (5) hours per day and had to be done by 3:00 p.m. He further explained that he would drive outlying areas for distances of at least 100 miles a day and sometimes up to 150 miles per day. The Grievant testified that maybe once a month the office would receive an Express Mail piece that he could not deliver because it exceeded his twenty (20) pound weight limitation. The Grievant also testified that he performed pick-up and collection duties on an average of two (2) hours per day. He explained that he would take the collections from about twenty (20) free-

standing mail deposit boxes. He stated that he made all the collections except for a large insurance business and the State's administrative office because the mail volume in those boxes exceeded his lifting limitations. The Grievant testified that he would work the hot case mail; i.e., mail sorted to the wrong route, usually performed by a clerk. He explained that if the carrier for that route had left the office before the hot case mail had been sorted he would take the mail to the carrier for delivery. The Grievant stated that most days there was some hot case mail to take. The Grievant also testified that he would deliver cuts to the appropriate carrier for delivery. He added that this happened almost everyday. The Grievant testified that he also would deliver certified and registered letters to customers if the carrier on those routes lacked the time to make the delivery. He explained that this task was performed a few times a week, not everyday. The Grievant further testified that he conducted inventories of collection boxes on a quarterly basis, which would take between three (3) to four (4) days to complete. This work involved inspecting the boxes and their labels, to make sure they were in safe working order, to be sure the scanned bar was correct and whether the box needed paint. The Grievant stated there are forty (40) boxes throughout the City.

The Grievant testified that he was assigned by a supervisor to conduct growth management duties. He explained that when the City had a new development established he would meet with the developers and rural and City officials, assist in making new addresses in the county, decide what type of delivery the structure would receive and make up the schemes for the new additions or changes of addresses. The Grievant estimated that while he performed this duty he was involved in thirty (30) new developments. One such development consisted of 750 homes. The Grievant testified that this duty involved three (3) to four (4) hours a day in the past but was reduced as a result of the affects of the poor economy.

The Grievant testified that he performed other duties on an ad hoc basis, such as taking pictures of damaged or vandalized collection boxes and answering the telephone, although he was not in the office much of the time. He stated that he was doing something eight (8) hours a day and never sat around. He added that he pre-assigned duties every day.

The Grievant testified that after he received the August 28, 2009, letter he was given thirty (30) days administrative leave because of his military veterans status. He added that after the thirty (30) days expired he used his leave. The Grievant stated that since October 24, 2009 he exhausted his leave and has had no income.

The Grievant testified that after receiving the August 28, 2009 letter he filed a claim with the OWCP for compensation but he is waiting for their decision. He explained that on February 15, 2010 he was notified by OWCP that they are seeking a second medical opinion to be conducted in March. In the meantime, he is without income.

Ms. Linda Sanfilippo testified concerning her involvement in the NRP review of injury compensation employees in the Colorado and Wyoming areas. Her normal place of work is as the Postmaster of Morrison, Colorado, but she has been detailed to Denver for her NRP work. Ms. Sanfilippo described her responsibilities under the NRP to assess all limited duty employees, to assess the work that is available and to review the injured employee's current medical information, such as CA-17s, on file. She explained the process is to provide necessary work to the employee within the employee's installation, or to another installation, and in the employee's craft or to work outside the employee's craft, depending upon the availability.

Ms. Sanfilippo testified that she completed a review of the Grievant's case and filled out a form, Priority for Assignment Worksheet, for limited duty pertaining to the Grievant. The form takes the reviewer through what the parties refer to as the "pecking order" when searching for limited duty work for a partially recovered injured employee. JX 2, p. 181. Ms. Sanfilippo, relying upon information provided to her by line management, was unable to identify adequate work for the Grievant at any of the steps of the pecking order.

The line managers were instructed in their search for work that would be within the Grievant's medical restrictions and would constitute "necessary work." The forms involved in the NRP define what is the "necessary work" to identify for the employee. The form states that, "Necessary work is defined as any tasks that are determined by management as necessary for an operation and/or function. Necessary tasks are office or facility specific and must be approved by senior management." JX 2, p. 34 as an example. Ms. Sanfilippo testified that what the review sought was work done by a Part-Time Flexible (PTF) or Transitional Employee (TE) carrier. She stated that in the Grievant's case all such work was already encumbered, meaning that an employee on a bid assignment was doing the work. Ms. Sanfilippo offered as examples of "necessary work" to include boxing mail, distribution of mail, window duties, dispatch and any other "necessary work for the office to meet its daily operations." The search for work for the Grievant was also limited to offices within a fifty (50) miles range from the Cheyenne MPO.

Ms. Sanfilippo testified that she was unable to locate work for the Grievant in any of those outlying offices for various reasons.

With regard to the results of the NRP, Ms. Sanfilippo stated that the review covered 570 employees in the Colorado/Wyoming area. She added that 120 of those employees were found full eight-hour a day work and about 50 employees were given partial day's work from one (1) to seven (7) hours a day. She estimated that about 100 employees retired and about 200 employees returned to full duty (she did not indicate whether this number included the 120 employees for whom full limited duty had been found). Ms. Sanfilippo stated that about 70 employees were in similar situations to that faced by the Grievant.

Postmaster Spurgas testified that he has been the Cheyenne Postmaster for about three (3) years and was also a supervisor at Cheyenne for about eight years. He stated that he worked with Ms. Sanfilippo on the local review conducted under the NRP. Postmaster Spurgas testified that he personally searched through the customer service side of the Cheyenne installation for work for the Grievant and determined there was no necessary work in view of the Grievant's current medical information and the requirements of the jobs involved. He added that documentation in the record shows the search for work for the Grievant in the plant-side of the Cheyenne installation. JX 2, pp. 180 through 204.[2] The documents pertaining to the search for work indicate there was "no necessary work" available that met the Grievant's medical restrictions.

Postmaster Spurgas specifically addressed the positions of mail handler, mail clerk and letter carrier in his testimony concerning the search conducted for work for the Grievant. He stated that in his search he also checked with the stations for Cheyenne to see if they had work for the Grievant. He referred to the Grievant's lifting restrictions and restrictions pertaining to pushing and pulling activities. He determined that the Grievant could not perform mail handler duties because of those medical restrictions. He also determined that the Grievant could not perform mail clerk duties for the same reasons, as well as the Grievant had restrictions for fine hand manipulation and loading mail. Postmaster Spurgas stated that the Grievant was unable to perform the task of boxing mail because of those restrictions. He further stated that the Grievant

[2] There is considerable duplication of documents in the record pertaining to the search for work, among other documentation.

was unable to perform the primary duties of a letter carrier; i.e., casing and delivering mail and driving a LLV.

With regard to the duties the Grievant had been performing until August 28, 2009, Postmaster Spurgas disagreed with the amount of time the Grievant expended to deliver Express Mail. He believed vehicle utilization reports would show otherwise. He stated that on occasion the office's employee might drive long distances to deliver Express Mail. In rebuttal of the Grievant's estimate of time he spent performing this duty, the Postal Service submitted a Vehicle Utilization Daily Report for the delivery days of February 1 through 17, 2010.[3] The reports show the mileage used by employees working routes 34 (an auxiliary route) and 35, who assumed the Express Mail deliveries when not carried by the route's carrier.[4] A sampling shows that for February 17, 2010, the two (2) employees drove a total of 118 miles, 84 miles on February 16, 137 miles on February 13, 125 miles on February 12, 2010, etc. Of the fourteen (14) days covered by the reports, only one report shows there were no deliveries for Express Mail made by other than the regular route's carriers. Frequently, the combined total mileage for delivering Express Mail by the PTF or TE is close to or over 100 miles a day. Management Exhibit (MX) 1. The reports also show that with few exceptions the PTF or TE begins travel for the Express Mail delivery before 10:00 a.m., although there are some errors in the report. For example, the report for February 12, 2010, shows that Employee Osterman began use of the postal vehicle at a little after 4:00 p.m. but drove 71 miles in two hundredths of an hour.

Postmaster Spurgas testified that he gave consideration to the Grievant's performance of delivery of Express Mail but had issues with continuing this work by the Grievant. He referred to the Grievant's lifting restrictions and stated that from time to time an Express Mail piece would exceed the Grievant's restrictions. He reasoned that an employee with no restrictions could be sent everywhere. Postmaster Spurgas stated that the Grievant was limited from using

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[3] The Union objected to the admission of the reports inasmuch as the neither documentation nor the information had not been provided during the earlier grievance steps. The objection was overruled on the basis that the information was in rebuttal to the Grievant's testimony of the distances he typically drove when delivering Express Mail, information that had not been raised in the earlier grievance procedure.

[4] The testimony was not clear. Postmaster Spurgas testified that he highlighted the mileage for Employees Rentz and Osterman because they had been assigned to deliver Express Mail. They are listed on the report for Routes 34 and 35; however, other employees are also shown on different days to work those same routes.

the primary type of vehicle in the Cheyenne fleet – the Long Life Vehicle (LLV). He added that the Grievant had used one of the vans in the fleet, but that the Cheyenne installation had suffered a reduction in the fleet and did not have a pool of vehicles as they used to have.

Postmaster Spurgas testified that currently no limited duty employees deliver Express Mail. He stated that the Express Mail is currently delivered by PTFs or other carriers, such as Reserve Letter Carriers to achieve their guarantee of eight (8) hours work per day, or by TEs. He further stated that Express Mail is delivered every day. He testified that box collection is done every day. Postmaster Spurgas stated that the Grievant performed box collection except for the receptacles for a large insurance company and the State Capitol building because of the volume and the weight of mail from those two places.

Postmaster Spurgas testified that hot mail deliveries to the carriers already on the routes happen frequently. He stated that currently the employee who performs this task is the same person who is doing the Express Mail; i.e., a PTF or a TE.

Postmaster Spurgas testified the number or quantity of cuts to be done depend on the situation of the day. He stated that cuts happen frequently. He added that sometimes the carrier on the route would be called by the supervisor to come to the office to pick up the cut, particularly if the carrier's route is close to the office. Otherwise, the supervisor will have someone take the cut out to the carrier while on the route.

Postmaster Spurgas testified that certified and registered mail are normally delivered by the carrier assigned to the route involved. He added that rarely does someone other than the regular carrier for that route deliver certified or registered mail pieces.

Postmaster Spurgas testified that the inventory of collection boxes is a supervisory duty and is currently being done by supervisors.

Postmaster Spurgas testified that it is Management's job to label CBUs and perform work related to growth management. He added that currently members of Management are doing this work. Postmaster Spurgas stated that the Grievant was involved in growth management activities. He acknowledged that in the past the work was done by limited duty employees so as to give them an eight (8) hour assignment; however, he considers the work to be "make-work." With regard to the other duties the Grievant listed (reference JX 2, p. 25), Postmaster Spurgas stated that those items were necessary. He testified that prior to August 28, 2009, the Grievant

performed all of those duties. He added; however, that all carriers input new addresses and the supervisors subsequently verify and place the new addresses in the proper sequences.

Postmaster Spurgas testified with regard to the list of duties once performed by the Grievant that those duties belonged to other people. He stated that anyone can deliver Express Mail. He claimed that city carriers pick up collections, although he qualified his testimony by stating that Employee Rentz is primarily assigned to do the box collections daily. Postmaster Spurgas testified that it is Management's duty to take pictures of the postal collection boxes. He stated that the Postal Inspectors conduct stakeouts to prevent vandalism. He added that General Clerks answer the office's telephone.

PTF Letter Carrier Russ Osterman testified his deliveries involve the outlying areas of Cheyenne, and that he uses a van for his deliveries. He stated that Express Mail may be done by two (2) to three (3) employees, but that usually just he and either another PTF or TE, Christy Rentz, deliver Express Mail. Mr. Osterman testified that his Express Mail deliveries take between two (2) to three (3) hours a day and that they must be done by no later than 3:00 p.m. He added that he worked some Express Mail with the Grievant but since the Grievant's absence he has picked up the slack. Mr. Osterman stated that he drives between 100 to 150 miles a day due to the distances involved in covering the county. He described there was a lot of area from Chugwater, the State line, County Road 217 and the Albany County line.

TE Letter Carrier Christy Rentz testified that she delivers Express Mail every day. She added that the amount of time spent on this duty varies between one (1) to three (3) hours per day. She stated that she delivers Express Mail "all over" with Mr. Osterman. Ms. Rentz testified that she also does the box collections every day, which she believes is assigned to an auxiliary route, Route 34. She added that the box collections take between two and a half (2.5) to three (3) hours per day. Ms. Rentz stated that she may not start the collections work until 4:00 p.m., but may start as early as 2:00 p.m., depending on the situation.

Positions of the Parties

For the Union

The Union asserted that the Postal Service is obligated to adhere to the provisions of the FECA and that one of the major goals of the Act is to return an injured employee to productive employment. The Union cited two (2) provisions of the regulations pertaining to the rights of

federal employees covered under the FECA that the Postal Service "must make every effort" to restore the injured employee to limited duty and to treat the covered employee "substantially the same as other handicapped individuals" under the Rehabilitation Act of 1973. See 5 CFR Part 353.301(c) and (d). The Union also relied upon other regulatory provisions pertaining to the application of the Americans with Disabilities Act of 1990 (ADA) to supports its contention that federal law requires the Postal Service to make every effort to restore injured worker to limited duty. Reference 29 CFR 1614.203(a) and (b) and 29 CFR 1630.9(a) and (b).

The Union posited that the National Agreement requires the Postal Service to comply with federal law and that Articles 3 and 5 establish that the grievance arbitration procedure may be used to enforce those legal obligations. In support of its positions, the Union cited a National Pre-arbitration Settlement, F94N-4F-C 96032816 (reference JX 2, p. 143; M-01316, dated May 21, 1998)[5] and the National Arbitration Award of Arbitrator Bernstein (Case No. H1N-5G-C 14964, March 11, 1987 [C-06858]) that has been incorporated in the parties' JCAM, page 5-1.[6] The Union relied on other provisions of the National Agreement in support of its positions that the Postal Service must observe "regulations concerning OWCP claims (Article 15.1) and violations of law and that alleged violations may be adjudicated under the negotiated Grievance-Arbitration Procedure. See also Article 21.4.

The Union brief contained a detailed chronology of the development in Postal Service regulations. The Union asserted that the Postal Service's obligation to injured employees no longer limits an employee's return to work to an established job or to "productive work." The Union argued that the current provisions of the ELM 546.142 require the Postal Service to "make every effort toward assigning the employee limited duty." The Union noted that the current ELM provision replaced the terms "established jobs" of the prior regulation with "limited duty" work, that the previous terms "maximum efforts" [to find and place the employee in a work situation] were replaced with "must make every effort" and that the reference in the prior regulation to "productive" work was eliminated. The Union further noted that the language of the current ELM 546.142 provisions mirror the provisions of the current 5 CFR 353.301(d) and

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[5] (" . . ., the parties agree that pursuant to Article 3, grievances are properly brought when management's actions are inconsistent with applicable laws and regulations.")

[6] In interpreting Article 5, Arbitrator Bernstein found that the contractual provision expressed the parties' interest to utilize the grievance and arbitration procedure in Article 15 to enforce the Postal Service's National Labor Relations Board commitments.

the National Step 4 Settlement for Grievance No N8-NAT-003 (M-01010, dated October 26, 1979). JX 2, pp 97-99.

In additional support of its arguments on the above points, the Union referred to the Postal Service's NRP Handout (JX 2, p. 348[7]), hand-written notes on issued Forms CA-17s,[8] and a brief the Postal Service submitted in a National Arbitration case (Case No. E90C-4E-C 95076238, dated April 15, 2002; JX 2, pp. 100-117).[9] The Union also cited a National Award rendered by Arbitrator Shyam Das wherein the Postal Service argued that the creation of duty assignments is based on Management's operational needs; however, rehabilitation assignments are created uniquely for the employee with work restrictions due to an on-the-job injury because of the Postal Service's legal, contractual and regulatory obligations to reassign or reemploy an employee who has been injured on the job. Reference Case No. E90C-4E-C 95076238, pp. 12-13; JX 2, pp. 131-132. The Union asserted that the Postal Service's position expressed in the Das Award shows that the Postal Service recognized its obligation to create limited duty

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[7] The handout bearing the logo of the Postal Service shows bullet definitions of limited duty assignment upon rehabilitation as follows:

Traditional
- Employee returned to an assignment – make work or necessary work
- Employee not returned to an assignment – OWCP Disability Rolls
- OWCP determines: compensation eligibility – Vocational Rehabilitation participation

However, under the "Reassessment Process" the Postal Service designates "necessary work only, where the employee is returned to an assignment.

[8] The Union offered copies of two (2) CA-17s for an employee other than the Grievant for the remarks concerning availability of light duty. The Postal Service objected to the admission of these documents on the basis that the documents were not included in the joint Step B file. Upon review of the record, I overrule the objection and admit the documents. Both documents bear the initials of the parties' representative involved in the processing of the grievance and designated the documents as Attachment #7, U-24 and U-25. The Union's written grievance specifically references these documents by those designations in the file. Mr. Davis testified without rebuttal that he provided these documents to Management during the grievance process. The table of contents for the grievance file lists these documents as included in the record. Although there are other documents in the grievance file (JX 2) that bear the designation U-24 and U-25, the file contains 439 pages. It would appear that the parties inadvertently omitted the documents, admitted as Union Exhibit 1. The documents state that duty and light duty is available at the post office and that "we" can accommodate almost any limitations.

[9] Rehabilitation assignments are created as a result of legal, contractual, and regulatory requirements as opposed to duty assignments created under Article 37 (of the USPS/APWU National Agreement). Brief at 101-102.

assignments that are not operationally necessary and that the Postal Service should not be allowed to argue to the contrary in the instant case.

Lastly, the Union quoted National-level correspondence, dated August 19, 2005, wherein the Postal Service wrote to the Union that the Postal Service made no assertions that: (1) it had no duty to provide limited duty to a carrier when the employee was disabled from delivering mail, (2) that it had no duty to provide limited duty if such work was unavailable for eight (8) hours a day or for forty (40) hours a week; and, (3) that it lacked an obligation to provide limited duty where the employee was unlikely to fully recover from the injury. Reference #M-1550, JX 2, pp. 141-142.

The Union responded to the Postal Service's argument that the latter did not have an obligation to create non-productive limited duty assignments for injured workers on the basis of provisions of the EL-505, specifically, that "[t]he assignment should result in a tangible product and should not be a 'make work' job." The Union noted that this provision resides under the heading of "Basic Consideration" of the cited manual. The Union argued that the Postal Service's obligation "to make every effort" should not be discharged upon basic considerations. The Union alleged that the Postal Service placed too narrow a view on what should constitute limited duty and seemed to rely upon core letter carrier duties such as casing and carrying mail. The Union offered that every traditional limited duty job, such as answering phones, serving as the lobby director, handling Edit Books, delivering Express Mail pieces, meets the definition of tangible work.

The Union cited the National Pre-arbitration Settlement, M-01706, dated June 18, 2009, concerning the Postal Service's implementation of the NRP, specifically, the following agreements reached by the parties:

> *1. The NRP has not redefined or changed the Postal Service's obligation to provide limited duty or rehabilitation assignments for injured employees. The ELM 546 has not been amended and remains applicable to all pending grievances.*
>
> *2. The Postal Service has not developed new criteria for assigning limited duty. Injured employees will continue to be assigned limited duty, in accordance with the requirements of ELM 546 and 5 C.F.R., Part 353.*
> JX 2, pp. 95-96.

The Union submitted a recent regional arbitration award that interpreted the M-01706 Settlement agreement, as follows:

> *What the Settlement language reveals is that nothing has changed in the obligation of the Service to provide limited duty and rehabilitation jobs to injured employees. Further, there have been no new criteria developed by the Service for assigning limited duty jobs. Also, the Settlement reaffirms that ELM 546 and CFR Part 353 are controlling when it comes to limited duty assignments and the requirements and extent of the obligation placed on the Service. The terms of the Settlement clearly support the Union position that the Service was employing new and different criteria (or its implementation) in the Grievant's situation; criteria different from what had been done in the past. The "necessary work" and "operational need" standards used by the Service as justification where it has not been shown to have been applied in the past is not in conformance with the clear understandings derived from the Settlement between the Parties."*[10]

The Union argued that the National Award of Arbitrator Bernstein established that "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."[11] The Union submitted three (3) regional awards that up the interpretation that Section 546.141 to provide limited duty on a continuing basis.[12]

The Union asserted that the Postal Service failed to meet its legal and contractual obligations to the Grievant, specifically those contained in ELM 546.142. The Union observed that the Postal Service complied with the regulation for almost ten (10) years until August 28, 2009. The Union contended that the Grievant's medical restrictions had not changed and that the existence of the work he had been doing for the past decade had not changed. The Union posited that the only change was local Management's implementation of the NRP. The Union claimed that Management used a narrow and very restrictive definition of "necessary work" that blinded Management from adhering to its obligations under ELM 546.142. The Union further asserted that the M-01706 National Pre-arbitration Settlement puts to rest any notion that Management

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[10] Case Nos. B01N-4B-C 06189348/55606 (LaLonde, 2010).
[11] Case No. H1N-1J-C 23247 (1987) at p. 14. Arbitrator Bernstein continued by stating that, "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." *Id.*
[12] Case Nos. W7N-5N-C 22042/15773 (Barker, 1991); Case No. W0N-5TC- 862 (Abernathy, 1993); Case No. E98N-4E-C-01097720 (Freitas, Jr., 2002)

can impose a "necessary work" criteria when discharging their "must make every effort" obligation under ELM 546. The Union argued that despite the use of the criteria the work the Grievant had been doing was not only necessary but vital to the mission of the Postal Service; i.e., collecting mail, delivering the Postal Service's premium product of Express mail, running cuts and hot case mail to the carriers and managing growth.

The Union responded to the Postal Service's proffer that eight (8) hours of work was not available for the Grievant by showing the mileage report for TE Rentz and PTF Osterman who had delivered Express mail. The Union offered that the mileage records do not show the mileage driven by the Grievant when he delivered Express Mail and that the Grievant testified that he started his express run before the second dispatch which enabled him to also meet the second dispatch of mail, whereas Rentz and Osterman did not start their Express Mail run until after the second dispatch. The Union opined that the Grievant could easily have been on the road for this task for a longer period than employees Rentz and Osterman.

The Union submitted two (2) regional arbitration awards for the proposition that a presumption exists where any employee has been performing in a rehabilitation position for a sustained period of time and that the Postal Service bears a heavy burden to demonstrate that it can no longer accommodate the injured employee.[13]

The Union argued that had the Postal Service conducted an assessment without using its improperly narrow standards the Postal Service would have found necessary work available the very next day after Management relieved the Grievant. The Union noted that the Grievant was immediately replaced by PTFs and TEs for most of the duties he had previous performed. The Union claimed that no reassessment has occurred within Cheyenne since August 28, 2009.

The Union urged the Arbitrator use a shifting burden of proof in the analysis of the instant grievance because the ELM 546.14 places an affirmative burden on Management to demonstrate that they met the obligations to locate work within the established pecking order. The Union posited that once the Union has established a *prima facie* case that the burden moves

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[13] Case No. E06N-4E-C 08200936 (Vanhof, 2010) (Performing limited duty for 9 years leads to some presumption that was not proved by the Postal Service otherwise that there was adequate work to be performed in the rehabilitation position); Case No. E90N-4E-C94004012 (Axon, 1995)("Where the Postal Service has successfully accommodated a limited duty employee for two years, it bears a heavy burden to demonstrate that it can no longer accommodate that employee.").

to Management and the Union has no further burden to prove that work was available for the grievant. The Union argued that it established a *prima facie* case that Management failed to follow their obligations under ELM 546.14. The Union maintained that it showed in great detail the work the Grievant had been doing and could still do. The Union submitted two (2) regional arbitration awards in support of its position concerning the allocation of the parties' burdens of proof.[14] The Union contended that the evidence at hearing clearly demonstrated that there was sufficient work available at the very first level of the pecking order within the Grievant's craft, facility and tour, making the *Performance Cluster Necessary Work Identification Worksheets* unnecessary.

The Union also claimed that the Postal Service violated the Rehabilitation Act of 1973 when it ceased to provide the Grievant with reasonable accommodation. The Union observed that Article 2 incorporates the Rehabilitation Act into the National Agreement and to remedy violations of the Handbook EL-307, Guidelines on Reasonable Accommodation through Article 15. The Union cited provisions of the EL-307 for the proposition that the Postal Service is required to consider ways to change the manner of doing a job to accommodate a qualified person with a disability (Section 131) and that reassignment is a form of reasonable accommodation (Section 531). The Union opined that the Postal Service had reasonably accommodated the Grievant for ten years until August 28, 2009, but sent the Grievant home based on Management's implementation of the NRP that no necessary work was available. The Union reiterated that the cessation of the Grievant's reasonable accommodation failed to meet the obligations under the Rehabilitation Act.

The Union anticipated that the Postal Service may raise an issue of substantive arbitrability with regard to remedial relief. The Union argued that because this issue was not raised at the arbitration hearing it should be dismissed. Nevertheless, the Union provided argument to support its position that the remedies it seeks for the Grievant are within the Arbitrator's authority to render. The Union posited that the parties have agreed that the provisions of ELM 546.14 are enforceable through the grievance-arbitration process. Reference

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[14] Case Nos. W4N-5C-C 43784/12779 (Lange, III, 1989); Case Nos. J06N-4J-C 08372998/DRT 06-119525 (Dilts, 2009) ("[O]nce the Union has demonstrated that the Grievant was removed from a modified job assignment, received because of an on-the-job injury, the burden rests with the Postal Service to show it made 'every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance.'").

to the National Level Settlement agreement dated January 28, 1997, JX 2, p. 144.[15] See also, JCAM, page 13-11; JX 2, p. 86. The cited provisions states as follows:

> ELM 546.14 specifies the steps that must be taken in seeking limited duty work in order to ensure the assignments are minimally disruptive to the ill or injured employee. The Step 4 Settlement G90N-4G-C 95026885, January 28, 1997 (M-01264), specifically provides that the provisions of ELM 546.141 (currently ELM 546.142) are enforceable through the grievance/arbitration procedure.

The Union also referred to traditional industrial relations sources for the proposition that doubts as to arbitrability should be resolved in favor of proceeding with arbitration resolution. The Union asserted that Articles 3 and 5 of the National Agreement also provide for the arbitration of violations of applicable laws and regulations. The Union cited regional arbitration awards that have granted remedies in cases similar to the Grievant's. In an award rendered by Arbitrator Edna E. J. Francis, the arbitrator held the issue of remedy was within her authority, stating in pertinent part:

> . . . Under those circumstances [that limited duty was available but denied in violation of policy], to state that the grievant received compensation because of the finding of the OWCP that he was "totally disabled" is to pervert the facts. The truth is that the grievant received compensation because he was not afforded limited duty in accordance with his contractual rights – and, therefore, was denied the right to continue his regular salary and benefits and, therefore, was forced again to obtain injury compensation. If the limited duty had been continued, as required, reinstatement of his injury compensation would not have been necessary and the grievant would not have received compensation from the OWCP or been placed in a LWOP status (with the consequent loss of leave benefits and regular salary).[16]

As remedial relief, the Union seeks that the Grievant be returned to work and made whole for all lost wages and benefits; including but not limited to any loss of sick and annual leave, any lost holiday pay, and any lost contributions to the Thrift Savings Plan. The Union also seeks economic remedies due to the Grievant's financial harm by awarding one and a half (1.5) times

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[15] M-01264 ("[W]e agreed that the provisions of ELM 546.14 are enforceable through the provisions of the grievance/arbitration process. Whether an actual violation occurred is fact[-]based and suitable for regular arbitration if unresolved.").

[16] Case No. W7N-5C-C-29751 (Supp. 1992), pp. 28-29.

his base hourly rate for the hours of work he missed. The Union submitted one National award and three (3) regional arbitration awards in support of its positions relative to the remedy.[17]

The Union submitted four (4) additional arbitration awards for consideration.[18]

For the Postal Service

The Postal Service argued that while it is bound to comply with the Code of Federal Regulations issues about whether it has done so do not fall within the grievance/arbitration procedure. The Postal Service asserted that the appropriateness of compensation for injured employees are to be appealed to the Secretary of State and claims of disability are to be appealed to the Equal Employment Opportunity Commission (EEOC).[19]

The Postal Service observed that the Union did not dispute that the Grievant's medical restrictions rendered him incapable of performing the casing and delivery of mail duties of a Letter Carrier. The Postal Service claimed that the Union did not establish that there existed adequate duties the Grievant could perform at his home facility, the Cheyenne MPO or its stations. The Postal Service maintained that the Grievant had worked full-time doing various "make work" duties that did not include any of the essential duties of a Letter Carrier. The Postal Service noted that the duties the Grievant had performed; i.e., delivery of Express Mail, picking up from some collection boxes, delivery of hot case mail, delivery of cuts to carriers, delivery of certified and registered letters, inventory of collection boxes, labeling CBUs, making changes and additions to schemes, meeting with certain officials concerning the City's growth and other duties were not the core duties of a Letter Carrier.

The Postal Service cited the testimony of Postmaster David Spurgas that related the Grievant had delivered some Express Mail on a daily basis, however, the Grievant performed this task by using a Dodge Caravan that accommodated the Grievant's limitations. The Postal Service represented that this vehicle had been removed from service due to economic issues and

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[17] Case Nos. H4N-NA-C-21 and 27 (Mittenthal, 1986); Case No. S4N-3R-D-35445 (Sobel, 1987); Case Nos. G01N-4G-D 07034244 and 07072314/02307006D and 02707007D (Clarke, 2007), reaffirmed May 22, 2007.

[18] Case Nos. J01N-4J-C 07263763/62450-0701 (Suardi, 2007); Case No. W7N-5C-C-29751 (Francis, 1992); Case Nos. W7N-5C-C-34092/CY-1425-91C (Levak, 2000); Case Nos. E94N-4E-C98030853/97285 (Olson, Jr., 1999).

[19] The Postal Service did not raise an arbitrability threshold issue of jurisdiction at either the arbitration hearing nor directly in its brief.

a reduction in the vehicle fleet. The Postal Service contended that the Grievant was medically unable to use the traditional Long Life Vehicle (LLV). Moreover, the Postal Service argued that the delivery of Express Mail is not an exclusive Letter Carrier duty, but that clerks, rural letter carriers or supervisors can perform this task. The Postal Service noted Postmaster Spurgas's testimony that delivery of Express Mail is currently done by PTFs who also case and deliver other mail. The Postal Service claimed that this is the efficient manner to handle the delivery of Express Mail.

The Postal Service noted that the Grievant could not fully perform the collection route because of his medical restrictions. The Postal Service referred to Postmaster Spurgas's testimony that the Grievant's inability led to having two (2) and sometimes three (3) employees to perform the collection box duty. The Postal Service maintained that in consideration of the economic difficulties it faces it can ill afford to "make work" for employees that wastes resources.

The Postal Service cited Postmaster Spurgas's testimony that the other duties performed by the Grievant (delivery of hot case mail, cuts and certified and registered mail) were not performed on a consistent basis. The Postal Service contended that the remaining duties relied upon by the Grievant consisted of work which belonged to managers, supervisors and the Inspection Service. The Postal Service asserted that the NRP process resulted in work being returned to the appropriate employees to be performed per their job descriptions. The Postal Service claimed that prior to the NRP implementation Management had simply taken various duties from other employees in an attempt to keep injured employees somewhat busy with "make work" duties which were not part of the essential functions of the employee's actual position.

The Postal Service noted that the Grievant had filed an injury compensation claim which is pending with the Secretary of State. The Postal Service observed that processing of that claim is outside the authority of the Arbitrator.

The Postal Service acknowledged its obligation to comply with the provisions of the ELM 546.142; i.e., to search for necessary work in accordance with the pecking order set therein. The Postal Service maintained that it complied with the ELM provision. The Postal Service delineated its efforts in its search for work within the Grievant's medical restrictions in both the Cheyenne, Wyoming installation as well as other small offices within a fifty (50) mile radius of the MPO. The Postal Service cited the successful placement of a number of employees using the

NRP process, including a Cheyenne injured letter carrier. The Postal Service asserted that despite its search for the Grievant no necessary work could be found for him. The Postal Service offered that as a result the Grievant was informed of his rights, and the Grievant filed a claim with the OWCP.

The Postal Service claimed that the Union has failed to prove that Management did not follow the pecking order in the ELM 546. The Postal Service also claimed that the Union failed to show that work was available for the Grievant that was within his medical restrictions. The Postal Service maintained that Management appropriately exercised its rights and obligations in Article 3 and in accordance with the ELM 546 when it determined there was not adequate and/or necessary work that could be assigned to the Grievant.

The Postal Service opined that Article 3 places an obligation on it to operate efficiently.[20] The Postal Service asserted that it alone has the prerogative to determine what is necessary work within the confines of Article 3. The Postal Service reiterated that Management performed a thorough search for necessary work within the Grievant's medical restrictions and found none.

The Postal Service asserted that Union has attempted to argue that the NRP does not meet the requirements set forth at the ELM 546. The Postal Service cited the National Level Settlement Agreement, dated June 18, 2009, and quoted the first two (2) paragraphs (reproduced at page 18 above). The Postal Service reiterated it that followed the ELM 546's pecking order in its search for acceptable work for the Grievant. The Postal Service relied upon the regional arbitration award of Arbitrator Thomas L. Levak wherein he reviewed Management's obligations under ELM 546.142, stating: "Regional arbitrators have determined that those provisions restrict common law managerial right to fully base assignments on efficiency and production, and, instead, require management to examine the opportunity for work that is adequate, suitable, and sufficient, given the injured employee's medically-defined work limitation tolerances."[21] The Postal Service further relied upon the Levak Award for the proposition that the Postal Service must continuously balance the needs of limited duty employees against each other as well as the production needs of the Service. Lastly, the Postal Service cited to the Levak Award in support

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[20] The Postal Service cited the National Award of Arbitrator Howard G. Gamser (Case No. AD-NAT-1311 of 1981) that discussed the Postal Service's obligation to operate efficiently. The issue before Arbitrator Gamser pertained to work jurisdiction between two unions not a party to the instant grievance or that represent the letter carrier craft.

[21] Case Nos. F01N-4F-C 02239791/DRT 01-043170; OS-1223-02C, 2003, p. 7.

of the Service's argument that the requirement at ELM 546.142 to make "every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitations tolerance" does not carry with it the mandate that non-productive "make-work" be provided the employee and that "adequate work" means productive work. *Id.* at 8.

The Postal Service posited that in similar cases regional arbitrators have followed a shifting system of burden of proof found in an arbitration award rendered by Arbitrator Carlton J. Snow.[22] The Snow Award formulates the burden-shifting scheme 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*
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> 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.*[23]

The Postal Service asserted that Management fulfilled its burden of production by providing ample evidence that it followed the pecking order and, thus, should prevail in the instant case. The Postal Service argued that the Union failed to meet its burden of persuasion in this case. In addition to citing the Levak and Snow Awards, the Postal Service submitted two (2) regional arbitration awards in support of its position.[24] The Postal Service referred to the body of evidence developed during the grievance process and argued that job searches were documented and contained in the file. Reference JX 2, pp. 35-51, 180-244.

The Postal Service relied upon the regional arbitration award of Arbitrator T. Zane Reeves for a definition of the type of work Management may use in its search.[25] Arbitrator Reeves expanded upon a definition expressed by Arbitrator David Goodman in a regional award

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[22] Case No. F90N-4F-C 96026953 31095 (2000).
[23] *Id.* at 20-21.
[24] Case Nos. G98C-4G-C99172396/APWU 32AC001799 (Baldovin, 2001); Case Nos. W4N-5C-C 43784 (Lange III, 1989).
[25] Case Nos. E01-N-4E-C 04191208/78.04 CHM (2005). Also, Case Nos. E94N-4E-C-99182504/GTS 14723 (Monat, 2001).

that "adequate" work need not be the most efficient, economical or the practical but it is enough that work is suitable, satisfactory, or sufficient to occupy the employee's work day.[26] Arbitrator Reeves also found the following to be pertinent to the definition:

> *[T]he term "adequate" may contain elements of sufficiency and satisfaction, the legal definition of adequate work is much more demanding than simply to "occupy the employee's work day." For example,* Black's Law Dictionary (5th ed.) *defines "adequate" as an adjective meaning "commensurate; equally efficient, equal to what is required, suitable to the case or occasion; . . . equal to some given occasion or work" (36). Thus,* ***adequate work*** *is more than filling up a workday; it means adequately meeting the minimum job duties and responsibilities required in a particular position, i.e., letter carrier, clerk, etc. As Arbitrator Hutt noted in her award regarding the Postal Service's requirement to provide adequate work to the Grievant, "It does not make* ***sound business sense*** *to have the Grievant perform work that is not necessary or inefficient, when assignments are available in which Grievant can contribute to the mission of the Service." (14)*
> (Emphasis in original).

The Postal Service urged the Arbitrator to review this grievance using the reasonable person standard.[27] Additionally, the Postal Service noticed that the Rehabilitation Act and the ADA require "reasonable accommodation" for employees who meet the statutory definition of "qualified employee." The Postal Service argued that this standard means that even when an individual has a disability that does not guarantee employment for the individual.

The Postal Service argued that review of these types of situations must balance the interest of the employee with the business interests of the employer and relied on the disability statutes' caveat that the individual "can perform the essential functions of the job in question." The Postal Service reiterated that it is simply not reasonable to provide unnecessary make-work to an employee to the detriment of an employer's business interests.

The Postal Service argued that the Union bore the burden of proof to show that the work the Grievant had previously performed (such as Express Mail delivery, collections) was also "adequate" to meet the needs of the Service, as held by most arbitrators. The Postal Service

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[26] *Id.* at 8, *quoting* Case No. C0N-4U-C 7403 (1992) and Case No. WSN-5T-C 12431 (1989).
[27] See Reeves Award, p. 24(In deciding whether to offer the grievant the "make work" duties of modified carrier job with no more than two hours of work a day or of a modified clerk job with meaningful duties, a "reasonable person" would choose the latter); Case Nos. E01N4EC 04115594/78.01 CHM (Hutt, 2004)(Award adopted a standard of reasonableness).

maintained that the District NRP team reviewed the input provided by the managers when denying accommodation and reviewed of the steps of Section 546. The Postal Service asserted that the record of evidence in this case contains extensive testimony and evidence of the extensive search made by Management in an attempt to find adequate work for the Grievant. The Postal Service reiterated that the Union has failed to meet its burden of proof in this regard. The Postal Service urged the grievance be denied.

The Postal Service argued that the Union's requested remedy; i.e., that the Grievant by immediately be restored to limited duty, is inappropriate because the Postal Service met its obligations under ELM 546.142 and there were no limited duty positions available within the Grievant's medical restrictions.

The Postal Service also argued that the other requested remedies; i.e., to be made whole for all lost wages and benefits, including but not limited to, lost wages, annual leave, sick leave, and TSP benefits, is outside the jurisdiction of the grievance/arbitration procedure. The Postal Service quoted at length the analysis of regional arbitration awards that found in those cases the employee's claim lies in the hands of the OWCP/DoL and not within an arbitrator's jurisdiction.[28] The Postal Service observed that the parties' JCAM specifically stated under the heading of Limited Duty that the OWCP has the exclusive authority to adjudicate compensation claims and to determine the medical suitability of proposed limited duty work.[29]

The Postal Service submitted an additional arbitration award for consideration.[30]

Analysis and Discussion

The proper review of this grievance necessitates adopting the burden-shifting scheme articulated in the Snow Award (reproduced on page 26 above). In the case where the Union

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[28] Case Nos. K98C-1K-C 02181081/SDC62820102 (Loeb, 205); Case Nos. S0N-3S-C3277/GTS 016760 (Stephens, 1992); Case No. H90C-1H-C 95045349 (Helburn, 1997);

[29] Case No. F98N-4F-C 01187494/WM 809-01C (Brand, 2002)(The Union sought the grievant be compensated for the difference between his OWCP compensation and full wages, for annual leave, and for Thrift Savings Plan and retirement contributions not made. The Arbitrator found the Union sought to have the OWCP's determination that the job offered to the grievant was compatible with his medical condition overturned); Case Nos. C0N-4L-C 10943/GTS 003382 (Mikrut, Jr., 1992); Case Nos. G94C-4G-C 97015588/APWU 77922 (Bartman, 2004)(Arbitrator was without jurisdiction to determine issue of grievant's refusal of a modified job offer under 5 U.S.C. Section 8106(c)(2)).

[30] Case Nos. E00N-4E-C 05058089/DRT # 04040237 (Monat, 2006).

brings a claim of contract violation, the Union traditionally bears the burden of proof to show that the Postal Service's action or failure to act violated a provision of the National Agreement, or a Postal Service regulation incorporated by Article 19 or an applicable employment right established by law or government-wide regulation. There was no dispute that the Grievant had suffered an on-the-job injury and that his physical limitations rendered him unable to perform the full range of letter carrier duties. There was also no dispute that because of the Grievant's medical restrictions as a result of his on-the-job injury he was covered under the provisions ELM 546. The last element Arbitrator Snow articulated in his analytical paradigm requires that the Union must show that Management failed to follow the "pecking order" set forth in the ELM (Section 546.142) in the Grievant's situation.

The Union presented a *prima facie* case that Management did not follow the pecking order under ELM 546.142 inasmuch as Management failed to allow the Grievant to perform "other work . . . within [the Grievant's] facility." ELM 546.142.a.3. Specifically, as will be discussed at length below, Management continued to assess the Grievant's situation to the fourth step (ELM 546.142.a.4) and then ultimately placed him in a non-duty status on the basis that no "necessary" work could be found that met the Grievant's physical restrictions. It was undisputed that prior to the Grievant's release from duty on August 28, 2009, he had been performing limited duty consisting of "other work" not within the exclusive purview of the letter carrier craft. Specifically, the Grievant had been performing duties under a "Rehabilitation Position" since at least March 12, 2007, and on a Modified Assignment (Limited Duty) since April 2008. The Postal Service did not rebut this evidence. The Postal Service did not present any evidence that the duties the Grievant had been performing had changed in any way. What did precipitate the Grievant's release from duty was the Postal Service's implementation of the NRP that inserted the new criteria or standard limiting Management in considering whatever work was to be assigned to injured employees to be "necessary" work. This standard lies outside ELM Section 546.141. In view of the evidence that the Postal Service utilized an erroneous standard in its exercise under ELM 546.142 that fatally flawed the entire process, the Union is found to have satisfied its initial burden of proof under the shifting burden analysis.

The burden of proof shifts to the Postal Service. ELM 546.142 does not exist in isolation. The Postal Service regulation exists to deal with various aspects of how to manage the placement and work assignments of an injured employee who has had a claim or is eligible to

make a claim under the FECA. A number of laws, coded regulation, and contractual provisions bear on the exercise of the provisions of ELM 546.142. Therefore, the Grievant's release from work per the Postal Service's August 28, 2009 letter (see pages 8-9 above) must be reviewed under all the applicable regulations and legal requirements current at the time of the Postal Service's action. Of pertinent relevance here is the requirement under ELM 546.142 that the Postal Service must "make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance" and to "minimize any adverse or disruptive impact on the employee." Additionally, EL-505, Exhibit 7.1 states that "The assignment should result in a tangible product and should not be a 'make work' job."

The crux of this grievance rests on what constitutes appropriate duties, tasks or work that the Postal Service must assign to the injured employee so as to comply, at least at the minimum degree, with ELM 546.142 and EL-505. Unfortunately, ELM 546.142 and EL-505, Exhibit 7.1 do not define what type of work is involved. ELM 546.142 speaks in terms of "limited duty" and EL-505 refers to "tangible product" and prohibits "make work." This language is not particularly helpful by itself and requires further reference and interpretation.

The reference to tangible product in the EL-505 seems misplaced. The Postal Service is not a manufacturing entity: it produces no real product as that term is commonly used in the industrial relations lexicon. The Postal Service, as its name suggests, provides postal services to its customers; i.e., the delivery and collection of mail, the sale of postal products such as stamps and postage, the rental of mail boxes, etc. In absence of real tangible products made by the Postal Service, I find the interpretation of "tangible product" to consist of specific work tasks a postal employee would perform in the furtherance of the mission of the Postal Service. The examples are too many to articulate in a regional arbitration award, or perhaps in any forum. However, using the above interpretation, I find that the delivery of Express Mail to constitute a tangible product as intended under EL-505. Express Mail involves a customer's desire for a special and time-sensitive mail delivery for which the customer pays a premium postage. Thus, the delivery of Express Mail is a specific work task that employees perform in the furtherance of the Postal Service's mission to its public customers. Likewise, the delivery of certified and registered mail consists of a tangible product that requires specific work tasks an employee could perform that fulfils the mission of the Postal Service. Similar to Express Mail, the customer's purchase of certified or registered mail service requires special treatment of the piece at a higher

cost than regular mail and for which the customer agrees in consideration for the special attention. Other specific duties, such as making rounds to pick up the mail customers have placed in convenient collection boxes and to deliver cuts and hot mail to carriers already on their routes, accomplish in a direct manner the furtherance of the Postal Service's mission to collect and deliver the mails. Therefore, these duties fall within the above interpretation of "tangible product."

Additionally, some tasks may have an indirect affect on the accomplishment of the Postal Service's mission but are nevertheless to be found as tangible products. The inspection of collection boxes ensures the working order of those receptacles and that the collection times posted on them are accurate. This task provides access of the mail flow to customers to deposit their mail in a safe place and for the customer to confidently rely on the collection time. Further, the tasks performed relative to growth management contribute to the mission of the Postal Service in its service to be provided to the customers who will eventually take up residence in the new developments. Without systematic and planned action, postal service to the new customers could suffer from undue disorganization and untimely delivery and collection of their mail.

The Postal Service focused in the grievance on the elaborate efforts it conducted in searching for limited duty work for the Grievant and sought to have the grievance denied on the basis that the Postal Service had observed the various steps of the pecking order under ELM 546.142. However, the process undertaken in the NRP assessment, which led to relieving the Grievant of duties he had performed without incident, was based on a faulty premise. The Postal Service simply refused to accept that the work the Grievant had been doing for the previous decade was acceptable for the purposes of assigning limited duty work under ELM 546.142. Throughout its entire process, the Postal Service through its agents used an erroneous and improper standard of "necessary" work by which to evaluate the available work tasks; i.e., that whatever work could be found must satisfy the definition of "necessary" work the Postal Service had created unilaterally.

The standard of necessary work is faulty on many counts. ELM 546.142, the primary governing regulation in the Grievant's case, does not require the high standard of "necessary" work, as the Postal Service defines it. The regulation is devoid of any criteria or standard of work that constitutes "limited duty," except to the extent that such work must be within the

injured employee's medical restrictions and the circumstances in performing the work (work location, hours of work) should minimize any adverse or disruptive impact on the employee. From an evidentiary standpoint, the criteria of "necessary" work has been created in contravention of the applicable contractual, statutory and regulatory provisions that apply to situations such as the Grievant's. A careful review of all such provisions fails to reveal that the Postal Service is permitted to raise the bar of what constitutes limited duty to the heightened standard of "necessary" work, at least to the extent the Postal Service applied it in an improper and narrow manner. By operation of this standard, the Postal Service failed to make a good faith effort to the place the Grievant at any level of the pecking order under ELM 546.142.

The burden of persuasion next shifts to the Union to show that work was available for the Grievant at the level of the pecking order above the level at which Management placed him. In this case, the Grievant was placed at none of the levels of the pecking order but was relieved of duty under the erroneous application of the "necessary" work standard. Nevertheless, the Union demonstrated with credible and persuasive evidence that work did indeed exist for the Grievant to perform. Local Management acknowledged that the Grievant had performed those duties listed in JX 2, p. 25 for a sustained period and on a consistent basis. Moreover, those duties continued to exist after Management relieved the Grievant of those duties and placed him in a non-work status. Those duties were merely re-allocated to other personnel and for reasons that are not supported by the Postal Service's obligations to injured employees (to prefer to have PTFs and/or TEs or supervisors or clerks perform those duties rather than the injured employee for efficiency reasons). The evidence shows that local Management properly accommodated the Grievant's medical restrictions with tangible work for his limited duty assignments prior to August 28, 2009. The evidence fails to show that local Management could not continued to assign the Grievant the work he had been doing for many years after his on-the-job injury. Thus, the Union has met its burden of production to show that there existed legitimate work under ELM 546.142 and related regulations and statutes that should have been assigned to the Grievant as limited duty. Likewise, the Union has shown that the Postal Service violated the National Agreement under the above-cited provisions when the Service ceased the Grievant's limited duty assignments and caused an adverse and disruptive impact on him. Relieving the Grievant from proper limited duty and placing him in a position of non-pay and loss of corresponding employment benefits constitutes the ultimate adverse and disruptive impact.

Having found that the Postal Service violated the National Agreement in this matter, this would normally resolve the grievance in full. However, the Postal Service raised several issues that should be addressed.

The Postal Service argued that it took its actions relative to the Grievant's situation within its authority under Article 3 and that the Postal Service had the sole authority to decide what work was appropriate to assign to the Grievant. This argument cannot be sustained. Article 3 sets forth rights reserved to Postal Service Management, but those rights pertaining to limited duty requirements take precedence by operation of Article 2, Article 19 and the applicable handbooks and manuals and Article 21.4. To allow Article 3 to grant Management *carte blanche* as the sole authority would nullify contractual provisions to which the parties have agreed and that may be redressed through the grievance-arbitration procedure.

The Postal Service also argued that the grievance is substantively outside the jurisdiction of the negotiated grievance procedure, particularly as it relates to remedy. I find that this grievance pertains directly upon the application of Postal Service regulations (ELM 546.142, EL-307 and EL-505) as incorporated under Article 19. As such, Article 15 is an appropriate mechanism to enforce those rights granted to injured employees and the obligations the Postal Service has to comply with those regulations. Further, provisions of the National Agreement, as expressed at Article 15.1 of the JCAM and Article 2.3, specifically allow for grievances containing the issues brought in the instant grievance. It is true that the OWCP/DoL retain exclusive jurisdiction over injury compensation claims filed under the FECA. However, this grievance does not seek to overturn an OWCP determination or to force any such determination. The true nature of this grievance involves violations of the National Agreement and the appropriate remedy to resolve those violations. Should the OWCP accept the Grievant's pending claim for injury compensation, the OWCP will make the necessary adjustments, if any are needed, to the Grievant's compensation claim before that forum. However, the claim with the OWCP is outside this grievance and has no bearing on the decision in this Award.

The Postal Service argued that the vehicle the Grievant used in making his deliveries was no longer available and implied that there were no other accommodating vehicle in the Cheyenne fleet. The evidence does not support this argument. The Grievant is not completely limited from operating a LLV. He may do so as long as he has no more than four (4) stops to make on a particular run. The Postal Service presented no evidence to show how or in what way the

Grievant's limited use of a LLV would preclude him from making any deliveries. Additionally, PTF Osterman testified that he uses a van to make his Express Mail runs, thereby showing that the Cheyenne fleet owns at least one (1) van.

The Postal Service also argued that it is more efficient to have other employees, such as clerks, rural carriers and supervisors, deliver Express Mail than for the Grievant to accomplish the delivery and that the Express Mail delivery is not an exclusive duty to the Letter Carrier craft. These arguments are basically irrelevant when assessing limited duty work to be assigned to an injured employee. ELM 546.142 expressly allows for the assignment of duties from "other crafts." Also, EL-307, Section 131, states that ". . . the Rehabilitation Act requires the Postal Service to consider ways to change the manner of doing a job to allow a qualified person with a disability to perform the essential functions of a particular job." Therefore, the Postal Service is expected to look to different ways to accomplish work that would meet the medical restrictions of the injured employee, and ELM 546.142 expands the obligation to work that is outside the core duties of the employee's occupational craft. This is what the "reasonable accommodation" obligation is all about. If efficiency of operations were the primary factor, it would effectively eviscerate the Postal Service's obligation to make reasonable accommodation and to "make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerances."

The Postal Service seems to assert that assigning the Grievant to accomplish collections from collection boxes is "make work." As described in detail above, this assertion cannot be sustained. First, the duty is one needed to fulfill the mission of the Postal Service. Secondly, the evidence shows that the Grievant is capable of making all of the collections except for two (2) stops (out of forty total) that are located close to the MPO. The Postal Service presented no evidence to show that the manner in which collections were made by the Grievant prior to August 28, 2009, posed an undue hardship on the Service's operation.[31] Once the Grievant is returned to performing this duty, as ordered below, the TE primarily responsible for it may be

[31] The EEOC has defined undue hardship to mean that the accommodation would be too difficult or too expensive to provide, in light of the employer's size, financial resources, and the needs of the business. An employer may not refuse to provide an accommodation just because it involves some cost. An employer does not have to provide the exact accommodation the employee or job applicant wants. If more than one accommodation works, the employer may choose which one to provide.

used to accomplish other duties. This holds true for the other duties local Management allocated to other personnel when the Grievant was placed in a non-work status. What was once allocated to those employees on or after August 28, 2009, must now be re-allocated to the Grievant upon his return to work on limited duty.

The Postal Service asserted that the duties performed by the Grievant prior to August 28, 2009, belonged to other personnel and have been returned to them per their job descriptions. This assertion turns the Postal Service's obligations to provide limited duty assignments under ELM 546.142 and in reasonable accommodation for the Grievant's medical restrictions on their heads. Contrary to the Postal Service's assertion, the re-allocation of duties from some personnel to the injured employee squarely complies with the Service's obligations to provide reasonable accommodation and to assign limited duty. The Postal Service's assignment of those duties that occurred long before August 28, 2009, complied with those obligations. The Postal Service presented no legitimate reasons for not continuing to assign the Grievant those duties. To the contrary, the Postal Service's withdrawal of those limited duty assignments constituted violations of those obligations owed to the Grievant.

Additionally, the fact that some of the duties the Grievant performed prior to August 28, 2009, were done on an inconsistent basis is not the test by which those duties may be assigned to an injured employee or withheld from the employee. Nothing precludes the Postal Service from assigning work that occurs on an ad hoc basis. The test involves that the work is available and that it is within the injured employee's medical capabilities (in addition to the consideration that it minimize any adverse or disruptive impact on the employee). The evidence of record shows in this case that delivery of hot case mail, cuts and certified and registered mail comes available with a high degree of frequency and is within the Grievant's medical restrictions. Thus, this type of work qualifies for limited duty under ELM 546.142 for assignment to the Grievant. Inasmuch as the work must be performed, it does not constitute "make work."

Award

The grievance is sustained. The Postal Service violated the National Agreement and applicable Postal Service regulations incorporated under Article 19, cited above, when the Service failed to provide Limited Duty to the Grievant, Craig Boyce.

The Postal Service is hereby ORDERED to return the Grievant to work status upon receipt of this Award. Because the Grievant's placement in a non-work status resulted from contractual and regulatory violations, the Grievant is entitled to "make whole" relief that includes appropriate back pay and restoration of benefits he lost as a result of the erroneous action of August 28, 2009. However, the Grievant received pay during a period of thirty (30) days of administrative leave. Therefore, in making the computations of back pay the Postal Service may properly omit the thirty (30) day period from the back pay distribution. Otherwise, the Postal Service is hereby ORDERED to make the Grievant whole for all lost wages, salary, benefits and other employment issues the Grievant suffered as a result of the erroneous action taken on August 28, 2009. The Postal Service is referred to decisions published by the National Labor Relations Board for guidance relative to back pay, restoration of benefits, etc., that are used when the employer is ordered to reinstate a discharged employee. In essence, the Postal Service is required to reconstruct the Grievant's employment as though the erroneous action of August 28, 2009 never occurred and make the corresponding restoration of pay and benefits to him.

The Postal Service is also hereby ORDERED to return the Grievant to the limited duty assignments he was performing prior to the August 28, 2009, action, to include at a minimum those duties listed at JX 2, p. 25 of the arbitration record. However, this ordered remedy does not preclude the Postal Service from re-assessing the Grievant's situation, upon his return to work, provided the re-assessment is accomplished in strict compliance with ELM 546.142 and related obligations. In doing so, the Postal Service is ORDERED to cease and desist from utilizing the erroneous standard of "necessary" work as the Postal Service has improperly restricted its meaning.

Other remedies requested by the Union are not granted.

The Arbitrator will retain jurisdiction of the effectuation of the above-ordered remedies should issues arise in this regard.

Date: April 22, 2010

Kathy L. Eisenmenger

Kathy L. Eisenmenger, J.D.
Labor Arbitrator