C-28121

National Arbitration Panel

In the Matter of Arbitration	)	
	)	
	)	
between	)	
	)	
	)	Case No.
United States Postal Service	)	Q01N-4Q-C 07229522
	)	
	)	
and	)	
	)	
	)	
National Association of Letter Carriers	)	
	)	
	)	
and	)	
	)	
American Postal Workers Union - Intervenor	)	

Before: Shyam Das

Appearances:

For the Postal Service:	Brian Reimer, Esq.
For the NALC:	Keith E. Secular, Esq.
For the APWU:	Darryl Anderson, Esq.
Place of Hearing:	Washington, D.C.
Dates of Hearing:	June 25, 2008 August 4, 2008

Date of Award:	March 20, 2009
Relevant Contract Provision:	Articles 1, 5, 13, 19, 21 and 41 and ELM, Subchapter 540
Contract Year:	2006-2010
Type of Grievance:	Contract Interpretation

Award Summary

The grievance is sustained. The proposed changes to ELM 546 are invalid and are to be rescinded by the Postal Service.

Shyam Das, Arbitrator

BACKGROUND Q01N-4Q-C 07229522

This is an Article 19 appeal filed by the NALC protesting proposed changes to Section 546 of the Employee and Labor Relations Manual (ELM). Notice of these changes was provided by the Postal Service on March 23, 2007. The APWU has intervened in this proceeding.

The ELM 546 changes were proposed pursuant to a Memorandum of Understanding (MOU) between the Postal Service and the APWU which was agreed to as part of the negotiation of the 2006 APWU National Agreement. The MOU, which sets forth the proposed changes, reads as follows:

MEMORANDUM OF UNDERSTANDING
BETWEEN THE
UNITED STATES POSTAL SERVICE
AND THE
AMERICAN POSTAL WORKERS UNION, AFL-CIO

Re: Limited Duty and Rehabilitation Assignments Within APWU Crafts Involving Workers from Other Crafts

The parties wish to find a way to resolve their ongoing disputes about the reemployment or reassignment of workers from other crafts to perform APWU bargaining unit work, either temporarily or permanently, under Part 546 of the Employee and Labor Relations Manual (ELM). The parties also recognize that reassignment or reemployment of employees injured on duty must be in compliance with applicable collective bargaining agreements and applicable law.

In order to implement Part 546 of the ELM in a way that is fair to injured workers and fair to workers with seniority in APWU bargaining units, the parties agree that the

following ELM 546.2 changes will be proposed pursuant to Article 19:

546.21 Compliance

Reassignment or reemployment under this section must be in compliance with applicable collective bargaining agreements and applicable law. Individuals so reassigned or reemployed must receive all appropriate rights and protection under the National Agreement of the craft to which the employee is being reassigned or reemployed. Any such reassignment or reemployment must be accomplished through Article 13 of the National Agreement applicable to the craft to which the employee is being reassigned or reemployed.

546.23 Types of Appointments

Types of appointments available include the following:

a. A current full-time career employee may be reassigned to a full-time career position through Article 13 of the National Agreement applicable to the craft to which the employee is being reassigned or reemployed, if his or her job-related medical condition permits.

b. A current or former part-time flexible career employee may be reassigned or reemployed to a part-time flexible career position through Article 13 of the National Agreement applicable to the craft to which the employee is being reassigned or reemployed.

c. A current or former noncareer employee may be reassigned or reemployed to the position held previously or, upon satisfactory demonstration of the

ability to meet the job requirements and in accordance with the appropriate collective bargaining agreement, may be reassigned or reemployed to another noncareer position or noncompetitively converted to a career position (NOA 501) approval for conversion actions from noncareer to career must be approved by the manager of Health and Resource Management at Headquarters prior to any PS Form 50 action.

In the event that an employee is reassigned or reemployed into an APWU craft and Article 13.5 is not applicable, then one Part-Time Flexible (PTF) employee in the gaining craft and installation shall be entitled to receive priority consideration to transfer to another craft or installation within 6 months. The priority consideration shall not be to the detriment of non-APWU employees with pending transfer requests.

The APWU agrees to withdraw any and all pending national-level grievances and field-level, non-national grievances containing the same interpretive issue regarding reassignment of ill or injured employees into APWU crafts, including those regarding status and job assignment, and all grievances pending at other levels that raise the issues raised by the withdrawn National-Level grievances. This will include, but not be limited to Grievance Nos. Q90C-4Q-C 95033931 and Q00C-4Q-C 04118765. Only field-level grievances involving disputes about the application, not the interpretation, of the National Agreement will remain in the grievance system.

If the changes made to Part 546.2 of the ELM pursuant to the Memorandum of Understanding (MOU) are invalidated by a National-Level

arbitration award or by a federal court decision, or if the U.S. Department of Labor determines in a final and binding decision that the Postal Service's reassignment or reemployment practices under this MOU do not permit the Postal Service to comply with its obligations to obtain suitable employment for injured employees under FECA, then this MOU will be null and void. If this occurs, the APWU may reinstate the above-referenced grievances in writing, within fourteen (14) days of their receipt of written notification that this MOU has been voided.

The basic provisions of Article 13 date back to the first National Agreements in the early 1970s.[1] Relevant portions of Article 13 provide as follows:

ARTICLE 13
ASSIGNMENT OF ILL OR INJURED REGULAR WORKFORCE EMPLOYEES

Section 1. Introduction

* * *

B. The U.S. Postal Service and the Union recognizing their responsibility to aid and assist deserving full-time regular or part-time flexible employees who through illness or injury are unable to perform their regularly assigned duties, agree to the following provisions and conditions for reassignment to temporary or permanent light duty or other assignments. It will be the responsibility of each installation head to implement the provisions of this Agreement within the installation, after local negotiations.

[1] Unless otherwise noted, the provisions of the NALC and APWU National Agreements relevant to this case are identical.

Section 2. Employee's Request for Reassignment

* * *

B. Permanent Reassignment

1. Any ill or injured full-time regular or part-time flexible employee having a minimum of five years of postal service, or any full-time regular or part-time flexible employee who sustained injury on duty, regardless of years of service, while performing the assigned duties can submit a voluntary request for permanent reassignment to light duty or other assignment to the installation head if the employee is permanently unable to perform all or part of the assigned duties. The request shall be accompanied by a medical certificate from a physician designated by the installation head giving full evidence of the physical condition of the employee, the need for reassignment, and the ability of the employee to perform other duties. A certificate from the employee's personal physician will not be acceptable.

* * *

Section 3. Local Implementation

* * *

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

* * *

Section 4. General Policy Procedures

* * *

E. An additional full-time regular position can be authorized within the craft or occupational group to which the employee is being reassigned, if the additional position can be established out of the part-time hours being used in that position without increasing the overall hour usage. If this cannot be accomplished, then consideration will be given to reassignment to an existing vacancy.

* * *

Section 5. Filling Vacancies Due to Reassignment of an Employee to Another Craft

When it is necessary to permanently reassign an ill or injured full-time regular or part-time flexible employee who is unable to perform the regularly assigned duties, from one craft to another craft within the office, the following procedures will be followed:

A. When the reassigned employee is a full-time regular employee, the resulting full-time regular vacancy in the complement, not necessarily in the particular duty assignment of the losing craft from which the employee is being reassigned, shall be posted to give the senior of the full-time regular employees in the gaining craft the opportunity to be reassigned to the vacancy, if desired.

B. If no full-time regular employee accepts the opportunity to be assigned to the

vacancy in the complement, not necessarily in the particular duty assignment in the other craft, the senior of the part-time flexibles on the opposite roll who wishes to accept the vacancy shall be assigned to the full-time regular vacancy in the complement of the craft of the reassigned employee.

C. When the reassigned employee is a part-time flexible, the resulting vacancy in the losing craft shall be posted to give the senior of the full-time regular or part-time flexible employees in the gaining craft the opportunity to be assigned to the part-time flexible vacancy, if desired, to begin a new period of seniority at the foot of the part-time flexible roll.

D. The rule in A and B, above, applies when a full-time regular employee on permanent light duty is declared recovered and is returned to the employee's former craft, to give the senior of the full-time regular or part-time flexible employees in the gaining craft the opportunity, if desired, to be assigned in the resulting full-time regular vacancy in the complement, not necessarily in the particular duty assignment of the losing craft.

Section 6. Seniority of an Employee Assigned to Another Craft

A. Except as provided for in Section 4.I, above, a full-time regular employee assigned to another craft or occupational group in the same or lower level in the same installation shall take the seniority for preferred tours and assignments, whichever is the lesser of (a) one day junior to the junior full-time regular employee in the craft or occupational group, (b) retain the seniority the employee had in the employee's former craft.

> B. A part-time flexible employee who is permanently assigned to a full-time regular or part-time flexible assignment in another craft, under the provisions of this Article, shall begin a new period of seniority. If assigned as a part-time flexible, it shall be at the foot of the part-time flexible roll.

The Postal Service has obligations under the Federal Employees' Compensation Act (FECA) to workers who are injured on the job, including obligations to reemploy injured employees in accordance with Office of Personnel Management (OPM) regulations. Injured employees who have partially recovered are under a statutory duty to seek employment.

In 1978, the Postal Service and the APWU, NALC and NPMHU (Mail Handlers) -- who at that time bargained jointly -- executed a Letter of Intent recognizing that the provisions of the National Agreement were "subject to" FECA and that the parties shared a "mutual obligation" to meet the requirements of the Act. Article 21.4 of the National Agreement requires the Postal Service "to promulgate appropriate regulations" to comply with FECA requirements. In 1976, the Postal Service first issued regulations regarding its injury compensation program. In 1979 it issued Subchapter 540 of the ELM. Section 546 covers reemployment of employees injured on duty. Section 546.141 states:

> 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.

In 1979, the NALC and the Postal Service negotiated a pre-arbitration settlement establishing the so-called "pecking order" of criteria for the assignment of injured employees to temporary limited duty or permanent rehabilitation assignments. The pecking order, which is designed to minimize any adverse or disruptive impact on the employee, was incorporated in ELM 546.14. None of the other Unions filed an Article 19 appeal when this occurred.

As provided in the pecking order, employees may be given limited duty or rehabilitation assignments in other crafts. In a 1987 national level award, Arbitrator Bernstein held that the Postal Service cannot involuntarily transfer an employee to a different craft, but it can offer a permanent transfer and inform the employee that if the offer is turned down this will be reported to the Office of Workers Compensation Programs (OWCP), putting at risk the employee's right to compensation under FECA. See Case No. H1N-1J-C 23247 (1987) (Bernstein Award). This is now codified in the EL-505 Handbook. In 1993, the Postal Service, APWU, and NALC negotiated an MOU providing that:

> 1. By accepting a limited duty assignment, an employee does not waive the opportunity to contest the propriety of that assignment through the grievance procedure, whether the assignment is within or out of his/her craft.

A cross-craft rehabilitation assignment may be to a residual vacancy or, more often, to a uniquely created rehabilitation assignment, which otherwise would not exist. When an employee bids off or transfers from such a uniquely created assignment, it ceases to exist.

In 1985, Arbitrator Mittenthal issued a national level decision in Case No. H1C-4K-C 17373 (Mittenthal Award). In that case, an injured letter carrier (Pickrell) who had reached maximum medical improvement (MMI) was transferred to a uniquely created rehabilitation assignment in the clerk craft. The APWU grieved the Postal Service's failure to post for bid in the clerk craft ("gaining craft") the residual vacancy in the letter carrier craft ("losing craft") resulting from the transfer. The APWU contended that this violated Article 13, Section 5. The Postal Service insisted Article 13 did not apply. As set forth in the Mittenthal Award:

> It stresses that there are two distinct ways by which an injured employee can be permanently reassigned from one craft to another. It recognizes that one path is Article 13 and it concedes that had Article 13 been the path followed here, the APWU grievance would have merit. It insists, however, that the other path is Part 540 of the ELM and that when the reassignment is made pursuant to Part 540, the cross-posting

> requirements of Article 13, Section 5 are inapplicable. It emphasizes that Pickrell's reassignment in this case involved Part 540, not Article 13. Its position, accordingly, is that the carrier vacancy resulting from Pickrell's move did not call for posting the vacancy to the "gaining craft" (i.e., the APWU unit).

Arbitrator Mittenthal agreed with the Postal Service. His decision states:

> The APWU argument seems, at first blush, to be supported by the language of Article 13, Section 5. Pickrell was an "injured full-time regular..." carrier who was "unable to perform the regularly assigned duties" and who was thereafter "permanently reassign[ed] ...from one craft to another...", i.e., from carrier craft to clerk craft. In this situation, Section 5 appears to require that the resultant carrier vacancy be posted for bids in the "gaining craft", i.e., the APWU unit. If Article 13 said nothing else on this subject, the APWU would prevail.
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> The difficulty with the APWU's argument is that it views Article 13, Section 5 in isolation. That section is merely one part of a comprehensive set of rules with respect to reassignment of ill or injured employees. The "permanent reassignment" mentioned in Section 5 is obviously the "permanent reassignment" described in detail elsewhere in Article 13. The several provisions of this article are interrelated. What action constitutes a "permanent reassignment" cannot be determined from the language of Section 5 alone. One must look elsewhere in Article 13 to find the answer to this question. Hence, a close reading of this

article is essential to an understanding of the scope of Section 5.

To begin with, Article 13 concerns employees who are "unable to perform their regularly assigned duties" on account of "illness or injury" (Section 1B). They have a right to seek "permanent reassignment" to "light duty" work (Section 2B1). That right, however, comes into play only if the employee makes a "voluntary request" for reassignment (Section 2B1). Moreover, the request relates only to such "light duty assignments" as have been established through "local negotiations" (Section 3). Given these circumstances, the "installation head" must show the "greatest consideration" to such request and must reassign the employee "to the extent possible" (Section 2C). "Every effort" is to be made to reassign "within the employee's present craft" (Section 4A). But if that is not possible, "consideration" is to be given to reassignment "to another craft" (Section 4A). The employee is entitled to this reassignment only if he meets "the qualifications of the position to which [he]...is reassigned" (Section 4B).

When Section 5 speaks of how to fill a vacancy caused by permanent reassignment of an employee from one craft to another, it is clearly referring to the "permanent reassignment" discussed in Sections 1, 2, 3 and 4. Here, Pickrell was not the subject of such a "permanent reassignment." He made no "voluntary request" for reassignment following his injury. He was offered reassignment because of the Postal Service's obligation under Part 540 of the ELM to make work available to employees injured on the job. He accepted the offer. His reassignment was to a clerk position which was created by Management for him alone. He

was not placed on a "light duty assignment" which had been established through "local negotiations." There were no such "light duty assignments" in Ottumwa. In short, Pickrell's case does not fit the language of Article 13. His was not the kind of "permanent reassignment" contemplated by this article. It follows that the vacancy arising from his reassignment did not have to be filled through the Article 13, Section 5 posting procedures. There has been no violation of the National Agreement.

The APWU suggests that Pickrell was somehow coerced into accepting reassignment. It cites the terms of Management's February 1983 offer: "If you accept this offer, it will be effective March 19, 1983. If you refuse to accept this position, we will so advise the Office of Workers Compensation Programs for action deemed warranted." These words were meant to inform, not to coerce. Management was required by Part 546.72 of the ELM, after an employee has refused an offer of reassignment within his medical limitations, to "advise the individual that [his]...refusal may result in the termination or reduction of compensation benefits..." and to "notify the OWCP district office...of the [employee's] declination..." Management's letter to Pickrell merely sought to comply with this requirement.

One final note is appropriate. Part 540 of the ELM was a response to the fact that the Postal Reorganization Act placed all Postal Service employees under the coverage of the Federal Employees Compensation Act (FECA). Part 540 was a means of implementing the injury compensation program set forth in FECA. It concerns employees who suffer job-related disabilities; it requires the Postal Service to make "every effort" toward

placing an injured employee on "limited duty" consistent with his work limitations.* Management must make that "effort" even though no "request" has been submitted by the employee and even though no "light duty assignments" have been negotiated by the local parties. At the arbitration hearing, it was stipulated that Pickrell was offered and accepted reassignment pursuant to Part 546.14 of the ELM. His reassignment was plainly not based on the provisions of Article 13. There is nothing in the language of Part 540 which demanded that the carrier vacancy resulting from his reassignment be posted for bids to the "gaining craft", i.e., the APWU unit.

*By contrast, Article 13 requires "every effort" in reassigning an injured employee within his craft but only "consideration" to reassignment to another craft. Pickrell's right to reassignment under Part 540 was thus much larger than it would have been under Article 13.

In a 1993 national level award, Arbitrator Snow upheld a grievance filed by the APWU. In that case, the Postal Service reemployed a former full-time letter carrier who had been injured on duty, and assigned him to a full-time clerk position in accordance with its then practice. The APWU protested that granting this employee full-time status in the clerk craft violated the seniority rights of clerk craft part-time flexibles (PTFs). Arbitrator Snow agreed. See Case No. H0C-3N-C 418 (Snow-418 Award).

Following issuance of the Snow-418 Award, the Postal Service changed its practice so that a reassigned or reemployed employee who was full-time in the losing craft would now be

part-time in the gaining craft. In a subsequent national level case heard by Arbitrator Snow, the NALC grieved the application of this new policy to the permanent transfer of an injured full-time letter carrier, who had been actively employed by the Postal Service on limited duty, to a PTF clerk position. See Case No. H94N-4H-C 96090200 (Snow-200 Award). The APWU intervened to ensure that the resulting award complied with the conversion rights of PTF clerks under the APWU National Agreement. In the Snow-200 Award, Arbitrator Snow pointed to a distinguishing factor between that case and the Snow-418 Award. The earlier case involved the reemployment of a former full-time employee, whereas the Snow-200 Award involved the reassignment of an employee who had never left the rolls. He stated that this constituted a fundamental distinction because the pecking order (then set forth in ELM 546.141) treats former and current employees differently. The Snow-200 Award held that an active full-time letter carrier could not be reassigned as a part-time employee consistent with the pecking order. Arbitrator Snow went on to note:

> In order to comply with ELM Section 546.141(a), the Employer is not permitted to change the status of a disabled employee when switching crafts; but if the employee is a full-time regular worker and there are part-time flexible workers in the gaining craft, then reassigning the employee as a full-time regular worker could violate conversion rights of part-time flexible employees in the gaining craft.
>
> Such an assessment, however, must be based on the APWU's agreement with the Employer, not that of the NALC. Whether or not such a

> transaction violates the APWU agreement is not before the arbitrator in this dispute....

Arbitrator Snow remanded the issue of remedy in the Snow-200 Award to all of the parties. He subsequently issued two follow-up decisions, in 2001 and 2003, in the first of which he pointed out:

> It is a well-established rule of contract law that compliance with one contract is not an excuse for violating another. Should the Employer find itself in a position of being unable to comply with more than one of its contracts at the same time, its only option is to bargain with one or more of the parties with which it has entered into a contract in order to negotiate a resolution. The U.S. Supreme Court concluded that, if a company commits itself voluntarily to two conflicting contractual obligations, it must negotiate itself out of the dilemma. *(See W.R. Grace & Company v. Rubber Workers*, 461 U.S. 757, 103 S. Ct. 1277 (1983).)

After the Snow-200 Award, the Postal Service resumed its earlier practice of reassigning employees who were full-time in the losing craft to full-time positions in the gaining craft.[2] That led to further grievances by the APWU, including grievances cited in the 2006 APWU-Postal Service MOU agreeing to the changes in ELM 546.2 which are disputed by the NALC in this case.

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[2] The NALC stresses in the present case that the remedy it sought in the Snow-200 case was the return of the grievant to the letter carrier craft, and that it has never taken the position

NALC POSITION

The NALC contends that the proposed change to ELM 546 is inconsistent with the NALC National Agreement and is not fair, reasonable, and equitable, as required under Article 19.[3]

The NALC argues that the proposed change is plainly inconsistent with the settled meaning of Article 13. The 1985 Mittenthal Award holds conclusively that the transfer of letter carriers into the clerk craft under ELM 546 because of a job-related injury does not trigger the Article 13, Section 5 reciprocity provision. Mittenthal's interpretation of Article 13 was final and binding at the time it was issued, and continues to define the scope of Article 13. The Mittenthal Award is consistent with the Postal Service's prior position that limited duty assignments under ELM 546 are not made pursuant to Article 13, but pursuant to the mutual obligation of the Postal Service and Unions under FECA to return employees with job-related injuries to duty subject to their medical restrictions.

The NALC maintains that the record clearly establishes that the Postal Service has no intention of eliminating traditional ELM 546 transfers. Management simply contemplates that it will now apply the reciprocity provisions of Article 13,

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that injured full-time letter carriers who are transferred to the clerk craft are entitled to retain their full-time status.

Section 5 to such transfers. But, Article 13 cannot be applied by its terms to transfers initiated by management. Article 13 explicitly requires employees to initiate the Article 13 reassignment process by submitting a request for reassignment. In contrast, under ELM 546, the Postal Service initiates the reassignment of employees injured on duty without any employee request. Moreover, under the 1993 MOU, an employee may accept a limited duty assignment under ELM 546 and grieve it at the same time. This procedure cannot logically apply to the Article 13 process because an employee who affirmatively requests a light duty assignment under Article 13 lacks any basis for grieving the grant of his or her request.

The NALC asserts that Article 13 also cannot be applied to transfers to uniquely created rehabilitation positions. As Arbitrator Mittenthal recognized, job assignments under Article 13 are limited to assignments previously identified through local implementation and negotiations as "light duty" assignments. Any attempt to apply Article 13.5 to a uniquely created assignment would create an additional anomaly under Section 5.D, which creates a reverse reciprocity procedure whereby letter carriers have the opportunity to bid on the resulting clerk vacancy if an injured letter carrier who had been permanently transferred to a clerk position recovers and returns to the letter carrier craft. This provision cannot apply to uniquely created ELM 546 assignments because no vacancy

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[3] The NALC does not object to the revisions in the first two sentences of ELM 546.21, which do not relate to application of Article 13.

would remain if an injured carrier recovers and leaves a uniquely created rehabilitation assignment in the clerk craft.

The NALC further argues that Article 13.5 does not cover cross-craft transfers outside the installation, whereas ELM 546 authorizes assignment of employees outside their own installations to other offices under certain circumstances. The reference to "within the office" in the introductory paragraph of Article 13.5 makes clear that it only covers cross-craft transfers within an installation.

The NALC notes that the distinction between Article 13 and ELM 546 is confirmed in the NALC-USPS Joint Contract Administration Manual (JCAM) and other national arbitration awards. The JCAM states:

> The provisions of Article 13 govern voluntary requests for light duty work by employees who are temporarily or permanently incapable of performing their normal duties as a result of illness or injury.
>
> The term "light duty" should not be confused with the term "limited duty." The term limited duty is not used in the National Agreement. Rather, the term limited duty was established by 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 job-related injury or illness. USPS procedures regarding limited duty are found in Part 540 of the *Employee & Labor Relations Manual (ELM)*. Limited duty may be provided for an

> employee who is temporarily or permanently incapable of performing his/her normal duties as a result of a job-related compensable illness or injury. National Arbitrator Mittenthal held in H8N-5B-C 22251, November 14, 1983 (C-03855), that Article 13, Section 4.H applies to both light and limited duty situations (see below).
>
> An employee who has suffered a compensable illness or injury may seek permanent light duty work through the procedures provided in Article 13. However, in most circumstances such employees will find the procedures and regulations provided in ELM Chapter 540 better suited to their needs. The limited duty provisions contained in ELM Section 540 will be discussed at the end of this article.

The NALC contends the proposed ELM 546 change also is inconsistent with the seniority rules set forth in Article 41 of the NALC National Agreement. Article 41.2.G provides that a new period of seniority begins when an employee from another craft is reassigned voluntarily or involuntarily to the letter carrier craft. Article 13.6 provides an exception to this rule for employees who transfer pursuant to the provisions of Article 13. By expanding the scope of Article 13.5, the new ELM language effectively expands the scope of Article 13.6. This would substantially narrow the scope of the general seniority rule in Article 41.2.G. In addition, the proposed expansion of Article 13.6 will distort the provisions in Article 41 regarding promotion of PTF letter carriers to full-time positions. Under Article 13.5.B a PTF clerk may be permitted to accept a full-time carrier resolved vacancy ahead of incumbent PTF letter

carriers with greater seniority. The NALC insists that any exception to promotion rules for carriers must be stated in the National Agreement itself and cannot be established by a handbook or manual.

The NALC contends that the Postal Service's unilateral change in the terms and conditions of employment of letter carriers injured on the job violates Article 5 of the National Agreement. The Postal Service is required to bargain over such proposed changes. In this case the Postal Service and the APWU negotiated an MOU requiring implementation of the disputed ELM language during the 2006 round of national bargaining. At that time the Postal Service was engaged in simultaneous negotiations with the NALC, yet it never bargained with the NALC over the proposed amendment to ELM 546 or offered any proposals linking ELM 546 to Article 13. Indeed the Postal Service failed to even notify the NALC of its agreement with the APWU. Instead it simply provided a standard Article 19 notice of the proposed new language on March 23, 2007, more than four months after the MOU with the APWU had been executed.

The NALC asserts the proposed ELM change also would result in a unilateral alteration of the 1979 settlement which established the pecking order governing reassignment of injured letter carriers under ELM 546, as the Postal Service itself argued in the Mittenthal case.

Under both established arbitral case law and NLRB case law, the NALC argues, if the Postal Service enters into an agreement with one union that violates the collective bargaining

rights of another it is required to negotiate with the latter union.

In addition, the NALC stresses, under Article 1, any changes in the rules regarding who would be allowed to bid on letter carrier jobs may only be negotiated with the NALC. Therefore the proposed ELM 546 change also violates Article 1 of the NALC National Agreement.

The NALC contends that, in addition to violating the National Agreement, the proposed ELM 546 change is not fair, reasonable or equitable. The NALC stresses that there is no reciprocity if Article 13 is applied to ELM 546 transfers. Article 13.5 embodies an equitable principle of reciprocity. When a carrier requests a light duty assignment under Article 13 and is given a previously existing assignment in the clerk craft, the letter carrier and the letter carrier craft gain a benefit. Because the clerk craft loses a position, the principle of reciprocity applies and employees from the clerk craft have the opportunity to bid on the resulting vacancy. The principle of reciprocity is completely inapplicable when carriers are reassigned under ELM 546.

The NALC asserts that letter carriers frequently grieve ELM 546 transfers, preferring to remain in the carrier craft with their full craft seniority. From the perspective of both the employee and the NALC, an ELM 546 permanent transfer is a negative development. If the proposed change to ELM 546 is implemented, and clerks are permitted to bid on the resulting

vacancies to the detriment of incumbent letter carrier PTFs, the letter carrier craft will be doubly disadvantaged.

Furthermore, the NALC maintains, the Postal Service often creates positions in the clerk craft for carriers injured on the job that did not previously exist, in order to comply with its obligations under FECA and ELM 546. In this situation, the clerk craft does not lose any positions as a result of the reassignment and does not experience any negative impact. Yet, if Article 13.5 were applied, a member of the clerk craft would obtain the resulting vacancy in the letter carrier craft, which is inconsistent with the principle of reciprocity. As the Postal Service itself observed in the Mittenthal case, there is absolutely no equity in allowing clerks to bid on a carrier vacancy when the carrier has been assigned to a uniquely created position.

The NALC stresses that to the extent the ELM 546 changes would result in letter carriers who are permanently reassigned to clerk craft positions receiving full-time status and enhanced seniority under Article 13.6, the NALC never sought -- let alone negotiated -- such benefits.

Finally, the NALC contends that the Postal Service's negotiation of the ELM 546 amendments with the APWU without giving the NALC any opportunity to participate in the negotiations, despite the direct impact of the proposed ELM 546 changes on the letter carrier craft, is unfair, unreasonable and inequitable to the NALC.

POSTAL SERVICE POSITION

The Postal Service insists that there is no requirement in Article 19 that obligates it to meet with the NALC or any other union before it submits proposed changes to the ELM or any other manual or handbook. It analogizes this case to the situation in 1979 when the Postal Service and the NALC reached a settlement regarding the pecking order that was to be included in ELM Section 546. After reaching that settlement with the NALC, the Postal Service submitted the revisions to ELM 546 to the other unions through the Article 19 process.

The Postal Service also denies any violation of Article 5. It stresses that while the pecking order provision was negotiated between the NALC and the Postal Service the rest of ELM 546 was not. The ELM changes at issue here did not implicate the pecking order settlement. Even if they did, that would not prevent the Postal Service from making changes pursuant to Article 19, although the prior settlement would be a factor in applying Article 19. See APWU Case No. Q98C-4Q-C 02013900 (Das 2006) (Das MS-47 Award).

The Postal Service contends that the proposed changes are not inconsistent with the National Agreement. Article 13 always has applied in this situation. Indeed, until the late 1970s, Article 13 was the procedure for processing reassignment of employees who were injured on duty. During the 1970s the Postal Service began promulgating ELM regulations concerning FECA. These regulations followed on the heels of Congress'

expansion of workers compensation benefits to include continuation of pay, which made it less burdensome for an injured employee to seek benefits. Article 13, however, always has been available to an employee who is injured on the job, reaches maximum medical improvement, and can no longer perform a position in the employee's craft.

The Postal Service stresses that there is no language in the National Agreement that has ever required the Postal Service to allow these types of reassignments to take place outside of Article 13. It is true that the Postal Service on its own initiative previously made assignments under ELM 546 that did not invoke Article 13. Arbitrator Mittenthal upheld these reassignments, and correctly held that Article 13 did not apply to a reassignment under ELM 546 in the absence of it being invoked. The Postal Service now is making a change to the ELM that would lead to a different result in the future.

The Postal Service rejects the NALC's arguments that reassignments under Article 13 are limited to light duty positions implemented through local negotiations under Article 13.3.A. Article 13 broadly applies to "light duty or other assignments." Article 13 also is not limited in scope to a single installation. The reference to an installation head in Article 13.B.1 is not limited to the installation where the employee currently is assigned.

In short, the Postal Service argues, Article 13 always has been available for employees who are injured on the job to be reassigned. While the Postal Service previously allowed ELM

546 reassignments to occur apart from Article 13, the Postal Service always retained the right to cease doing so pursuant to Article 19.

The Postal Service further contends that the changes to ELM 546 are fair, reasonable, and equitable. They will allow the Postal Service to comply with both of the major ELM 546 awards by Arbitrator Snow (Snow-418 and Snow-200 Awards) and resolve the W.R. Grace situation the Postal Service has been trying to dig out of for a decade. Avoidance of further strife on this issue is an important benefit to all the participants in this case.

The Postal Service stresses that the ELM changes mean that a full-time employee who is reassigned to a position in a different craft will have full-time status in the new position, and thus the changes comply with the Snow-200 Award. The changes also allay any concerns about compliance with the Snow-418 Award, as the employee's status within the gaining craft will be in compliance with the gaining craft's National Agreement. In addition, reassigned employees will be better off because they will have modified seniority under Article 13.6, instead of starting with zero seniority after reassignment.

Application of Article 13 also means that if the Postal Service decides to fill a residual vacancy in the losing craft that results from the reassignment, the vacancy will be filled under Article 13, meaning that it can be successfully bid for by a member of the gaining craft. The Postal Service insists that reciprocity in this situation is fair, reasonable,

and equitable. Without it, it is possible that PTF employees in the gaining craft would lose conversion opportunities to full-time status. Reciprocity puts an end to the situation where the losing craft was, in effect, having its cake and eating it too -- that is, having one of its employees get injured, move to a full-time position in the gaining craft, possibly impede advancement opportunities for members of the gaining craft, and then having the residual vacancy filled with one of its own members.

Finally, the Postal Service argues that utilization of Article 13 is particularly fair, reasonable and equitable because Article 13 is a product of negotiations between the Postal Service and all of its major unions. It once was the sole means for reassignment under these circumstances, and it has always been an open route for such a reassignment.

APWU POSITION

The APWU points out that the ELM changes at issue were promulgated by the Postal Service to settle a long standing dispute between the Postal Service and the APWU over the reassignment or reemployment of injured employees from other crafts into an APWU craft. The settlement resolved two national level grievances and numerous other grievances at the regional and local levels that had been held in abeyance pending resolution of those disputes. The settlement allowed the Postal Service to resolve the dilemma it was faced with as a result of the Snow-418 and Snow-200 Awards.

The APWU emphasizes that the Postal Service cannot justify violations of its collective bargaining agreements by reference to its statutory obligation to accommodate employees who have been injured on duty. The present accommodation reached by the APWU and the Postal Service will permit the Postal Service to assign clerk work to injured letter carriers who are reassigned to the clerk craft, with appropriate recognition of contractual protections for the rights of other clerks. Once an injured letter carrier is made aware of the possibility of reassignment to a position in another craft consistent with their work restrictions, the employee has an affirmative obligation under FECA to seek that reassignment. An employee under this obligation can hardly be heard to argue that the Postal Service has inappropriately "initiated" the idea of reassignment. The employee has an obligation to initiate it or, if previously unaware of the possibility, to respond affirmatively to the opportunity.

The APWU argues that the ELM changes in issue are consistent with the NALC National Agreement, with the Mittenthal Award and with the 1979 Settlement Agreement on the pecking order.

The disputed ELM changes require that Article 13 of the National Agreement be applied when an injured employee needs to be reassigned to a position in another craft. Because the requirement is that Article 13 be applied as written, the APWU can see no tenable argument that Article 13 has been varied or violated.

Arbitrator Mittenthal distinguished between reassignments requested by the employee and those not requested by the employee because Article 13 comes into play only if the employee makes a voluntary request for reassignment. The APWU argues that this dichotomy between cases in which the employee requests or does not request reassignment under Article 13 has not been changed by the ELM amendments at issue. As all parties agree, if the employee requests reassignment to the proffered position in response to the Postal Service's notice, that request is voluntary within the meaning of Article 13.

The APWU stresses that the pecking order established by the 1979 settlement between the Postal Service and NALC is unchanged by the ELM amendments at issue. Both Article 13 and the pecking order can still be applied in accordance with their terms. Moreover, absent an explicit agreement to the contrary, ELM provisions, including the pecking order, can be changed in accordance with Article 19. See Das MS-47 Award.

The APWU insists that Article 13 is not limited to light duty assignments set aside for that purpose by the parties under Article 30. Article 13.2.B.1 refers to permanent reassignment "to light duty or other assignment." And Article 13.4.E contemplates the establishment of positions specially created to accommodate a permanently partially disabled employee. Article 13 makes no distinction between reassignments to residual vacancies set aside by the parties for light duty under Article 30 and positions specially authorized and established under Article 13.4.E.

The APWU further contends that the ELM changes are fair, reasonable, and equitable. Partially disabled employees reassigned to suitable positions in other crafts are permitted to take their own seniority with them or are given seniority one day junior to the junior full-time regular in the gaining craft. That seniority may well be greater than that of PTF employees in the new craft who, when they do make regular, will be unable to outbid the reassigned employee. While the specially created position may not be reposted after the reassigned employee bids away from it, that does not diminish the impact of giving the reassigned employee seniority in the APWU craft. If anything this aspect of the reassignment increases the adverse impact on the gaining craft.

In response to the NALC's contention that former letter carriers wish they could retain their letter carrier craft status and seniority while doing clerk work for the rest of their working lives, the APWU points out that such a practice is precluded by law and by the APWU National Agreement. When a carrier injured on the job has become permanently partially disabled, FECA requires that the employee be permanently reassigned to a suitable position, whether or not the position is in the letter carrier craft. Likewise, the APWU National Agreement requires that employees performing work in APWU bargaining units be reassigned to the appropriate bargaining unit.

The APWU argues that the reassigned carrier actually is better off using Article 13 than ELM 546, because under Article 13 the reassigned carrier either will be permitted to

take his seniority with him or will be given seniority one day junior to the junior full-time regular in the clerk craft. If Article 13 were not invoked the reassigned carrier would be required to begin a new period of seniority under the APWU National Agreement.

Arguably, the APWU asserts, the NALC itself would be better off if letter carriers reassigned to the clerk craft could be left as letter carriers, but nothing in the 1979 Settlement Agreement or in the pecking order itself is designed or intended to protect the interests of a union. These provisions are designed to protect the injured employee who is better off under Article 13. Furthermore, the effect of Article 13 on the NALC is not unfair, unreasonable or inequitable. Even where the reassignment is to a specially created position, providing Article 13 reciprocity to a senior clerk is only fair. After the reciprocal transfer, clerks will not have lost a bid position, although they will have a new employee with accumulated seniority in their craft. Likewise, letter carriers will have a new employee in their craft with seniority, but the reassignment will not cost them a bidding opportunity they otherwise would have had. Instead they will have an opportunity to bid for the vacated assignment, and the reassigned clerk will be assigned to the resulting vacancy. The APWU insists this is fair and even-handed.

FINDINGS

The reciprocity and seniority provisions in Article 13.5 and 13.6 are contractual exceptions to the posting and seniority provisions contained in Article 41 of the applicable National Agreement. These agreed to exceptions cannot be expanded under the Article 19 process, but only by agreement of the respective parties.

The position taken by the Postal Service (and APWU) in this case regarding the scope of Article 13.5 is diametrically opposite the position the Postal Service took in the Mittenthal case. In that case it contended in its brief that Article 13.5 "is a rare exception to the posting procedures found in the craft articles and applies exclusively to permanent light duty assignments made under the specific provisions of Article 13." The Postal Service insisted that Article 13.5 "applies only to permanent light duty assignments under Article 13, not to temporary or other assignments under Article 13, and not to limited duty assignments under Part 540 of the ELM." (Emphasis in original.)

Arbitrator Mittenthal agreed with the Postal Service. He ruled that the assignment of injured letter carrier Pickrell to a uniquely created position in the clerk craft under Part 540 of the ELM "was not the kind of 'permanent reassignment' contemplated by [Article 13]." He pointed out that Pickrell did not make a "voluntary request" for reassignment following his injury, as provided for in Article 13.2.B.1, and stated that

such a request "relates only to such 'light duty assignments' as have been established through 'local negotiations' (Section 3)."

In NALC Case No. H8N-5B-C 22251, decided fourteen months earlier in 1983, Arbitrator Mittenthal did find that, at least with respect to Article 13.4.H, an employee who was temporarily reassigned under Part 540 of the ELM could also have rights under Article 13. In that decision, he noted that Article 13.B.1 referred not just to "light duty" but also "other assignments" as well. He also stated that "absent any explanation of the functional difference" between the terms "light duty" and "limited duty," the reference to one and not the other was "a distinction without a difference." While that decision still is controlling with respect to the applicability of Article 13.4.H, it seems clear that the later 1985 Mittenthal Award took a different view of the difference between light duty assignments under Article 13 and limited duty assignments under Part 540 of the ELM, at least for purposes of defining the scope and applicability of Article 13.5.

The 1985 Mittenthal Award does not address the reference in Article 13.2.B.1 to "other assignments" in addition to light duty assignments. The Postal Service argued in that case that only permanent light duty assignments were covered by Article 13.5, stressing the reference to such assignments -- and not others -- in Article 13.5.D. In this case, the Postal Service and the APWU contend that the term "other assignments" in Article 13.2.B.1 and other sections of Article 13 (notably not including Article 13.5) is broad enough to encompass an assignment to a uniquely created position under ELM 546. The

APWU goes further and reads Article 13.4.E as specifically contemplating the establishment of such positions.

There is no bargaining history, practice or other evidence in this record that addresses the meaning and scope of Article 13.4.E or the reference in several provisions of Article 13 to "other assignments." Article 13.4.E provides:

> An additional full-time regular position can be authorized within the craft or occupational group to which the employee is being reassigned, if the additional position can be established out of the part-time hours being used in that position without increasing the overall hour usage. If this cannot be accomplished, then consideration will be given to reassignment to an existing vacancy.

On its face, this provision seems to contemplate the establishment of an additional full-time regular position in the gaining craft consistent with the overall approach taken in Article 13, which is to identify or create regular positions that can be filled by injured employees. I do not read this provision as covering a uniquely created position of the sort established under ELM 546 -- which does not remain in the craft after the reassigned injured employee leaves that position. Moreover, the Mittenthal Award precludes application of Article 13.5 -- a key component of the understanding reached by the Postal Service and APWU at issue here -- to such a position.

In addition to the language in Article 13 and national arbitral precedent, application of Article 13.5 to a uniquely

created position established under ELM 546 does not fit the reciprocity scheme set forth in Article 13.5. This is forcefully expressed in the Postal Service's brief in the Mittenthal case, as follows (footnote omitted):

> The provisions of Article 13, Section 5... allows a clerk craft employee who possibly could have bid this assignment or a PTFS clerk craft employee, an opportunity to fill the resulting vacancy in complement in the letter carrier craft. And the end result is that you have the same number of full-time positions in the clerk craft as you started with and the same number of full-time positions in the letter carrier craft as you started with and each craft with the same number of qualified employees. Is it different under the provisions of Part 540 of the ELM? Absolutely! In this case, Mr. Arbitrator, the letter carrier in question did not make a request for permanent light duty. There was no negotiated light duty assignments in this office and the grievant did not meet the qualifications for any existing clerk craft assignment. He was offered a created, make work assignment. By this we mean an assignment that did not exist, was not part of the full-time complement of clerks at this office and therefore, would not have been posted for bid to the clerk craft. And as has been pointed out to the Arbitrator when on May 1, 1983, this letter carrier who was assigned into the clerk craft in March of 1983 resigned, the make work position was not posted or otherwise filled. What this means Mr. Arbitrator is that there was no flexible who was denied a conversion opportunity. There was no full-time regular clerk who was denied an opportunity to bid into this position. Lacking such equity if you will, there is absolutely no reason to take the

> vacated letter carrier position and post it to the clerks. The clerk craft has not gained a new full time, qualified clerk into its ranks but a person who is only capable of doing duties which had to be molded to fit his personal, physical needs. Thus it is completely different than when an assignment is made under the Article 13, permanent light duty procedure.

In addition, the reverse reciprocity provision in Article 13.5.D could not be applied to a uniquely created position in the event the injured employee recovered and was returned to his or her former craft, because that position would cease to exist.

The Postal Service and APWU contend that the ELM 546 changes in issue, nonetheless, are fair, reasonable, and equitable because of the enhanced seniority the reassigned employee obtains in the gaining craft under Article 13.6. But that only becomes a consideration if the changes are not inconsistent with the National Agreement.

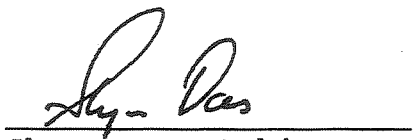
There are other considerations that support a finding that Article 13 cannot be utilized to encompass permanent reassignment to uniquely created positions in other crafts established under ELM 546. While the Mittenthal Award concluded that Pickrell was not coerced into accepting reassignment -- so that it can be characterized as voluntary -- the Award also found that Pickrell made no "voluntary request" for reassignment, as provided in Article 13.2.B.1. As stated in the 1987 Bernstein Award, Article 13 "had been conclusively construed by Arbitrator Mittenthal to be available only for voluntary reassignments initiated by the employee." (Emphasis

added.) Clearly, the ELM 546 changes at issue provide for a much broader application of Article 13. In addition, as the NALC points out, Article 13.5 refers to reassignments "from one craft to another craft within the office," whereas reassignments under ELM 546 may be to other offices.

Obviously, the 2006 MOU between the Postal Service and the APWU agreeing to the ELM changes in issue represented a mutually acceptable basis on which to resolve an ongoing festering dispute that spawned numerous grievances. But the NALC was not a party to the MOU, and it is entitled to insist that the contractual Article 13 exception to normal application of the posting and seniority provisions in Article 41 of its National Agreement not be expanded without its agreement. Accordingly, this grievance must be sustained.

AWARD

The grievance is sustained. The proposed changes to ELM 546 are invalid and are to be rescinded by the Postal Service.



Shyam Das, Arbitrator