

Compensation:

Grieving limited duty violations

Management's National Reassessment Program (NRP) continues to spread to more districts throughout the country. As it does, more and more injured carriers are either improperly denied limited duty or have their limited duty job offers withdrawn. In other cases, limited duty is provided but in violation of the pecking order in ELM 546. The two major types of limited duty violations thus can be identified as: 1) Denial and Withdrawal violations and 2) Pecking Order violations.

Denial and Withdrawal violations occur when limited duty is available but not offered, and/or when limited duty is improperly withdrawn.

Pecking Order violations occur when management provides limited duty, but does not attempt to minimize the adverse impact on the injured carrier. An example would be if limited duty is provided at another station when it was available at the carrier's bid station.

Some cases could involve a combination of a Pecking Order violation and a Denial violation. Example: four hours of limited duty is offered on

tour three when the injured carrier could have worked eight hours on his/her regular schedule.

While no article can cover all of the intricacies that will arise during the development and processing of a limited-duty grievance, the following discussion will cover most of the foundational elements needed to produce a strong grievance file.

Include this fundamental evidence in all limited duty grievances:

1. Proof that the grievant is entitled to limited duty:

OWCP letter accepting the grievant's on-the-job-injury claim.

Grievant's Form CA-17 which indicates the grievant is able to perform limited duty; prior CA-17s may also be needed to establish the history and possible changes in the grievant's medical restrictions.

2. All correspondence concerning limited duty job offers:

Changes to limited-duty job offer(s).

Withdrawal(s) of limited duty.

3. Current and recent Form 50s for the grievant.

4. Grievant's bid assignment to prove his/her regular schedule and work station on date of injury; TACs records may also be useful for this purpose.

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The truth about GPS in postal vehicles

The Postal Service's decision whether or not to place Global Position System [GPS] devices in postal vehicles and/or in scanners has been generating great interest in carriers for some time. The latest rumors going around—that the postal GPS devices have a seat detector which can tell when the vehicle driver left the driver's seat or that there were hidden cameras in the GPS devices or that postal scanners [IMDs] contained GPS capability—simply are not true.

Late in 2008, GPS devices were placed in postal vehicles in Chicago, Illinois, with the Albuquerque District following suit soon after. In early January 2009



Some postal vehicles across the country have been fitted with GPS systems.

the Postal Service expanded GPS implementation and deployed additional GPS devices in the Dallas, Houston, San Antonio, Arkansas, Louisiana, Oklahoma, and Fort Worth Districts. By February of 2009 there was a total of 611 GPS units deployed throughout the

country including in some of the new T-3, three-wheeled vehicles. Further expansion occurred in April 2009 when GPS was placed in postal vehicles in other areas of Illinois and in areas of Arizona.

National level discussions

There have been many discussions at the national level regarding GPS since implementation began. As part of these discussions the parties addressed the issue of covert surveillance. In a letter dated May 18, 2009 (M-01705), the Postal Service stated that “city letter carriers working in delivery units where GPS devices are installed will be advised in advance of the installation and the vehicles receiving GPS devices.” The same letter also stated that “Currently, there is no nationwide implementation plan of GPS devices.” In further meetings with the Postal Service the NALC was told that the service was not finding any return on their investment and that there were no plans to expand further.

Fast forward to Fall 2009. The Postal Service switched gears and planned to place more than 4,200 additional units throughout the country. Expansion of GPS is a topic of further discussion at the national level.

In September 2009 the NALC at the national level was notified of

the pending installations of GPS units. (See box on page 3 for a list of the affected stations.)

While Postal Service headquarters has notified NALC headquarters which Postal Stations will have GPS devices installed in postal vehicles and, in turn, the NALC has communicated this information to all National Business Agents [NBAs], the first thing that letter carriers need to remember about this is that the Postal Service has agreed that “**city letter carriers working in delivery units where GPS devices are installed will be advised in advance of the installation and the vehicles receiving GPS devices**” (emphasis added).

If you become aware that GPS devices are being installed in postal vehicles in your office without notification to the carriers of their existence and exactly which vehi-

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cles they are being installed in, immediately contact your steward or branch officer and request that he/she immediately contact the NBA. The NBAs have been asked to expeditiously forward such information to the NALC's Director of City Delivery.

So what should carriers know about the GPS units and how they function? One or two supervisors in each of the offices that use the device plus an administrative person in each District and Area should be trained on the system. A supervisor or manager doesn't have to sit by a computer to watch little dots on a screen to know what is going on. An activity report has the capability to depict the geographically specific location, idle time, speed and direction of movement, all time specific, of the vehicle with the GPS device, which is tracked throughout the day.

In addition to the activity report, the designated supervisor can pull up any vehicle in the office and find that vehicle's activity for the day from any internet access. The screen will show everything that happened that day including any time the vehicle sat idle for an extended period of time. It will show the supervisor any park points with a clock showing the length of time the vehicle was stopped there in 15 minute increments. This information is available for six months and then archived for an additional six years.

What supervisors will know

What else can the GPS unit tell your supervisor besides where the vehicle is at a particular time? Several options can be programmed into each GPS unit. For example:

Electronic Fence - The unit can be set to document and notify the

Announced GPS Sites

NY Metro Area

Triboro	50
Caribbean	50
New York	50
Long Island	100
Westchester	50
Northern NJ	200

Northeast Area

Boston	140
Southeastern NE	70
Maine	50
Connecticut	130
Albany	40
Western NY	70

Eastern Area

Central PA	500
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Pacific Area

Los Angeles	100
Santa Ana	100
Sierra Coastal	100
Bay Valley	50
Sacramento	50
San Diego	50
San Francisco	50

Southwest Area

Houston	100
Oklahoma	50
Rio Grande	50
Louisiana	100
Arkansas	50
Fort Worth	40
Dallas	40
Albuquerque	9

Southeast Area

Atlanta	250
South Florida	250
Tennessee	250

Great Lakes Area

Greater Indiana	250
Southeast Michigan	36
Detroit	60
Greater Michigan	60
Lakeland	50
Northern Illinois	35
Central Illinois	50
Gateway	26

Cap Metro Area

Baltimore	100
Greater SC	10
Capital	300
Richmond	40

Post Office if the vehicle goes outside a specific boundary. That boundary can be a route, a zip code, or maybe an entire city. Maybe a particular carrier was instructed that his home was not an authorized lunch location. The electronic fence could be set up to show if the carrier's vehicle drove by the carrier's home.

Speed Limit - The unit can be set up to show the speed the vehicle

traveled and even set to show if a vehicle went over a certain limit programmed into the device.

Vehicle ignition off or on - The unit will show when the ignition is off and when it is on. Is the vehicle running or is the ignition off when sitting in one place? If the vehicle is sitting in one place with the vehicle running for an extended period of time the report will show this.

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Letter carrier craft and the Assignment of new deliveries

All new delivery of mail is assigned to city letter carrier craft delivery. That is the result of the *Assignment of City Delivery* Memorandum of Understanding dated October 22, 2008 (M-01694). Specifically, the memo states in part:

In offices with both city and rural delivery, new deliveries will be assigned in keeping with the following

Growth will be assigned in accordance with boundaries that have been established by agreement of the Postal Service, National Association of Letter Carriers, and National

Rural Letter Carrier's Association.


Absent such agreement, the city letter carrier craft will be assigned all new growth (i.e., new deliveries that are not in-growth on an existing route assigned to another form of delivery), subject to the following. The Postal Service may assign new growth to another form of delivery only if assigning the work to the city letter carrier craft would result in inefficiencies. In such case, the appropriate NALC National Business Agent must be provided notice. If the union disagrees with such assignment,

the National Business Agent may directly refer the matter to a national level task force. The task force will consist of two members appointed by the Postal Service Vice President Labor Relations, and two members appointed by the President of the NALC. The task force will promptly determine whether assignment of such deliveries to the city letter carrier craft will result in inefficiencies.

Local leaders' role

Since the National Business Agent is notified if the Postal Service assigns new deliveries to an-

Fig. 1. NALC Assignment of New Deliveries Alert



NALC ASSIGNMENT OF NEW DELIVERIES ALERT

Immediately report all new deliveries assigned to your National Business Agent!

Reported By: Branch# _____ Date _____

Contact Person: _____

Contact Day Phone #: _____

Location of new deliveries: Installation _____ Station _____ Zip Code _____

Circle ONE: Station is: City delivery ONLY City & Rural

Number of new deliveries assigned _____ Location(address/subdivision) _____

Number of potential deliveries with future growth related to assigned deliveries _____

IF new deliveries NOT assigned to city delivery circle the form of delivery that will be used

Rural Existing highway contract route Contract delivery route

Check the reason deliveries were not assigned to city delivery

In-growth on another form of delivery (include map)

Assigned consistent with a written boundary agreement (please include copy)

Assigned pursuant to claim of "inefficiencies" (please explain and provide YOUR opinion)

None of the above (please explain the basis used)

All new delivery assignments should be reported to the National Business Agent in addition to those which occurred since October 22, 2008

NBA ID# _____


other form of delivery, is there any need for local branch leaders to monitor new deliveries? The answer is, YES!

While the simple answer is yes, the local follow-up requires a little more explanation. First, the memo states that when new deliveries are assigned to a form of delivery other than city delivery, the NBA is supposed to be notified. Don't assume this will happen. With thousands of new deliveries added each year, presumably some deliveries may be assigned in error. However, just because we assume errors may occur does not imply those errors are acceptable or tolerated. All new delivery assignments must be monitored. As a local branch activist you should help keep tabs on new deliveries.

Former President Young sent a letter to every branch president in the country requesting that *any-time new deliveries are assigned in any delivery unit* the National Business Agent be notified. Accompanying the February letter was a worksheet to be used to notify the NBA of the new addresses—*NALC Assignment of New Delivery Alert* (Fig. 1). The request makes clear that it is imperative we keep track of all new delivery.

Why is there such an imperative to keep track of new deliveries? M-01694, *Assignment of City Delivery* is linked to M-01695, *Memorandum of Understanding, Re: Interim Alternate Route Adjustment Process* from which the MIARAP process evolved. When the parties agreed to the alternate route adjustment process the parties also agreed to assign all new deliveries to city delivery. The streamlining of the route adjustment process—IARAP/MIARAP

Fig. 2. USPS Address Management System New Delivery Report

USPS 03-6988		U.S. POSTAL SERVICE - ADDRESS MANAGEMENT SYSTEM										DATE: 12/01/2009
SAN MATEO IBSSC		NEW DELIVERY POINT REPORT BY DATE										PAGE: 1
REPORT LFA21896		10/20/2008 - 12/01/2009										
												
											(MA)	
ZIP CODE: 12345	TL	ADDR BUS	S V REPLY DELVPT	ADDR LRT REC								
YA	SECY APT/	SORT FAM	E A MAIL/ T B N	MRRR CEL ON	SCHM	FLUS4	DELIVERY					
FC ADDRESS	ABBR ROOM BUILDING/FIRM	INST SRVD	AC MEDIA	F R S	CODE SID ADMIR	CARR	RANGE	DIF	CARR			

E	BROOK ST (1000-1198 E)						Y YYY	C009	(0167	0167)		
S	1108						D B	1.0	YYYYY			

E	LOIS LN (2500-2698 E)						Y YYY	C009	(0114	0114)		
S	2506						D B	1.0	YYYYY			
S	2508						D B	1.0	YYYYY			
S	2510						D B	1.0	YYYYY			
S	2512						D B	1.0	YYYYY			
S	2514						D B	1.0	YYYYY			
S	2516						D B	1.0	YYYYY			

E	5TH ST (900-998)						Y YYY	C009	(0195	0195)		
E	918						D B	1.0	YYYYY			

N	ADVANTAGE AVE (1201-1299 O)						Y YYY	C009	(2114	2114)		
S	1201						A R C	1.0	YYYYY			
S	1203						A R C	1.0	YYYYY			
S	1205						A R C	1.0	YYYYY			

E	32ND ST (4001 - 4099 O)						Y YYY	R036	(2557	2557)		
S	4012						E R	1.0	YYYYY			
S	4017						E R	1.0	YYYYY			
S	4019						E R	1.0	YYYYY			

N	MOSSY OAK AVE (1200 - 1298 E)						Y YYY	R036	(2507	2507)		
S	1208						D B	1.0	YYYYY			

—coupled with the reduction in mail volume has seen the loss in the total number of city delivery routes. The assignment of new deliveries to city delivery will add to the total number of city delivery routes nation-wide. In other words, any loss of routes due to IARAP/MIARAP should certainly be more than offset by the gains of the new deliveries assignments.

Regrettably, the simple fact of the matter is that we are not doing as good a job of reporting new deliveries as we should. At NALC headquarters, the Information Technology department has been tasked with building a system to track new deliveries. As the NBAs receive completed *New Delivery Alert* worksheets, they enter the data into the tracking system. Unfortunately, the number of new deliveries in the system is far below the number of new delivery points projected. Indeed the number of new deliveries

reported by the *New Delivery Alert* worksheet is far below the actual number of deliveries established since the signing of the memo. Absent local reporting it is more than difficult to pinpoint violations of the memo. Local reporting of new deliveries is the best way for NALC to monitor the assignments and enforce compliance of the memo.

Reporting new deliveries

No finger pointing, no criticism and no complaints, but we must do a better job of reporting new delivery points. Each branch should be requesting information about new deliveries in order to accurately complete the *New Delivery Alert* worksheet and provide updated alert worksheets whenever additional new deliveries are assigned.

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STEWARDS' CORNER

The backbone of a successful grievance . . .

The interview

A carrier in your office has approached you and said he has just been told to report to the supervisor's office for an interview. He believes that the interview could lead to discipline. What do you do? First off, you've caught a break. Most grievants when asked to report for an investigative interview, think they can talk their way out of it. Therefore, at that critical first step, they don't ask for Union representation. But since you have the opportunity to be part of the interview with the grievant, take full advantage of your rights.

Pre-interview meeting

Ask for time for a pre-interview meeting with the grievant. Your pre-interview with the grievant should be private, just you and the grievant. Weingarten gives that right. If management refuses you time, make that a part of your due process arguments in the grievance file. The pre-interview will give you time to understand what the management interview is likely to be about. It will also give you time to strategize and clarify what the grievant should and should not say during the interview.

As it turns out, the pre-disciplinary interview concerned attendance, and management has now issued the grievant a Notice of Removal (NOR) for Irregular Attendance. So where do you start?

General Rules

Let's start with an overview of some general rules. Number one is listening. The key to a good interview is listening to what a person has to say. The best way to get to the

The key to a good interview is listening to what a person has to say.

facts is by being a good listener. Be relaxed when you do your interviews. A grievant who is facing discipline is already upset, so you need to diffuse that to the extent that you can. Control your feelings. Do not get caught up in the emotions that are already there. As you discuss the various issues, keep notes of the important things that are discussed. This should include a list of any additional potential witnesses.

Show the grievant that you are interested and want to get all the information out. Ask open-ended

questions that allow the witness to clarify and fill in facts. When you ask yes or no questions, often that is all you will get in return. For example, if you simply ask the grievant if they abused their sick leave, they will say no. How has that helped you? Obviously it hasn't. If however you ask what medical problems they have, you are likely to get a lot more information. It is also good to periodically repeat answers back to the witness to insure that what you have written down accurately reflects the witnesses statements.

Always supportive

During the interview, it's okay to be supportive, but don't make promises you may not be able to keep. If they ask you if you will be able to get their job back? Don't tell them you will, better to tell them you will do everything you can to get them back to work. And if they ask you a question to which you don't know the answer, tell them you will find out and get back to them. Don't guess and give them bad information.

Back to the interview. Use the NOR as your roadmap to start. Ask about the cited dates in the NOR and why the grievant used the sick leave, emergency annual and/or was AWOL. Ask if there was an underlying medical condition that could allow for an FMLA defense, or a drug or alcohol problem that could lead to an EAP defense.

The bottom line, once you engage a witness in an interview, let the conversation be natural while at the same time you direct the conversation to elicit the information and answers you need. Don't, however, miss opportunities when surprises occur to follow up those leads for additional information. The information you gather from the grievant will lead to your next interviews. This is also your opportunity to ask the grievant to provide you with documentation that he should have.

Interview the supervisor

Your next likely interview will be the supervisor that issued the discipline. Article 17, Section 3 states in relevant part, "and shall have the right to interview the aggrieved employee(s), supervisors, and witnesses during working hours." So you have the right to interview supervisors. Take advantage of that right. The issuing supervisor should be questioned about what information they consulted, why they issued the discipline, who they obtained concurrence from, and what documentation they shared with the concurring official.

This interview should be followed up with an interview of the concurring official. Determine what documentation the concurring official was provided and what rationale was used in concurring. Again, let the answers to your questions lead you to follow up questions. Once you have completed your interview with the supervisor, you should immediately attempt to interview the concurring official to see if that story matches the one given to you by the immediate supervisor.

Your interviews should continue as the facts lead you. For example, if you find that the grievant had a serious medical condition and that he had requested FMLA protected leave and it was denied, you may want to interview the FMLA Coordinator. Based on reasonableness, you should be able to interview the FMLA Coordinator at his/her office. "Reasonableness" means, for example, if the FMLA Coordinator works in close proximity to your office,

Your interview should always follow where the facts lead.

you should get a face to face meeting. If, however, the FMLA Coordinator works in a distant location, a telephone interview would be appropriate.

Other witnesses

There are other potential witnesses you may need to interview. Sometimes clarification of medical information from the grievant's physician or nurse is needed. In most cases the grievant will have to provide you with a release. Without that the doctor is not likely to speak to you.

These are simply examples of how a typical case might go. As already stated, let the information

you have developed from your early interviews lead you. And don't be surprised if you have to interview a witness more than one time. The grievant especially will require an additional interview after more facts have been developed and additional questions naturally flow from the information you have gathered.

Contract cases

Contract cases are not significantly different when interviewing witnesses. Start with the grievant and work from there. Supervisor interviews are often even more important in contract cases than in discipline cases. Supervisors often have the kind of knowledge that may be critical. For example, in a simple Article 8 bypass case, the supervisor will normally know why certain individuals were worked while others weren't. The supervisor will know a lot concerning the scheduling of employees.

A person skilled at interviewing witnesses may turn a poor case into a good case just by the information obtained from managers. Often we do not interview supervisors in the grievance procedure and that allows them time to formulate their position.

Good interviews are the backbone of any grievance. Without solid information, the best case will wither and die on the vine.

Please update your mailing information!

Remember to fill out and return the enclosed form, so that you can continue to receive the *Activist*.

COMPENSATION

Grieving limited duty violations

(Continued from page 1)

Show limited duty exists with the following evidence:

1. **Signed statements** by the grievant and other witnesses that detail available duties for possible limited-duty assignments

If the case involves a withdrawal of limited duty, provide statements that detail the actual work that the grievant was performing.

Explain all special accommodations that had been made in the past.

Provide statements and other evidence that indicate who performed the work after it was withdrawn from the claimant. (Consider including TACs reports).

2. **Historical data** like TACs reports and delayed mail reports that help establish proof of available work that can be part of limited-duty assignment

3. Any other evidence needed to **counter management's arguments**; if the grievance is NRP related, secure the following information from management:

- The grievant's entire "NRP Activity file," also referred to as the "shadow file"
- The grievant's "Current Modification Assignment/Position Worksheet"
- The NRP Tracking Sheet—Limited Duty Employees

- The NRP Tracking Sheet—Rehabilitation Employees
- NRP Tracking Sheet—Sent Home, No Job Offer, NRP NWA (No Work Available) Employees

What are the issues and how should they be framed?

The issue statement in Denial and Withdrawal cases should be framed in two parts for each grievance. This two-part issue statement clearly identifies management's contractual and legal obligations. Here is an example:

Whether management violated applicable contractual provisions

found in Articles 5, 13, 14.3.c, 15.1, 19, and/or 21.4 of the National Agreement/JCAM, and/or ELM Section 546.14, and/or Sections 2, 4, 7 and/or 11 of the EL-505 when management *failed to provide limited-duty work* for the grievant? If yes, what is the appropriate remedy?

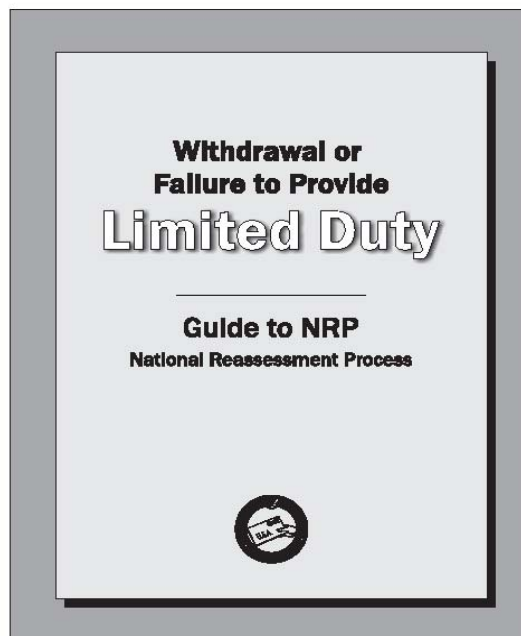
Whether management violated applicable laws as covered by Articles 2.1, 5, 14.3.c, 15.1, 19, and/or 21.4 of the National Agreement/JCAM, and/or the Rehabilitation Act, and/or the Code of Federal Regulations (5CFR353), and/or Sections 13 and/or 54 of the EL-307, when management *failed to provide limited duty work* for the grievant? If yes, what is the appropriate remedy?

*In withdrawal of limited duty grievances the phrase "withdrew limited-duty work from" will be substituted for "failed to provide limited-duty work for" in the issue statement.

In cases that only involve Pecking Order violations only part 1 of the example issue statement would normally be used.

Union contentions in limited duty grievances

The union's arguments in limited duty grievances have many facets that should be fully researched and developed to the maximum extent possible in each case. Making the right arguments is vitally important, but the arguments may not stand on their own. Ideally they should be supported by



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NALC's *Withdrawal or Failure to Provide Limited Duty: Guide to NRP* provides valuable information on this complex subject. It can be found on the NALC web site.

documented evidence or witness statements.

A snapshot of some union arguments follows, but keep in mind all of these arguments may not apply to certain types of limited duty grievances.

Argument 1: The National Reassessment Process (NRP) has changed **nothing**. Management's obligations under the ELM, the JCAM, and the law have **not** changed. This is a primary argument that should be found in every limited duty grievance. The national parties recently agreed that NRP does not change management's obligations to provide limited duty to injured employees and it does not change the provisions of ELM 546.

In that same agreement, the parties agreed that NRP does not create new criteria for assigning limited duty and that light duty carriers will not normally be displaced solely to make new limited duty or rehabilitation assignments unless required by law. A copy of this national level pre-arbitration agreement should be added to every limited-duty grievance file. (M-01706 is available online at <http://nalc.org/depart/cau/index.html>) Do not allow management the opportunity to paint NRP as some kind of replacement for all of their other obligations to provide limited duty.

Argument 2: The USPS has both a **contractual** and **legal** obligation to make every effort to provide limited duty.

Argument 3: Management has a long-standing history of providing limited-duty work to injured employees. For about 30 years, the USPS has met its obligation to provide limited duty for about 30 years by creating duty assignments.

In national arbitration case C-23472, management argued that

creation of duty assignments was based on "*the Postal Service's legal, contractual and regulatory obligation to reassign or reemploy an employee who is injured on the job. This assignment did not exist before the employee was injured and otherwise would not have been created by management, because no need for an Article 37 duty assignment existed.*" (C-23472 is printed in the *NALC Guide to NRP*.)

Argument 4: Limited duty work within the grievant's medical restrictions exists, or in cases of withdrawals of limited duty, still exists.

Provide all available evidence that supports this argument. Ideally the evidence will demonstrate two things: 1. the limited duty work is available, and 2. the limited duty is within the grievant's medical restrictions.

Argument 5: Address and argue the specifics of the grievant's case. Don't apply a one-size-fits-all approach to any grievance, but especially limited duty grievances. The medical restrictions of injured workers are rarely the same, and available limited duty work will vary based on the individual's medical restrictions.

Argument 6: If management failed to allow the grievant to have input or participation regarding the search for limited duty, that violation should also be included. Refer to sections 223 and 223.1 of the EL-307, which describes the required interactive process.

Argument 7: Argue the applicability of M-01550. This would apply, for example, if management sends an injured carrier home citing "no work available" because he/she is capable of casing, but not carrying. Another example would

be management denying work to a carrier because his/her restrictions permit only four hours of work per day.

Argument 8: 5CFR353.301.d states that the agency must "make every effort to restore" injured workers who are able to return to limited duty and also states that they will be treated substantially the same as other handicapped individuals covered by the Rehabilitation Act. (The Rehabilitation Act applies the regulatory standards of the Americans with Disabilities Act as amended in 2008.) Include a copy of EL-307.132 in your file.

Some limited duty carriers, based on their medical restrictions, will qualify for reasonable accommodations under the Rehabilitation Act. In such cases, management's failure to provide reasonable accommodations to those qualified carriers should also be argued in their grievance.

Requested remedies

For **Denial and Withdrawal** cases the requested remedy should include: 1) immediately provide limited duty to the grievant; 2) make the grievant whole for all lost wages and benefits, including but not limited to lost wages, lost annual leave, lost sick leave, lost TSP benefits, and lost overtime pay. 3) any other remedy deemed appropriate by the parties or an arbitrator.

For **Pecking Order** cases the requested remedy should include: 1) cease and desist violations of ELM 546 and immediately provide limited duty to the grievant; 2) pay the travel time and mileage (If applicable); 3) pay the grievant an additional 50% for all hours worked during and/or because of the 546 violation.

(Continued on page 14)

YOUR CONTRACT

Transitional employees . . .

Separation and lack of work

Transitional Employees (TE) are hired as Not To Exceed (NTE) Employees for 360 days. Normally TEs work the entire 360 day period and then management has the option of re-hiring the TE for another 360 days. As the language quoted below shows, Article 7, Section 1.B.4 lays out the length of term for which TEs are hired.

Article 7 Employee Classifications

Section 1. Definition and Use

B. Transitional Work Force

The transitional work force shall be comprised of noncareer, bargaining unit employees as follows:

4. Transitional employees shall be hired pursuant to such procedures as the Employer may establish. They will be hired for a term not to exceed 360 calendar days for each appointment. Transitional employees will have a break in Service of at least 5 days between appointments.

In addition, the National parties signed a Memorandum of Understanding (MOU) on TEs (see box on page 11).

Completion of assignment

The key to our discussion is the first two sentences in Article

16 which allow management to separate TEs “upon completion of their assignment” which is normally considered completion of the 360 day period. The sentence continues “or for lack of work” and that has created great consternation in the grievance procedure in determining exactly what “lack of work” means, and showing that management by releasing a TE short of the 360 days has improperly separated them.

The second sentence clarifies the issue of a TE who has completed a 360 day assignment. The sentence says “Such separation is not grievable except where the separation is pretextual.” So we know that most separations either for completion of assignment or for lack of work are not grievable unless the separation is pretextual.

Pretextual

But what does “pretextual” mean? *Black’s Law Dictionary* defines pretext as “ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive; false appearance; pretense.” So when management releases a TE in the middle of their term for lack of work, the union has several hurdles to clear.

Arbitrator J. Earl Williams gives probably the best explanation of “pretextual” and how it applies in the grievance procedure. In Case No. E90N-4E-C 94056306 (C-14680) Arbitrator Williams states:

The language of Section 7 of the National T.E. Award tends to be somewhat confus-

ing. It is clear that a T.E. can be separated due to lack of work, and, if this is the real reason for the separation, it cannot be grieved. However, it can be grieved, if this is a pretextual reason, or, in other words, a false reason given to hide the real reason. This would mean, if it was pretextual, it was not due to lack of work. Consequently, the employee could not be terminated. Thus, the pretextual issue is both an arbitrable issue and a merits issue....

Is the case arbitrable?

The first obstacle to overcome is management’s likely claim that any grievance is not arbitrable. So when management releases a TE for lack of work, the union must claim that in fact work was available. So once you’ve shown that there was work for the TE, we win right? No, in fact the road to victory is far more treacherous. As Arbitrator Williams stated, once we claim that work was available, we simply made the case arbitrable.

So what must we prove to prevail? Let’s look at a recent arbitration decision and see what happened and what if anything we might have done to change the outcome. In Case No. H06N-4H-D 08353145 (C-28404) Arbitrator Lawrence Roberts considered the case of two TEs who were separated from work on 8/15/08 ostensibly for lack of work. Neither TE had any disciplinary charges pending and both were released prior to completion of 360 days of service.

**MEMORANDUM OF UNDERSTANDING
BETWEEN THE
UNITED STATES POSTAL SERVICE
AND THE
NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO**

Re: Transitional Employees-Additional Provisions

ARTICLE 16

Transitional employees may be separated at any time upon completion of their assignment or for lack of work. Such separation is not grievable except where the separation is pretextual. Transitional employees may otherwise be removed for just cause and any such removal will be subject to the grievance-arbitration procedure, provided the employee has completed ninety (90) work days, or has been employed for 120 calendar days, whichever comes first. Further, in any such grievance, the concept of progressive discipline will not apply. The issue will be whether the employee is guilty of the charge against him or her. Where the employee is found guilty, the arbitrator shall not have the authority to modify the discharge. In the case of removal for cause, a transitional employee shall be entitled to advance written notice of the charges against him/her in accordance with the provisions of Article 16 of the National Agreement.

The USPS argued that the case was not arbitrable since the TEs were released for lack of work, and the union argued that the reason for the separations was pretextual, therefore the case was arbitrable. In part, management argued that the decline in mail volume has led to the determination that continued use of TEs is no longer warranted.

At the onset of the hearing there was a dispute as to whether or not the separation of the employees was considered discipline. The union believed it was disciplinary because the employ-

ees were issued a Notice of Separation from the USPS. The Arbitrator ultimately found that while the TEs were issued Separation Notices, there was no misconduct and no actual discipline. That was an appropriate finding since these cases are normally considered to be contractual. Therefore the burden is on the NALC to prove that lack of mail was not the reason for the separation of the TEs.

Decline in mail volume

Based on the testimony of the Postmaster and the use of Flash Reports, the USPS claimed a 29% de-

cline in mail volume. The union attempted to refute that claim with a January workload report that indicated greater workloads at least 70% of the time. The Arbitrator relied on the Weekly Flash Reports for the entire period, and found that the evidence supported management's claim that in fact the workload had declined. Ultimately the Arbitrator found that the installation was using more man hours for less mail volume than during the previous year.

An additional argument made by the union was that overtime remained virtually the same after the separation of the TEs. In response, the USPS argued that overtime had already significantly decreased prior to the separation of the TEs. In addition, management argued that they had a spike in the delay of mail dispatched to the installation. The Arbitrator found that in fact lack of work was the only reason for the separation of the TEs. Based on his finding, the Arbitrator found the case not arbitrable. Given the language in the TE Memo the Arbitrator's non-arbitrability finding was appropriate. However, remember that unlike the case where an arbitrator rules on arbitrability without looking at the merits, in the instant case the Arbitrator first ruled on the merits, and not finding for the Union, ruled on the arbitrability.

Documentation is key

So what can we glean from the Roberts award? Above all, documentation rules! The union needs strong documentation that leads only to the conclusion that work remains for the TEs. But showing that work remains for the TEs is not in itself sufficient. In Case No. F90N-4F-C 95055763 C-20528),

(Continued on page 12)

Transitional employees

(Continued from page 11)

Arbitrator William Eaton denied the union’s case involving the separation of five TEs prior to completion of their 359 day commitment. In doing so, Arbitrator Eaton states:

The Union has shown that work remained to be done after the five TEs were removed, and that much of that work was performed on an overtime basis. However, as the Postmaster testified, overtime is built into the staffing structure, and, as the Postal Service further demonstrates, when a facility is fully staffed, contingencies argued by the Union, such as sickness, leave, light and limited duty, and other considerations, anticipated or unanticipated, have also been factored into the staffing analysis.

Office complement

In denying this grievance, the Arbitrator agreed that while work was available, the fact that the office was properly staffed made management’s decision to separate the TEs an appropriate use of the TE Memo. A consideration of office complement thus should be a part of the union’s argument in this type of case. Given the current landscape of the USPS many offices are currently understaffed and therefore the Eaton Award can provide a useful argument.

In Case No. B90N-4B-C 94038904 C-14917) Arbitrator George R. Shea, Jr. grappled with the question of a TE separated allegedly for lack of work. The union argued that in fact the real reason (pretext) was that the

employee’s performance was not satisfactory. Arbitrator Shea found that this argument would be compelling if the union had proven it. In the instant case, the union was unable to carry that burden and the grievance was denied. But in his denial the Arbitrator states:

The Union, as the party asserting the applicability of the “pretextual” proviso to the grievant’s separation must bear the burden of

If the union can show work was available, it may carry the day in arbitration.

proof and persuasion regarding its contentions. If the Union is to meet these burdens and prevail in its contentions, the Arbitrator determines it must factually establish at least the following: (a) the Service had work, which was available for assignment to the grievant at the time of his separation; or (b) the Service was primarily motivated by reasons other than the lack of work, when it separated the grievant.

Here Arbitrator Shea makes two important points. First, if we can show work was available we

may carry the burden. But simply showing hours of work and overtime may not carry the day. If evidence exists of residual vacancies and/or other vacant assignments that are not filled by PTF’s, reserve carriers, or unassigned carriers, but rather are filled by use of pivoting and/or overtime by non-ODL letter carriers our case will be significantly strengthened. In addition, Arbitrator Shea found that if the union could show that the basis for the separation was some other reason the union could mount a successful grievance.

Lastly, the union can present a successful argument if we can show that after the separation of a TE a new TE was hired. These grievances clearly require thorough investigation and documentation to mount a successful case.

ACTIVIST INDEX

Want to access information in back issues of the *Activist*? As you all know, issues going back to Spring 1997 can be found on the NALC web site [nalc.org> depart> au>nalcpubs>activist]. And a new edition of the *Activist* index is now available, to help you find exactly what you need. The index covers every *Activist* issue from 1986 to 2009.

To get the index, in either digital or hard-copy format, please contact:

Nancy Dysart
 Director
 NALC Information Center
 100 Indiana Ave. NW
 Washington DC 20001
 202-662-2879
 dysart@nalc.org

Assignment of new deliveries

(Continued from page 5)

Remember, the report—*New Deliveries Alert*—is not just city delivery but **all new deliveries**.

What type of request, or what kind of report, will supply you with the data you need to determine the new deliveries in your branch? The Postal Service has a very handy report which will provide you with the exact number of new deliveries. You must request it. The *US Postal Service-Address Management System, New Delivery Point Report (NDPR)* will provide you with the raw data you need to find out about new deliveries (Fig. 2).

Requesting NDPR

Each branch should coordinate the requesting of the NDPR in order to avoid needless duplication. The report can be tailored by installation, zip-code, and date. For instance, you may decide to have each steward request the information for the office they represent. If your installation has 30 zip-codes, the stewards should request one report for each zip—30 reports. If you are in an office with only one or two zip-codes then a single request by a steward would be sufficient. Which method your branch chooses doesn't matter; what matters is getting the information.

Requests for the NDPR should indicate the time period for the requested data. The first request should be from October 22, 2008 through the date of the request. After receiving the initial NDPR, requests should be made quarterly to monitor all new deliveries to insure compliance with the memo.

Every subsequent request should cover the time since the last request date through the date the request is made (e.g. 10/22/08–

Fig. 3. Address Information Confidentiality Agreement

ADDRESS INFORMATION CONFIDENTIALITY AGREEMENT

[Insert name, city, county and state] hereby certifies that it is agreeing to protect and preserve the confidentiality of address information with the United States Postal Service (USPS).

In consideration of the agreement by the USPS to furnish to [Insert name] the DPFNow LFA215P6, *New Delivery Point Report by Date*, for the ZIP Code areas:

The Recipient hereby agrees to protect the confidentiality of any address information obtained from USPS, and to limit access and disclosure of such information within its own organization to its duly authorized agents having an official need to know.

The confidential information will be treated in the strictest confidence and recognizes the importance of safeguarding the confidential information against unauthorized use or disclosure. No right or license is granted by implication or otherwise.

Federal law prohibits the Postal Service from making available to the public by any means or for any purpose any list of names or addresses (39 U.S.C. 412). Accordingly, [Insert name] agrees that it will not at any time disclose to the public any address information received from the USPS, except as may be specified by law.

I _____
(Name)

(Title)

I am duly authorized to act on behalf of [Insert name] in entering into this agreement, and agree to all the terms and conditions of this agreement on behalf of [Insert name].

Signature and date

Telephone number, including area code

WARNING: The furnishing of false information on this agreement may result in a fine of not more than \$10,000 or imprisonment of not more than 5 years, or both. (18 U.S.C. 1001)

USPS USE ONLY

Received by (please print) Signature and date

Title (please print)

12/31/09, 01/01/10–03/31/10, 04/01/10–06/30/10, etc.).

Under the provisions of Article 17 and 31 the union has an absolute right to request information. The request for the NDPR is certainly within that right. That said, the Postal Service considers the NDPR to contain information which must be protected against privacy concerns. That is, the Postal Service seeks to protect and preserve the confidentiality of address information. When you request the NDPR you may be asked to sign a *ADDRESS INFORMATION CONFIDENTIALITY AGREEMENT* (Fig. 3). The requirement to sign the agreement is

to protect the privacy of the information from distribution beyond the Postal Service. If you are asked to sign such an agreement, you should read it carefully before signing and adhere to the disclosure requirements.

When you receive the NDPR you should review the document carefully. You will note the list of new delivery point addresses are on the left side of the report under the heading, *Address*. On the right side of the report, under the heading *SCHM CARR*, you will see what route the new deliveries are assigned. The *SCHM CARR* is identified as City Route, Rural

(Continued on page 14)

Assignment of new deliveries

(Continued from page 13)

Route, or Highway Contract Route (e.g. C009, R008, H007, etc.). Counting the new delivery addresses will enable you to report the number of new deliveries. By identifying the *SCHM CARR* designation, you will be able to report to what form of delivery the new addresses were assigned. Remember, except for the specific exceptions listed in the memo, all new deliveries are to be assigned to City delivery.

You are now ready for the next step in the process of monitoring the assignment of new deliveries: what to do if new deliveries are NOT assigned to city delivery. On the *New Deliveries Alert* worksheet you are asked to identify what other form of delivery received the new deliveries and the reason deliveries were not assigned to city delivery.

In the next installment of *Letter Carrier Craft and the Assignment of New Deliveries*, we will address the assignment of new deliveries to other than city delivery and how to document the disputed assignments. The Memorandum indicates disputes over the assignment of new deliveries will be addressed by the National Business Agent or the National Task Force if they cannot be resolved at the regional level. However, the NBA or Task Force can only pursue disputes based on the documentation and development of the dispute by the local union. We must be prepared to dispute every possible new delivery assignment which is not compliant with the Memorandum. This is a matter of compliance, this is a matter about jobs, and this is about our future. ■

Grieving Limited Duty Violations

(Continued from page 9)

Rebuttal Evidence

The union should also be prepared to counter management's arguments. Too often union representatives will assume that management's arguments are so frivolous that they don't deserve a response. Thus, they decide that no rebuttal evidence is needed. The same mistake is also made when the union feels that the grievant's case is so strong that there is no need to respond to the arguments raised by management. Don't take that chance.

The rebuttal of management's contentions should be investigated and formulated at Informal A and advanced at all subsequent steps of the grievance procedure. Don't allow management's arguments to go unanswered. Countering management's arguments may include interviewing management's witnesses and it may include requesting additional time and other records to test the accuracy of management's contentions.

Summary

All limited duty grievances are going to be different based on the injured carrier's medical restrictions and the limited-duty work available in your area. Investigate every facet and put forth the strongest case possible. The rights we fight for today may be the same rights that save our job tomorrow.

For further assistance contact your NBA's office. Also see the *NALC Guide to NRP* at <http://nalc.org/depart/owcp/index.html>. ■

GPS in postal vehicles

(Continued from page 3)

The unit can be set up to use all of these options or just a few. The system collects information every two seconds and it transmits to the office every five minutes with a two minute delay. It also recognizes any new event and then transmits it. So if the engine is turned off or the vehicle travels outside the preset boundaries the unit will transmit that information at that time. The GPS unit can also be set up to send an e-mail back to the authorized supervisor to notify him/her of any deviation from what is programmed into the unit. For example, if the vehicle goes outside the electronic fence, exceeds the speed limit programmed into the system, or sits in one location beyond a designated period of time, an e-mail alert can be sent to the supervisor.

It is important to understand that the GPS device tracks a postal vehicle. It can't tell if a carrier is delivering mail, taking a comfort stop, talking to a postal patron, taking an authorized break, or eating lunch. The reliance on the GPS device as the sole basis to support accusations of or discipline for the alleged improper conduct of a letter carrier would be a violation of the National Agreement and, where discipline results, a violation of the elements of "just cause," incorporated into Article 16 of the collective bargaining agreement, as well as Article 19 of the National Agreement and Section 115.4 of the M-39 Handbook. ■

Training Seminars & State Conventions

Region 1—NBA Manny Peralta, (714) 750-2982
California, Hawaii, Nevada, Guam

Apr. 23-25 Campaign School, Las Vegas, NV
May 20-23 Regional Training Seminar, Pasadena, CA
June 18-20 Campaign School, Los Angeles, CA

Region 2—NBA Paul Price, (363) 892-6545
Alaska, Utah, Idaho, Montana, Oregon, Washington

Jan. 30 Oregon Mid-Winter RAP, Florence, OR
Feb. 21-25 WA State Steward College, Gold Bar, WA
Mar. 1-4 OR State Steward College, Silver Falls, OR
Mar. 15-18 OR State Steward College, Silver Falls, OR
Mar. 26-28 WA Mid-Winter Training, Wenatchee, WA
Apr. 16-18 OR State Convention, Kah-Na-Tee, OR
Apr. 19-22 UT State Steward College, TBA
May 9-13 MT/ID Steward College, W. Yellowstone, MT
May 14-16 MT/ID Steward College, W. Yellowstone, MT
May 20-23 WA State Convention, Spokane, WA

Region 3—NBA Neal Tisdale, (217) 787-7850
Illinois

April 18 RAP Session, Chicago, IL

Region 4—NBA Roger Bledsoe, (501) 760-6566
Arizona, Arkansas, Colorado, Oklahoma, Wyoming

Jan. 29-30 CO State Training, Loveland, CO
Feb. 6-7 OK State Stewards College, Tulsa, OK
Feb. 20-21 AZ State Stewards College, Mesa, AZ
Mar. 6-7 WY State Stewards College, Casper, WY
Mar. 13-14 AR State Stewards College, Hot Springs, AR
Apr. 30-May 1 OK State Convention, Muskogee, OK

Region 5—NBA Mike Weir, (314) 872-0227
Missouri, Iowa, Nebraska, Kansas

Feb. 20-21 RAP Session, St. Louis, MO
Apr. 9-11 NE State Convention, Lincoln, NE
Apr. 30-May 1 KS State Convention, Topeka, KS
May 2-4 Iowa State Spring Training, Altoona, IA

Region 6—NBA Pat Carroll, (586) 997-9917
Kentucky, Indiana, Michigan

Feb. 27-28 KYSALC Training, Ashland, KY
Apr. 18-20 INSALC Convention, Michigan City, IN

Region 7—NBA Chris Wittenburg, (612) 378-3035
Minnesota, North Dakota, South Dakota, Wisconsin

Apr. 10-11 SD State Training Seminar, Chamberlain, SC
Apr. 23-25 ND State Training Seminar, Minot, ND
Apr. 26-30 Region 7 31st Annual Regional Training Seminar, Minneapolis, MN
May 14-15 WI State Convention, Waukesha, WI

Region 8—NBA Lew Drass (256) 828-8205
Alabama, Louisiana, Mississippi, Tennessee

Feb. 28-Mar. 3 6th Annual Regional Assembly/Training Session, Robinsonville, MS

Region 9—NBA Judy Willoughby (954) 964-2116
Florida, Georgia, North Carolina, South Carolina

Feb. 27-28 GA Training Seminar, Atlanta, GA
Mar. 12-14 FL Training Seminar, Melbourne, FL
Mar. 26-27 NC Training Seminar, Durham, NC
Apr. 22-24 SC Training Seminar, Myrtle Beach, SC

Region 10—NBA Kathy Baldwin (281) 540-5627
New Mexico and Texas

Feb. 13-15 Regional Training Session, Houston, TX

Region 11—NBA Dan Toth (518) 382-1538
Upstate New York, Ohio

Jan. 24 COR Training, Columbus OH

Region 12—NBA Bill Lucini (215) 824-4826
Pennsylvania, South and Central New Jersey

Feb. 21-23 Regional 12 Annual Training Seminar, Atlantic City, NJ
Mar. 12 NJ State Congressional Breakfast, Washington, DC
May 6 PA State Congressional Breakfast, Washington, DC
May 23-25 NJ State Seminar, Atlantic City, NJ

Region 13—NBA Timothy Dowdy (757) 934-1013
Delaware, Maryland, Virginia, West Virginia, Washington DC

Jan. 11-12 Region 13 Training for New Stewards, Charlottesville, VA
Jan. 17-18 DE Steward Training, New Castle, DE
Feb. 8-9 MD/DC Steward Training, Salisbury, MD
Feb. 14-15 WV Steward Training, Flatwood, WV
Feb. 25-26 VA Steward Training, Richmond, VA

Region 14—NBA John Casciano (617) 363-9299
Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

Mar. 6-8 Region 14 RAP Session, Boston, MA
May 14-16 MA State Convention, Cape Cod, MA
June 4-6 NH State Convention, Bartlett, NH

Region 15—NBA Larry Cirelli (212) 868-0284
Northern New Jersey, New York, SW Connecticut

Jan. 10-12 Branch 38 Training Session, Atlantic City, NJ

For more information, contact your
National Business Agent.

ACTIVIST

NALC

A NEWSLETTER FOR BRANCH LEADERS
 NATIONAL ASSOCIATION OF LETTER CARRIERS
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U S P S

BY THE NUMBERS

Operations

	Number	Change from SPLY*
FY 2009		
Total mail volume year-to-date (Millions of pieces)	177,058	-12.6%
Mail volume by class (in millions)		
First-Class	83,770	-8.9%
Periodicals	7,954	-7.5%
Standard (bulk mail)	82,706	-16.5%
Packages	730	-13.7%
Delivery points	150,115,881	0.6%
City	87,670,966	0.4%
Rural	39,704,212	1.6%
PO Box	20,091,571	-0.7%
Highway Contract	2,649,132	2.3%
Routes	234,001	-5.9%
City Carrier	150,779	-6.7%
Rural Carrier	75,332	-1.6%
Highway Contract	7,883	-26.1%

Finances

Full Year—FY 2009 (billions)

Operating Revenue	\$68.09	-8.9%
Operating Expenses	\$71.83	-10.3%
Operating Income	-\$3.74	

Employment and Wages

FY 2009 —Pay Period 20

	Number	Change from SPLY*
City carrier employment	214,590	-5.2%
Percent union members	92.2%	0.4%
Transitionals	6,472	-10.3%
FSS Transitionals	7,460	-1.1%
City carriers per delivery supervisor	17.9	0.6%
Career USPS employment	623,128	-6.0%
Fulltime average straight-time wage	\$25.39	5.3%

*SPLY=Same Period Last Year