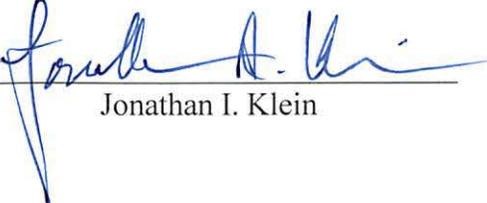


AWARD SUMMARY

The Union satisfied its burden of proof that management failed to comply with the pre-arbitration settlements dated November 21, 2012 and February 11, 2013, as it concerns processing the make whole back pay claims under those agreements.



Jonathan I. Klein

STATEMENT OF FACTS

On April 8, 2013, the Union filed a grievance which alleged that the Postal Service violated Article 15 of the National Agreement as a result of management's failure to comply with pre-arbitration settlements dated November 12, 2012 and February 11, 2013, involving letter carriers Lisa Lyon and William Howell. (Joint Ex. 2, at 4). The parties held a Formal Step A meeting on May 29, 2013, and the grievance was progressed to Step B on May 31, 2013. The Step B Dispute Resolution Team issued a remand on June 27, 2013, for the purpose of obtaining additional information. Specifically, the parties were "... instructed to schedule a meeting with the Manager Labor Relations and/or Labor Relations Specialist Eric Parmenter and NALC Representative Bill Bothwell to attempt to resolve this grievance in accordance with the Pre Arbitration agreement that was signed by the above mentioned parties." (Joint Ex. 2, at 20-21).

The grievance was advanced by the Union to Step B for a second time on July 24, 2013, and the Step B Dispute Resolution Team once again remanded the grievance. The Step B Decision issued on August 6, 2013, provides, in part, as follows:

* * *

The Step B parties have agreed to Remand the instant issue back to the local parties for reasons cited in the explanation below. The local parties are to mutually schedule a Step A Formal meeting within seven (7) days of receipt of this Step B decision unless the parties mutually agree to an extension for doing so. . . .

* * *

Though not completely clear from the case file and from a review of the PS Form 8190, it appears that the Union has advanced this Grievance to Step B without a Formal Step A meeting having taken place.

* * *

In this case, it appears that there was no Formal Step A meeting conducted and no reasons set forth as to why no meeting took place, what the availability of both the Union and Management Formal Step A designees were during the seven days following the appeal to Formal A and Management's receipt of the case file for the Formal A meeting, and/or why the case file was apparently unilaterally advanced to Step B without a substantive discussion of the merits of the case at Formal A.

* * *

(Joint Ex. 2, at 14-16).

The parties subsequently conducted a Formal Step A meeting on August 26, 2013. The grievance was progressed to Step B on September 3, 2013, and the Step B Dispute Resolution Team reached an impasse on September 10, 2013. (Joint Ex. 2, at 1-3). The parties proceeded to arbitration and a hearing was conducted on January 28, 2014, at which time the parties were afforded full opportunity to present documentary evidence, direct and cross-examine witnesses,

offer rebuttal testimony and present argument. Each party submitted a post-hearing closing brief and several arbitration awards in support of their respective positions.

STATEMENT OF ISSUE

The parties stipulated to the issue as set forth by the Step B Dispute Resolution Team:

Did Management violate Article 15 of the National Agreement when they failed to comply with Pre Arbitration settlements dated 11/21/12 and 2/11/13? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Article 15.3.A of the National Agreement provides as follows:

The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in resolution of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end. At each step of the process the parties are required to jointly review the Joint Contract Administration Manual (JCAM).

Article 19 of the National Agreement entitled “Handbooks and Manuals” provides, in part, as follows:

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

limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

* * *

CONTENTIONS OF THE PARTIES

Union's Contentions

The Union asserts that management violated Article 15 of the National Agreement as a result of its failure to implement the terms of three, pre-arbitration settlement agreements. Those settlements provided that the grievants would be made whole for all losses that they incurred due to "[m]anagement withdrawing their full-time Modified Job Assignments from them and sending them home No Work Available pursuant to the District's Implementation of the National Reassessment Process (NRP) in 2010." (Union's Post-Hearing Brief, 3). According to the Union, the facts in this case are not substantially in dispute. The grievances filed to protest management's decision to withdraw the full-time modified limited duty job assignments of letter carriers Lisa Lyon and William Howell pursuant to implementation of the National Reassessment Process (NRP) were settled by the parties on November 21, 2012. The parties also entered into a second pre-arbitration settlement concerning letter carrier Howell. Each of the pre-arbitration settlements contained make whole remedies.

The record shows that each of the grievants complied with their end of the bargain. Specifically, they provided management with medical updates within the required time frame and submitted claims for back pay on PS Form 8038. However, management refused to process the

agreed upon make whole remedies. The Union points out that the Dispute Resolution Team remanded the case twice in order to afford management additional opportunities to comply with the pre-arbitration settlements. Moreover, “[t]here is also no dispute that Management has not restored the Grievants to similar full-time limited duties as they previously worked before Management NRP’d them out the door in 2010.” (Union’s Post-Hearing Brief, 5). The Union notes that Lyon has only been provided a two and one-half hour limited duty assignment and Howell has not been offered any work at all.

William Bothwell, a special assistant to the NALC President for contract administration, testified that it is management’s responsibility to effectuate back pay awards, and the process for doing so is neither difficult nor time consuming. He described the back pay process and indicated that “. . . there is never a situation where the employee gets a bill due to back pay not being enough to cover deductions.” (Union’s Post-Hearing Brief, 5). Bothwell indicated that he expected management to restore the grievants to their previous or similar full-time limited duty assignments following the pre-arbitration settlements as the updated medical for both employees had not changed. Furthermore, he expected that management “. . . would have effectuated the 8038/8039 Back pay process, resulting in each of the Grievant’s being made whole from the date of their original NRP removal from Limited duty until the date that they were restored to suitable Limited duty.” (Union’s Post-Hearing Brief, 6). According to Bothwell, he made himself available to meet telephonically with management on multiple occasions.

The Union points out that the Postal Service's argument in this case centers around an attempt to shift responsibility for implementing the pre-arbitration settlements from management to Bothwell. However, the Union maintains that it is well-established in a labor-management relationship that it is the responsibility of management to implement the terms and conditions of a grievance settlement as they are the only party with the authority and means of doing so. The payment of back pay and benefits cannot be accomplished by a Union official. Nonetheless, Theresa Dougherty, the manager of labor relations for the Northeast New England District, testified that her expectation for implementing the terms of the pre-arbitration settlements did not include the processing of a make whole back pay award because she believed the 8038/8039 process to be cumbersome and time consuming. Dougherty acknowledged that she was aware that the pre-arbitration settlements called for make whole back pay and benefits, and she admitted that those agreements were not deficient in any manner.

The Union further asserts that "[t]he record also shows that while the parties that signed the pre-arbitration settlement disposed of Management's arguments in the instant case; that there is no work available for the Grievants, the duties that comprised the Grievant's previous modified job assignments were reassigned to other employees, etc." (Union's Post-Hearing Brief, 7). Therefore, the Union urges the arbitrator not to entertain any such arguments. This is a simple case where the Postal Service agreed that they violated Section 546.142 of the ELM and agreed to restore the grievants to the *status quo ante* by making them whole and providing them with limited duty within their work limitation tolerances.

In accordance with applicable law and MSPB precedent, the Union argues that the pay of manager of labor relations Dougherty, the Postal Service's representative for ensuring the timely implementation of the pre-arbitration settlements, should be suspended until full implementation of the settlements in question. Furthermore, the Union requests an additional monetary remedy for each of the grievants of \$25.00 per day from two weeks after the signing of the pre-arbitration settlements until they are fully implemented. It points out that regional arbitrators have awarded such punitive remedies in other cases.

For each of the aforementioned reasons, the Union requests that the grievance should be sustained and the arbitrator award the following remedy: require the Postal Service to implement the terms and conditions of the pre-arbitration settlements post haste; restore the grievants to the full-time limited duty assignments that each held at the time they were NRP'd or an equivalent, suitable full-time limited duty assignment within each grievant's work limitation tolerance; order management to immediately process the make whole back pay claims; pay each grievant a one-time lump payment of \$25.00 per day as discussed above; order that management cease and desist from further similar contract violations in the future; and any other remedy deemed appropriate. The Union also requests that the arbitrator retain jurisdiction for purposes of implementing the remedy.

Management's Contentions

The Postal Service maintains that the issue statement was not agreed to during the arbitration hearing and each party approached the dispute from varying viewpoints. The Postal Service “. . . contends that NALC advocate William Bothwell failed to abide by no less than three Step B directives to contact Labor Relations specialist Parmenter and/or Manager Theresa Dougherty to clarify negotiated settlements regardless of how clear, straightforward or obvious said settlement language appears to local President Rose or Advocate Mascolo.” (Postal Service Post-Hearing Brief, 2). The Union asserts that the instant grievance is an NRP case that encompasses the entire past history of the grievants, and it relies on an undeveloped joint file to do so. The Postal Service also claims that the instant grievance was advanced unnecessarily to arbitration as a result of Bothwell’s failure to discuss the case as directed by the Step B remands. “Regardless, the 34 page case file is entirely lacking in medical documentation or evidence or any desire to even seek it and clearly speaks to the fact that the case is not a complex NRP case for two employees . . .” (Postal Service Post-Hearing Brief, 2). Therefore, the Postal Service contends that the issue must be framed as set forth by the Step B Dispute Resolution Team on page 21 of the joint case file: “*The DRT directs the local parties to schedule a meeting with Manager Labor Relations and/or Labor Relations Specialist (LRS) Eric Parmenter and NALC Representative Bill Bothwell to attempt to resolve this grievance in accordance with the Pre Arbitration agreement that was signed by the above mentioned parties.*” (Postal Service Post-Hearing Brief, 2)(emphasis in original).

The record indicates that the only case ripe for arbitration begins on or about page 23 of the joint case file and evidences a Formal A meeting conducted by local Union President Mark Rose and Postmaster Mike Mitchell on May 29, 2013. The Postal Service points out that neither of the aforementioned individuals was privy to the pre-arbitration settlements. According to the Postal Service, the 14-day window to grieve the pre-arbitration settlements had long since been closed. As such, the Union failed to meet its obligation set forth in Article 15 of the National Agreement. The fact that the Union seeks a punitive remedy beginning two weeks after the signing of the pre-arbitration agreements indicates that it believes the violation occurred months prior to the filing of the grievance. As such, the grievance is procedurally flawed from the start and should be dismissed. Nonetheless, the Step B team accepted the case.

The Step B Team highlighted the language contained in Article 15.3.A of the contract to reinforce the notion that Bothwell and Parmenter were to observe good faith bargaining in resolving this matter. This directive is important for several reasons. First, it demonstrated that the Step B lacked the information necessary to address the case as presented by Rose, and second, it is a clear demonstration that the Step B Team directed and expected Parmenter and Bothwell to meet. However, a meeting never occurred and the Union failed to offer any evidence of attempts by Bothwell to meet as directed by the Step B Team. Management credibly asserted that it attempted to reach out regarding the scheduling of a meeting. “Despite the clear failure of the NALC to abide by the mutually bargained for language of a DRT team decision, Mark Rose again advanced the case to Step B on July 24, 2013 . . .” (Postal Service Post-Hearing Brief, 3).

The Postal Service points out that this advancement to Step B is untimely under the contract. Furthermore, the case was not sent to Step B until July 24, 2013, nearly a full month after the June 27, 2013, instructions to contact the DRT team no later than the end of the 7-day period within which Parmenter and Bothwell were directed to meet. During this period, the Postal Service repeatedly reached out to Bothwell who failed to reply in any fashion. The Postal Service notes that “Bothwell himself, the Union’s own witness, did not deny this, nor did he ever once contend he attempted to comply with the B team language.” (Postal Service Post-Hearing Brief, 3).

Although this is a contract case, the Union has failed to establish or even contend that Bothwell responded to anyone but Rose prior to July 13, 2013, at which time he “. . . unrealistically expects Rose to schedule a Monday meeting with busy LR personnel on a Sunday and that if said meeting falls through Bothwell will clean up the entire mess with MLR Ed Tierney . . . “ (Postal Service Post-Hearing Brief, 4). The meeting did not take place and Rose again advanced the case to Step B. In addition to the Union’s failure to timely re-advance the case, the Postal Service notes that no Formal A meeting was conducted thereby eliminating management’s ability to raise a timeliness argument. “Despite this the case was again allowed to continue on its disastrous and flawed voyage all the while being procedurally defective.” (Postal Service Post-Hearing Brief, 4).

The record indicates that Rose and Mitchell signed off on another PS Form 8190 on August 26, 2013, twenty days after the Step B Decision was mailed. The Postal Service

questions “. . . why all manner of contractual language regarding Management’s obligations are cited as violated yet the simple seven day dictate to meet is repeatedly overlooked by the NALC.” The Step B team finally gave up on trying to arrange a meeting between Bothwell and Parmenter/Dougherty and threw in the towel by declaring an impasse.

As is concerns the merits of the case, the Postal Service asserts that “. . . it is a question of whether or not management violated the National Agreement when it refused to acquiesce to the local NALC Union’s demand that President Rose was the party responsible for interpreting and enforcing the pre arbitration agreements at hand.” (Postal Service Post-Hearing Brief, 4). The Union argues that the pre-arbitration agreements are self-explanatory and there is no need for Bothwell to weigh in. However, this position is belied by the fact that the Step B Team repeatedly disagreed and instructed Bothwell to be involved with the resolution of the grievance.

According to management, there are a number of inconsistencies and variations of interpretations present in the pre-arbitration agreements. “First, how can the agreement documented on page 34 of the joint settle a time frame not referenced by the case number it represents and why would the Union not even include the cases the pre arbs resolve in the joint file?” (Postal Service Post-Hearing Brief, 5). The Union is seeking to establish the “worth” of the cases without affording the arbitrator an opportunity to review them. Second, why does the Union insist that the grievants should be put back to work regardless of their medical conditions and in conflict with the settlement agreement language that obligates management to search for work and not unequivocally return them to duty. “Did the Union argue and does the case file

demonstrate any work capacity in regard to Howell? No, it does not, and Management has searched despite the fact that it possesses medical evidence that clearly shows Howell's [d]octor recommends he *not* work on 12/19/2012." (Postal Service Post-Hearing Brief, 5). In regards to Lyon, the Union argues that she is not working to her capacity on available work but never evidences what she is capable of doing. The Postal Service asserts that Lyon was returned to duty consistent with her restrictions following the pre-arbitration settlements. It questions whether a 34-page case file consisting primarily of Step B responses evidences a mere bargaining breakdown or the remedy sought by the Union. The Postal Service is confident that the former is true and points out that "[t]he case file has no medical documentation, no evidence of work capacity, no evidence of what work the employees should be performing, no requests for information seeking evidence of job searches or the like." (Postal Service Post-Hearing Brief, 5). The Postal Service urges the arbitrator to carefully review the case file and is confident that it is completely lacking regarding any evidence required to establish an NRP violation and at best indicates a failure of Bothwell to meet with Parmenter as directed.

The Postal Service maintains that its witnesses testified in a credible manner while the Union's witnesses were taken through their testimony in a leading fashion thereby reducing the evidentiary value. The only documentary evidence regarding what was agreed to at the pre-arbitration meetings is the agreements themselves. The Postal Service points out that "[t]he DRT team has held this case in its hands no less than three times and never once determined the pre arbitration agreements spoke for themselves therefore Management is obligated to perform a, b,

and c.” (Postal Service Post-Hearing Brief, 6). In addition to both Parmenter and Dougherty seeking clarification, the Step B Team also believed that clarification of the pre-arbitration agreements was required in this case. Furthermore, “[t]he failure of the B team to specify the pre arbs meaning speaks to the fact the pre arbs are *a contract apart* and not proper for outside interpretation by those not privy to the negotiation process . . .” (Postal Service Post-Hearing Brief, 6).

Clearly, Bothwell’s refusal to return to the bargaining table prevented management from implementing the pre-arbitration settlements to his satisfaction. According to the Postal Service, management cannot clearly know if Bothwell, the only person who needs to be satisfied, is satisfied if he refuses to state whether he is accepting or disputing the actions which have occurred. Nonetheless, the Union requests that the Postal Service be required to implement the terms and conditions of the pre-arbitration settlement agreements.

The Postal Service maintains that there is no basis for implementing a punitive penalty as requested by the Union. Additionally, the case file contains no evidence that updated medical documentation was submitted by the grievants. Furthermore, “. . . the notion of insisting on a return to work without any demonstration of what work was available and within the restrictions of the employees is not supported by either common sense or that of the agreements which specifically mandate to *seek* work within restrictions, not to work the employees if no work within restrictions is found.” The Union has simply failed to satisfy its burden of proof in this case.

However, the Postal Service is not so bold as to expect the arbitrator to believe that the pre-arbitration settlements have been fully met, and management stipulated as much. Therefore, it believes that the appropriate remedy in this case is as follows: “[m]anagement is to continue to search for work within the medical restrictions of the employees and that the PS 8038 forms on hand should be compiled with PS 8039 forms and sent for implementation, but that case 13148485, which is framed by the B team as a good faith bargaining issue falling under the confines of an Article 15 dispute be denied in its entirety.” (Postal Service Post-Hearing Brief, 7). The Postal Service did not advance this case to avoid implementation of the pre-arbitration settlements and believes that Bothwell alone is the sole and proper party to clarify and either accept, or deny, the implementation of the agreements. It asserts that various aspects of this case have been arbitrated numerous times throughout the country and maintains that the awards attached to the post-hearing brief support its position in this matter. For each of the aforementioned reasons, the grievance should be denied in its entirety.

OPINION AND ANALYSIS

The instant dispute concerns the implementation of three pre-arbitration settlements which resolved grievances filed on behalf of letter carriers Lisa Lyon and William Howell in connection with the elimination of their respective limited duty jobs/rehabilitation assignments at the Bangor installation during the National Reassessment Process. Contrary to the Postal Service’s argument in its post-hearing brief, the parties stipulated at the arbitration hearing that

the issue presented in this case was set forth by the Step B Dispute Resolution Team. The issue is not whether the local parties scheduled a meeting between Bothwell and Manager Labor Relations Dougherty and/or Labor Relations Specialist Parmenter to attempt to resolve the grievance, but whether or not management complied with the terms and conditions of the pre-arbitration settlements at issue in this case. Clearly, the Union filed the instant grievance to address and resolve the allegation that management failed to provide the grievants with the remedy negotiated by the parties in the pre-arbitration settlements, and not whether a subsequent meeting took place to discuss the implementation of those agreements as directed by the Step B Team in several remand decisions issued prior to an impasse being declared on September 10, 2013. As such, this is the ultimate issue which must be addressed and resolved by the arbitrator. The arbitrator notes that there is no language in the pre-arbitration settlements which requires the parties to meet prior to performing the agreed upon actions in order to have resolved the underlying grievances.

The arbitrator finds that the pre-arbitration settlements at issue in this case contain clear and unambiguous language regarding the agreed upon remedies for management's contractual violations, as well as the obligations which each party must fulfill in order to effectuate said remedies. On November 21, 2012, the parties entered into the following pre-arbitration settlement resolving a grievance filed on behalf of letter carrier Lyon (Case Nos. B06N-4B-C 11423635; B06N-4B-C 10461313):

The instant grievance pertains to a reduction of the Grievant's work hours on February 10, 2010 at the Bangor, ME Installation.

The Service acknowledges that Section 546.142 of the ELM was violated when they failed to provide Lisa Lyon eight (8) hours of work and as a resolution, the parties agree to the following:

The grievant shall be made whole for all lost wages and benefits from March 14, 2010 until she's returned to a Limited Duty Job/Rehabilitation Assignment within his/her restrictions. This includes, but is not limited to, all wages, annual leave, sick leave, retirement benefits; minus wage-loss compensation from OWCP.

The grievant will provide the Postal Service with updated medical information as soon as possible, but no later than 30 days of the signing of this agreement.

Management will conduct a search for work in accordance with applicable handbooks, manuals and federal laws.

In future dealings with the grievant, management will comply with ELM 546.142.

This settlement is fully citable in any future proceedings.

(Joint Ex. 2, at 32).

The record further reflects that the parties entered into a pre-arbitration settlement, dated November 21, 2012, in resolution of a grievance filed on behalf of letter carrier Howell (Case Nos. B06N-4B-C 09297954; B06N-4B-C 10461312) which provides as follows:

The instant grievance pertains to a reduction of the Grievant's work hours on February 10, 2010 at the Bangor, ME Installation. The Service acknowledges that Section 546.142 of the ELM was violated when they failed to provide William Howell eight (8) hours of work and as a resolution, the parties agree to the following:

The grievant shall be made whole for all lost wages and benefits from March 14, 2010 until he's returned to a Limited Duty

Job/Rehabilitation Assignment within his/her restrictions. This includes, but is not limited to, all wages, annual leave, sick leave, retirement benefits; minus wage-loss compensation from OWCP.

The grievant will provide the Postal Service with updated medical information as soon as possible, but no later than 30 days of the signing of this agreement.

Management will conduct a search for work in accordance with applicable handbooks, manuals and federal laws.

In future dealings with the grievant, management will comply with ELM 546.142.

This settlement is fully citable in any future proceedings.

(Joint Ex. 2, at 33).

On February 11, 2013, the parties entered into a second pre-arbitration settlement regarding letter carrier Howell (Case No B06N-4B-C 11215240), which provides as follows:

The grievant shall be made whole for all lost wages and benefits from May 10, 2009 until February 10, 2010. This includes, but is not limited to, all wages, annual leave, sick leave, retirement benefits; minus wage-loss compensation from OWCP.

(Joint Ex. 2, at 34).

There is no dispute that the pre-arbitration settlements contain make whole remedies for all lost wages and benefits. According to Bothwell, a “make whole” remedy requires the Postal Service to place an employee in the position that he or she would have been in had the violation not occurred. He also asserted that the Postal Service has a duty to implement the back pay process, and “the only thing an employee has to do is return the PS Form 8038.” Labor Relations

manager Dougherty acknowledged that a make whole remedy restores the “status quo ante,” however, she does not know if this was done in either case involving the grievants.

Management Instruction EL-430-2012-4 regarding back pay specifically discusses the various types of back pay compensation, the procedures for processing back pay claims and the responsibilities of Postal Service personnel for managing the process. As it concerns make whole remedies, EL-430-2012-4 provides, in pertinent part:

Hours Calculation

An hours calculation is back pay compensation that is based on a hypothetical schedule (i.e., the schedule that the claimant would have worked if not for the personnel action that was subsequently reversed or the retirement action that was denied).

This computation method requires determining: (1) the relevant time period; (2) the appropriate basic rate of pay; and (3) the hours the employee would have worked during the back pay period. The resulting calculation may take into account the claimant’s regular work schedule and premium pay attached to that regular schedule or the claimant’s work history.

A back pay award that calls for an employee to be “**made whole**” **must be submitted as an hours calculation**. This type of compensation makes the employee whole because, unlike a lump sum payment, it includes most employment-related benefits, such as sick and annual leave, health and life insurance, Thrift Savings Plan, and retirement benefits. It also requires correction of an individual’s personnel history, and that change may affect the annuity calculations performed by OPM if and when the individual retires.

An hours calculation may take the form of a *pay differential* adjustment. This calculation takes an individual’s existing compensation history and compares it to an alternative that would

have occurred under different circumstances. The difference in pay, if any, results in a payroll adjustment to the employee.

An hours calculation is *always* subject to federal, state, and local income tax withholding, as well as Social Security and Medicare deductions, where applicable.

See Attachments B and C for more information regarding the application of hours calculation to different kinds of settlements, decisions, rulings, and determinations.

(Union Ex. 3).

The nature of the make whole remedy set forth in the pre-arbitration settlements at issue in this case clearly requires that management perform an hours calculation in order to determine the compensation due the grievants under the agreements. The step-by-step procedure which must be utilized to process this type of back pay claim is detailed in EL-430-2012-4:

* * *

4. For all back pay authorizations that stipulate an **hours calculation** encompassing one full Postal Service pay period or more (i.e., at least one Postal Service pay period with **no** previously paid leave or work hours), or a provision of back pay to make the employee whole, or a decision rendered by an authorizing agency or third party:
 - a. **Direct** the employee to **complete** in full and **sign** PS Form 8038, *Employee Statement to Recover Back Pay*. **Advise** the employee to include all applicable information on (1) mitigating damages and/or receipt of unemployment compensation; (2) voluntary refunds of retirement plan contributions; (3) participation in the Thrift Savings Plan (TSP), Federal Employee Health Benefits (FEHB), and/or

Flexible Spending Accounts (FSA); and (4) receipt of annuity payments from OPM.

Note: Employees or claimants should be informed that prompt, thorough, and accurate completion of PS Form 8038 allows management to complete PS Form 8039 in a timely and accurate manner that reflects compliance with statutory and regulatory requirements and case law precedent. Failure by the claimant to complete PS Form 8038 in a timely manner will delay payment of the award.

b. **Complete PS Form 8039 in full.**

- (1) Use the information provided by the claimant on PS Form 8038, resolving any discrepancies or omissions.

Consult with HR local services or HRSSC as necessary to determine service or salary history corrections required by the back pay award.

- (2) **Complete** part H, Work Schedule, describing what the employee's regular schedule would have been during back pay period as follows:

- (a) For an employee **with a regular schedule, check** the regular schedule assigned to the employee's position. **Estimate** any overtime or other premiums, such as night differential, Sunday premium, or higher-level pay, to which the claimant might be entitled for the back pay period.

* * *

(Union Ex. 3).

The record establishes that each of the grievants completed a PS Form 8038, Employee Statement to Recover Back Pay. However, management failed to complete PS Form 8039s, Back Pay Decision/Settlement Worksheet, and failed to process the make whole remedies in accordance with EL-430-2012-4. Labor Relations Manager Dougherty testified that “back pay claims are very cumbersome and time consuming and she would not agree to a pre-arb settlement that included doing back pay processing and she was directed to negotiate a lump sum payment if necessary.” Notwithstanding Dougherty’s position regarding the purported time consuming nature of back pay claims, the pre-arbitration settlements at issue in this case required management to implement this procedure in order to properly process the agreed upon make whole remedy. It matters not that Dougherty herself would not have negotiated such language, and the arbitrator notes that there is no mention of lump sum payments in any of the pre-arbitration settlements at issue.

Based upon the foregoing discussion regarding the proper procedure for processing make whole remedies such as those contained in the pre-arbitration settlements above, the arbitrator determines that management’s attempt to shift responsibility for the failure to implement the agreements is without merit. Labor Relations manager Dougherty stated that she “usually has authority to settle when she gets with the [Union’s] advocate.” According to Dougherty, she was “not going to offer something and was waiting for Bothwell to say that he wanted \$10,000.00, \$5,000.00, or \$2,000.00,” and she “did not want to put something out there.” The arbitrator finds that such an approach to implementing the pre-arbitration settlements is contrary to both the

Postal Service's own procedures regarding back pay claims, and the normal course of settlement negotiations. The time to negotiate the terms and conditions of a settlement is prior to the date upon which a resolution is reached and an agreement is signed. Once a grievance is settled in the manner of the settlements before the arbitrator, there is only the calculation of the make whole remedy to be performed for which the Postal Service has published a detailed management instruction, EL-430-2012-4. There is no claim that the grievants failed to submit PS Form 8038s or that they failed to fulfill any other responsibility required of them.

For each of the reasons discussed above, the arbitrator determines that the Union has satisfied its burden of proof that management failed to comply with the pre-arbitration settlement dated February 11, 2013, involving letter carrier Howell. (Joint Ex. 2 at 34). This agreement simply required the Postal Service to process a make whole remedy for the specified period of May 10, 2009 until February 10, 2010. The evidence of record establishes that management at the Bangor Installation failed to do so.

As it concerns the other pre-arbitration settlements involving letter carriers Howell and Lyon, dated November 21, 2012 (Joint Ex. 2 at 32-33), the record establishes that management did not process the make whole back pay claims. However, based upon the record in this case, the arbitrator determines that there is insufficient evidence regarding the current medical restrictions of the grievants. Although Bothwell testified that their medical restrictions have not changed, the arbitrator notes that the grievants did not testify and no documentary evidence was presented regarding their medical restrictions or contained in the joint file. Additionally, any

evidence regarding a search for work conducted by management in accordance with applicable handbooks, manuals, and federal laws is absent from the record. Specifically, there is no indication whether management conducted a search for work in accordance with the pecking order set forth in Section 546.142 of the ELM following the date of the pre-arbitration settlements. The pre-arbitration settlements specifically provide that the grievants shall be made whole for all lost wages and benefits from March 14, 2010, until he or she is returned to a limited duty job/rehabilitation assignment within his/her restrictions.

The testimony presented at the hearing indicates that while letter carrier Lyon has returned to work and is presently assigned two and one-half hours per day, there is no evidence that Howell has returned to duty. It is unclear to the arbitrator whether management conducted a proper search for work in accordance with the terms of the pre-arbitration settlements, and was unable to find any duties for Howell and no more than two and one-half hours of work for Lyon within their respective work restrictions.

Based upon these facts and circumstances, the arbitrator is unable to determine whether or not management complied with the agreed upon make whole remedy for any period following November 21, 2012 – the date of two grievance settlements. However, it is clear that a make whole remedy should have been processed by management for both grievants covering the period of March 14, 2010 through November 21, 2012, for the reason that the Postal Service expressly acknowledged in the pre-arbitration settlements that management violated Section 546.142 of the ELM as a result of its failure to provide each individual with eight hours of work. The arbitrator

notes that under the terms of the pre-arbitration settlements, management agreed that it would conduct a search for work in accordance with applicable handbooks, manuals and federal laws. As of November 21, 2012, no such search for work had been conducted by management. For each of the reasons discussed herein, the grievance is sustained, in part, as set forth in the Award.

AWARD

The grievance is sustained, in part, as follows. Management is directed to immediately process the make whole back pay claims of grievant Howell for the period of May 10, 2009 through November 21, 2012, and grievant Lyon for the period of March 14, 2010 through November 21, 2012, in accordance with applicable Postal Service procedures for processing such claims, including EL-430-2012-4. The parties are also directed to meet within thirty (30) days from the date of this Award to determine the extent of any make whole back pay claims commencing November 22, 2012, through the date(s) that the grievants are respectively returned to limited duty/rehabilitation assignments within his or her work restrictions pursuant to a proper search for work conducted in accordance with the pecking order set forth in Section 546.142 of the ELM. The grievants shall also receive interest on any back pay at the federal judgment rate from the date(s) of the pre-arbitration settlement(s) under which the make whole calculation is to be made. The arbitrator shall retain jurisdiction regarding the implementation of this remedy for a period of sixty (60) days from the date of this Award.


JONATHAN I. KLEIN, ARBITRATOR

Date of Issuance: April 17, 2014.