

Withdrawal of (or Failure to Provide) Limited Duty A Grievance Guide

Preface

The Postal Service Transformation Plan includes a strategy to reduce injury compensation costs through an accelerated rehabilitation process resulting in private sector outplacement of injured employees.

As a result, the landscape has changed.

In the past, the Postal Service not only recognized its contractual and legal obligation to provide limited duty, it also generally considered that it was in its own interest to do so. It generally took the position that all medical restrictions, short of bed-rest, could be accommodated. Virtually all carriers with compensable injuries who were able to do some work were provided limited duty. As a consequence, there are relatively few grievances protesting a refusal to provide limited duty.

Now, however, given the Transformation Plan strategy, the pendulum is beginning to swing. The Postal Service is beginning to withdraw existing limited duty from carriers. It is much more likely that stewards will face this issue.

Stewards must ensure that the Postal Service does not violate the contract in its efforts to reduce workers compensation costs and implement its Transformation Plan strategy.

This guide is intended to assist stewards to effectively investigate and process grievances when management fails to provide, or withdraws, limited duty.

Stewards should be aware that while there are very few regional arbitration decisions on the issue of failure to provide limited duty, there are many arbitration decisions on the related issue of the ELM 546.14 'pecking order'. Those related cases can be instructive because there are many parallels between the two – the same types of evidence and the same compelling arguments are found in 'pecking order' cases as well as 'failure to provide' cases.

Introduction

The Postal Service has contractual and legal obligations to make every effort to provide limited duty work to employees who have partially recovered from on-the-job injuries. The contractual obligation is found primarily at ELM 546.14. The

legal obligation is found primarily at 5 CFR 353. However, the legal obligation may also implicate the Rehabilitation Act. Violations by management of the obligation to make every effort to provide limited duty are grievable on both the contractual and legal grounds.

The shop steward's investigation for such grievances will involve two main thrusts. The first involves gathering evidence that work exists within the employee's limitations. The second involves gathering evidence of the process management followed (or failed to follow) in coming to a determination to withdraw (or not provide) limited duty, as well as evidence that management's claimed reasons are incorrect, pretextual, or insufficient to justify failure to provide limited duty.

Note that where this guide references *limited duty*, the intention is to include both temporary and permanent limited duty.

A. Case Elements.

Four elements will exist in every viable grievance. Additionally, in some cases, the employee will be a qualified individual with a disability under the Rehabilitation Act. Even in those cases where the employee does not qualify under the Rehabilitation Act, the provisions of that act may still be germane.

1. Employee has an on-the-job injury accepted by OWCP as work related.
2. The injury results in work restrictions that preclude the employee from doing his/her regular job, or requires accommodation in order to do his/her regular job.
3. Management stops providing limited duty work or fails to provide limited duty in the original instance.
4. Limited duty work is available.
5. The employee may qualify as a handicapped employee under the provisions of the Rehabilitation Act.

B. Definition of Issues.

1. The Union should document that work exists within the injured worker's medical limitations. The documentation must be specific to each case, and generally encompass a continuing time period

beginning with the withdrawal of limited duty (as well as the period when limited duty was worked).

2. The language of both the law and the contract is similar in requiring the Postal Service to *make every effort* to find limited duty work. This is a strong protection. The Postal Service must do more than *make some effort*. It must do more than *make a lot of effort*. It must make every effort. The steward should vigorously probe and document the efforts (or lack of efforts) made by USPS to find limited duty work, and argue accordingly.
3. The Postal Service has internal regulations detailing procedures to follow to comply with the Rehabilitation Act. Those procedures, and the OPM regulations under the Rehabilitation Act, are applicable to all employees who are partially recovered from compensable injury, even if they are not a qualified disabled person under the Rehabilitation Act.

5 CFR 353.301(d) states:

Agencies must make every effort to restore in the local commuting area, according to the circumstance in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973.

Thus, even though partially recovered employees with compensable injuries may not be covered under the Rehabilitation Act (because they are not a handicapped individual within the meaning of the Act), USPS must treat them substantially the same as covered employees for the purpose of making every effort to restore. The steward should become familiar with the USPS compliance regulations in the EL 307 as well as OPM regulations, and then investigate, document, and argue non-compliance, when appropriate.

4. The Postal Service is required by law and its own regulations to notify partially recovered and physically disqualified employees of appeal rights when it fails to restore to limited duty.

5 CFR 353.104 states:

When an agency separates, ... or fails to restore an employee because of ...compensable injury, it shall notify the employee of his or her rights, obligations, and benefits...including any appeal and grievance rights.

5 CFR 353.304(a) states:

Except as provided in paragraphs (b) and (c) of this section, an injured employee or former employee of ...the U.S. Postal Service...may appeal to the MSPB an agency's failure to restore, improper restoration, or failure to return an employee following a leave of absence. All appeals must be submitted in accordance with MSPB's regulations.

5 CFR 353.304(c) states:

An individual who is partially recovered from a compensable injury may appeal to MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration.

ELM 546.4:

Current or former employees who believe they did not receive the proper consideration for restoration, or were improperly restored, may appeal to the Merit Systems Protection Board under the entitlements set forth in 5 CFR 353.

ELM 546.65:

Management's Refusal to Reemploy...If the former employee will not be reemployed, the appointing officer must:...(b) ...notify the employee in writing of the refusal to employ, including a paragraph informing the individual of the right to appeal to the to the Merit Systems Protection Board...

The steward should document and argue any failures to provide written notification of appeal rights.

5. Arbitrability. In past cases, USPS has argued that when OWCP pays compensation for lost-time, the failure to provide limited duty is not grievable. Stewards should be prepared to argue arbitrability.

C. Citations

1. The contractual obligation. **Article 19**

ELM 546.142

When an employee has partially overcome a compensable disability, the Postal Service must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance.

See also:

- A. **EL 505 Section 2.4** *Centralizing the Processing of IC Forms and Paperwork and the Management of Claims – district HR manager or senior IC specialist...Prepare a comprehensive*

IC policy...The IC policy must ...Ensure that limited duty is made available and offered.

- B. **EL 505 Section 4.5** *Obligation: Assigning Limited Duty. When an employee is not totally disabled or has partially overcome the injury or disability, the USPS must make every effort to assign the employee to limited duty consistent with the employee's work limitation tolerance.*
- C. **EL 505 Section 4.18** *Assigning an Employee to Limited Duty. When an employee has partially overcome the injury or disability, the USPS must make every effort toward assigning the employee to limited duty consistent with the employee's work limitation tolerance.*
- D. **EL 505 Section 4.26** *Considering a Former or Current Employee for Reemployment...Disability Partially Overcome – Current Employee: When an employee has partially overcome a compensable disability, the USPS must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance.*
- E. **M-01264** January 28, 1997, G90N-4G-C 95026885
We agreed that the provisions of ELM 546.14 are enforceable through the provisions of the grievance/arbitration process.
- F. **M-01010** October 26, 1979, N8-NAT-003. [Showing that the language of ELM 546.14 is the result of a grievance settlement.]

2. The legal obligation. **Articles 3, 5, 14.3C, 15 & 21.4**

5 CFR 353.301(d)

Partially recovered. Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty.

5 CFR 353.301(c)

Physically disqualified. An individual who is physically disqualified for the former position or equivalent because of a compensable injury, is entitled to be placed in another position for which qualified that will provide the employee with the same status and pay, or the nearest approximation thereof, consistent with the circumstances in each case.

See also:

- A. **ELM 546.111** *Reassignment or Reemployment of Employees Injured on Duty*

Law

General The Postal Service has legal responsibilities to employees with job-related disabilities under 5 USC 8151 and the OPM regulations as outlined below.

B. **ELM 546.3 Restoration Rights.** *OPM is responsible for implementing the regulations contained in 5 USC 8151. These regulations are codified in 5 CFR 353.*

C. **EL 505 page 158**

The USPS has legal responsibilities to employees with job-related disabilities under OPM regulations. Specifically, with respect to employees who partially recover from a compensable injury, the USPS must make every effort to assign the employee to limited duty consistent with the employee's medically defined work limitation tolerance.

3. The Rehabilitation Act connection. Article 2.1

5 CFR 353.301(d)

Agencies must make every effort to restore in the local commuting area, according to the circumstance in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973.

See also:

A. **EL 307 Section 1- 12, 1- 13 & 5- 531**

This handbook establishes procedures that enable Postal Service managers and supervisors to make sound decisions regarding reasonable accommodation for qualified individuals with disabilities during ...the course of their employment, including requests for accommodation to perform a current job or for placement in other jobs....

The Rehabilitation Act also imposes an obligation on the Postal Service to find reasonable ways to accommodate a qualified individual with a disability. In other words, the Rehabilitation Act requires the Postal Service to consider ways to change the manner of doing a job to allow a qualified person with a disability to perform the essential functions of the particular job, or to be considered for a position he or she desires....

Reassignment is a form of reasonable accommodation that may be appropriate if no other accommodation will allow the employee to perform the essential functions of the position.

4. The notice of appeal rights obligation.
5 CFR 353.104 Notification of rights and obligations.
When an agency separates, grants a leave of absence, restores or fails to restore an employee because of... compensable injury, it shall notify the employee of his or her rights, obligations, and benefits relating to Government employment, including any appeal and grievance rights.
See also:
- A. **ELM 546.65** Management's Refusal to Reemploy
...notify the employee in writing of the refusal to employ, including a paragraph informing the individual of the right to appeal to the Merit Systems Protection Board...
5. Arbitrability. Articles 3, 5, 14.3C, 15, 21.4
JCAM 15-1
Broad grievance clause. *This section sets forth a broad definition of a grievance. This means that most work related disputes may be pursued through the grievance/arbitration procedure. The language recognizes that most grievances will involve the National Agreement or a Local Memorandum of Understanding. Other types of disputes that may be handled within the grievance procedure may include:...*
- *Disputes concerning the rights of ill or injured employees, such as claims concerning fitness-for-duty exams, first aid treatment, compliance with the provisions of ELM Section 540 and other regulations concerning OWCP claims. See Step 4 Settlement G90N-4G-C 95026885, January 28, 1997, M-01264. However, decisions of the Office of Workers' Compensation Programs (OWCP) are not grievable matters. OWCP has the exclusive authority to adjudicate compensation claims, and to determine the medical suitability of proposed limited duty assignments.*
 - *Alleged violations of law (see Article 5);*
- See also:
- A. **M-01264** January 28, 1997, G90N-4G-C 95026885
We agreed that the provisions of ELM 546.14 are enforceable through the provisions of the grievance/arbitration process.
 - B. **M-01316** May 18, 1998, F94N-4F-C 96032816
The parties agree that pursuant to Article 3, grievances are properly brought when management's actions are inconsistent with applicable laws and regulations.
 - C. **363 US 574, United Steelworkers V. Warrior & Gulf (US Supreme Court)**
An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation

that covers the asserted dispute. Doubts should be resolved in favor of coverage.

D. Arguments

1. Limited duty work exists.
2. USPS did not make every effort to find limited duty.
3. USPS did not comply with its own regulations (EL 307) regarding reasonable accommodation in accordance with the Rehabilitation Act, as required by 5 CFR 353.301(d).
4. USPS did not notify the employee in writing of his or her MSPB and grievance appeal rights.
5. The grievance is arbitrable.

E. Documentation/Evidence

1. Evidence of basic elements in grievance:
 - A. Letter from OWCP accepting claim.
 - B. Written Limited Duty Job Offer (LDJO) being withdrawn (and any prior LDJO's).
 - C. Current CA-17, OWCP-5, or other medical documentation of limitations. Also prior CA-17s.
 - D. Any written documents from management to the employee concerning limited duty, especially the notice advising the limited duty job is being withdrawn.
 - E. Current and recent Form 50's.
 - F. TACS records or other documents showing the actual duties and hours that were worked while doing the Limited Duty Job (LDJ), for the entire period of the LDJ.
 - G. Copy of Injury Compensation Control Office (ICCO) file on injured worker's claim.

2. Evidence that limited duty work exists.
 - A. What work was previously being done by the injured worker?
 1. LDJO
 2. DOIS/TACS/Workhour reports and codes
 3. Signed statement by IW detailing the actual work he/she had been doing (may or may not be the same as the work on the LDJO).
 4. Signed statements from co-workers detailing the actual work they have witnessed the IW doing.

 - B. Who is doing that work now?
 1. DOIS/TACS/workhour reports and codes

2. OT rates from Flash
3. PTF workhour reports and codes
4. Casual workhour reports and codes
5. Signed statements from the workers who are doing the work now.
6. Signed statements from co-workers detailing their observation of the work still being done by others

C. What work is available within the injured worker's restrictions?

1. If worker is able to do any letter carrier work, document availability: Flash reports showing carrier OT rates; TACS reports showing PTF and casual hours and work performed; statements by employees of availability of work. Review CA-17 work restrictions with other injured workers' CA-17's who have been given limited duty in the carrier craft. If restrictions are similar, argue work is available in carrier craft.
 2. If worker is able to do any other craft work, document availability: Flash reports showing craft OT rates; TACS reports showing PTF and casual hours and work performed; statements by employees of availability of work.
 3. Historical documents, and even current documents showing that management is able to accommodate all restrictions, up to bed rest: letters to physicians; stamped notice on bottom left of CA-17; letters to injured workers; copies of prior LDJO's in conjunction with associated CA-17s showing management was able to accommodate other employees with similar restrictions.
3. Evidence that management did not make every effort to find work.
- A. Name and position of management official who made the decision to withdraw (or not provide) limited duty. Ask immediate supervisor who made the decision, or ask the manager who signed a letter to the injured worker advising that limited duty was no longer available, then work up the chain of command until deciding individual is identified. Then request to interview him or her.

- B. Shop Steward's notes of interview of deciding official, with answers to probing questions, e.g.:
- Who made the decision to withdraw (or not provide) Limited Duty?
 - What were the reasons to withdraw (or not provide) Limited Duty? Any other reasons?
 - What data, if any, was reviewed prior to making the decision to withdraw (or not provide) Limited Duty? Any other data?
 - What efforts were made to identify available limited duty? Any other efforts?
- C. Copy of all data that was reviewed by deciding official and/or relied on by management to withdraw (or not provide) limited duty.
- D. Review any notice to the Injured Worker advising him or her of the withdrawal of limited duty. If that notice claims the decision was made based on a review of current operational needs, the shop steward must interview the manager who signed the notice and determine who performed the "review of operational needs", what data he or she reviewed, when he or she reviewed it, how much time he or she spent reviewing it, etc. Focus on, document, and undermine management's stated reason(s) for withdrawing the job offer.
- E. If management states the reason limited duty is being withdrawn (or not provided) is declining mail volumes, first pin management down to precisely what their claim is. What type of mail volume? (Current USPS Financial and Operating Statement ending 7/31/04 shows that year-to-date First Class volume is down 1.7% compared to Same Period Last Year, but volume for all classes of mail combined is up 1.3%). For what period of time? In what geographical area? What documents were reviewed that led to the conclusion that volume declined? Then verify the accuracy of the claim, challenge if appropriate, and compare bonafide overall volume drops with concurrent personnel reductions – if volume is down 5% but personnel are down 6%, why does management claim no work is available?

If management states the reason limited duty is being withdrawn (or not provided) is clerks are being excessed out of the post office where the limited duty was being provided, verify the accuracy of the claim.

What clerks? How many? When? Where are they being excessed to? Challenge if appropriate and then look behind the claim. For instance, is APWU challenging the excessing? If so, request copies of all pertinent grievance documents. If management is simply projecting that some clerks will be excessed in the future, challenge the need to withdraw limited duty now. Argue such premature action violates the *make every effort* provisions.

If management states it cannot provide limited duty in the clerk craft when clerks are being excessed because that would violate the contract rights of clerks, insist on management identifying specifically what contract provision they are relying on. Argue that national level decisions have repeatedly held that providing limited duty work in the clerk craft to non-clerk craft employees does not violate the contract rights of clerks. C-23742, C-19717, C-19547, C-936.

4. Evidence that management did not follow the procedures in the EL 307.
 - A. EL 307 Section 223.1 requires management to attempt to gain the worker's participation in the reasonable accommodation process by asking questions. Statement from grievant.
 - B. EL 307 Section 25 requires that denials of requests for accommodation must be in writing, giving reasons. Statement from grievant.
 - C. EL 307 Section 261 requires use of a Reasonable Accommodation Decision Guide form to document efforts. Stewards request for copy of signed Reasonable Accommodation Decision Guide form.

5. Evidence that management did not notify the grievant in writing of appeal rights.
 - A. Signed statement by the injured employee affirming that management never advised him or her of appeal rights.

F. Remedies

1. Immediately restore the employee to limited duty.
2. Make the grievant whole for all lost wages and benefits, including but not limited to, lost wages, annual leave, sick leave, and TSP benefits.

3. Any other remedy deemed appropriate by the parties or an arbitrator.

G. National and Regional Arbitration Decisions

There are a number of national level decisions that contain holdings that are significant in failure to provide limited duty cases. There are not many regional decisions on the specific issue of management failure to provide (or withdrawal of) limited duty. However, there are many decisions on the issue of ELM 546.14 pecking order violations, and there are parallels in those cases that can be used in withdrawal/failure-to-provide cases. Some significant cases follow. They should be carefully reviewed by branch grievance representatives.

C-07233 Bernstein 8/7/87

In this national case, NALC grieved when management involuntarily changed a letter carrier on limited duty to the clerk craft. In addition to his ruling on the central issue of the case, Bernstein made a related ruling. He held that the ELM 546.14 obligation is a continuing one. He wrote:

The Service is contending that there should be a point in time at which it has the right to "wash its hands" of a particular injured employee and move him out of his craft and into another one for the remainder of his career. Perhaps it would be sound policy to have such a provision in the section. But there is no language to that effect in that section at this time. Section 546.14 must be read to impose a continuing duty on the Service to always try and find limited duty work for injured employees in their respective crafts, facilities and working hours. The fact that such duty might not be available at any point in time does not mean that it will never become available, because there are many changes that can take place.

While this ruling specifically addresses the second mandate of 546.14 (minimize the adverse effect by following the pecking order) there is no logical reason to not apply it to the first mandate of 546.14 (make every effort to provide limited duty).

C-936 Aaron 5/20/83

A management claim that providing limited duty in the clerk craft to injured letter carriers violates the APWU National Agreement is not accurate. In 1983, Arbitrator Aaron faced the issue of whether the transfer of an injured rural

carrier to a full time regular position in the clerk craft violated Article 1.2 or Article 13. Aaron held:

It is obviously too late in the day for the Union [APWU] to challenge the proposition that FECA regulations can augment or supplement reemployed persons contractual rights. The language of Article 21, Section 4 of the 1981-1984 Agreement, previously quoted, makes clear that the rights of such persons can be augmented or supplemented by federal regulations, with which the Postal Service must comply.

...(T)he applicable regulations, previously quoted, make it clear that an employee who has partially recovered from an on- the-job accident, and for whom no work within prescribed medical limitations in his or her own craft is available, must be offered a position in another craft in the same work facility that minimizes adverse or disruptive impact on the employee.

C-19547 Dobranski 6/1/99

In this case APWU claimed that management was required to give notice in accordance with Article 7.2 of the National Agreement when it offered a letter carrier a permanent limited duty assignment that included some clerical duties. Arbitrator Dobranski disagreed, writing:

The issue that emerged from discussion with the parties is whether the union notification provision under Article VII, Section 2, of the National Agreement applies to permanent Rehabilitation Program full-time assignments made under Section 546 of the Employee and Labor Relations Manual (ELM).

...(T)here is no question that the phrase "other work" in section 546 .141(a)(2) refers to work outside of the employee's "craft". What this means is that if there is not adequate work available within the employee's craft and within the work facility to which the employee is regularly assigned, and before the employee should be assigned to work outside his or her work facility, the employee should be given work outside his or her craft but within the work facility .

C-19717 Dobranski 6/14/99

The issue in this case involved whether the Postal Service violated Article 37 of the APWU National Agreement by assigning rural letter carriers to temporary

limited duty work in the clerk craft when no work was available within their medical restrictions within their own craft. Dobranski found no violation and his review of the Postal Service position in the case, as well as his quote of Aaron, are significant:

The Postal Service asserts that its workers are covered and protected by the Federal Employee Compensation Act (FECA) which makes certain provisions for the treatment of employees who suffer on-the-job injuries. In essence, FECA (5 CFR 353 .304) provides that employees who are injured on-the-job through no fault of their own should not be penalized solely because of their injuries. To that end, the Postal Service is required to make "every effort" to find such employees meaningful work. The FECA requirements have been expressly recognized by the parties in the National Agreement in Article 21, Section 4, Injury Compensation. This language has been in the National Agreement since 1973, and pursuant to this contractual commitment, the Postal Service published Section 546 of the ELM. Pursuant to the legal obligation of the Postal Service to comply with FECA and the contractual obligation to issue appropriate regulations to comply with FECA, the Postal Service, pursuant to Article 19 of the National Agreement, published Section 546. The parties recognized that Section 546 contained the Postal Service's legal responsibilities to employees with job-related injuries. The language of Section 546 was approved by the APWU pursuant to their rights under Article 19 under the National Agreement.

...Arbitrator Aaron, in relevant part, stated:

"It is obviously too late in the day for the Union [APWU] to challenge the proposition that FECA regulations can augment or supplement reemployed persons contractual rights. The language of Article 21, Section 4 of the 1981-1984 Agreement, previously quoted, makes clear that the rights of such persons can be augmented or supplemented by federal regulations, with which the Postal Service must comply..."

This rationale from the Aaron award is most persuasive.

In this case, APWU alleged a violation of Article 37 of its National Agreement and violation of the seniority rights of its PTFs when an injured letter carrier was given a permanent reassignment in the clerk craft as a General Clerk, when a General Clerk position had been previously abolished in that facility. Das found no violation. He wrote:

In its post-hearing brief, the APWU argues that: The impairment of seniority rights of parttime flexible employees occurs because of the aggregation of 40 hours per week of clerk hours into a position taken out of the normal operation of the seniority system. It is not merely the right to bid for the particular position that has been "uniquely created" that is at stake, it is the possibility of having other regular assignments created on tour 2 that might permit conversion of a part-time flexible employee into a regular assignment, and thereby advance that possibility for every other senior part-time flexible clerk.

If I understand the logic of this argument, the APWU basically is claiming that the seniority rights of PTF clerks are impaired whenever Clerk Craft duties are packaged into a rehabilitation assignment for an employee in a different craft, because some or all of that work otherwise ultimately might be included in a newly created full-time clerk position at some indefinite time in the future, and that might result in a conversion opportunity for a PTF . In making this argument, the APWU in effect is challenging the entire notion of assigning injured employees in one craft to a uniquely created rehabilitation assignment in another craft -- at least whenever there are any PTF employees in the craft in which the assignment is created . If such an attenuated proposition was the intent behind Section 546 .222, which in context seems improbable, presumably it simply would state something to the effect that injured employees may only be reassigned to a uniquely created rehabilitation position if there are no PTF employees in the facility . It does not do that, and I am not otherwise persuaded that the impact of the rehabilitation assignment cited by the APWU constitutes impairment of seniority rights of PTF clerks.

...(T)o paraphrase Arbitrator Aaron, it is too late in the day for the APWU to challenge the proposition that the Postal Service may reassign an injured employee to a

uniquely created position in another craft to provide appropriate work to that employee, which essentially is what the APWU's Article 37 position in this case does .

... (A)s set forth in the above Findings, the Postal Service was not required to post the rehabilitation assignment at issue under Article 37 of the National Agreement, and the creation of that assignment pursuant to provisions of Section 546 of the ELM did not impair the seniority rights of PTF clerks .

C-12165 & C-12680 Francis 7/14/92 & 11/7/92

In this regional case, the grievant was provided Limited Duty from April 1990 through December 1990, but was then told by management that no work was available within his restrictions. The Union believed work was available and grieved, claiming violation of ELM 546.14 (*the USPS must make every effort toward assigning the employee to limited duty*). Arbitrator Francis found that work was available within the grievant's limitations and that management's *concerns about efficiency and economy did not outweigh* the grievant's rights to work, and she remanded to the parties for remedy. (C-12165) The parties were unable to agree on remedy and Arbitrator Francis issued a supplemental and final award. (C-12680)

C-12680 is important for two reasons. First, the arbitrator analyzed in great detail, and rejected, management's faulty argument that the case was not arbitrable because the grievant had been paid compensation by OWCP and therefore OWCP had sole jurisdiction over the matter. Second, she awarded a remedy that made the grievant whole for the wages, sick leave, annual leave, and TSP benefits that were lost due to the withdrawal of limited duty.

Arbitrator Francis concluded:

My review of Federal case law interpreting the cited provisions of the FECA, particularly 5 USC 8128(b), disclosed that the "final and conclusive" language in 5 USC 8128(b) does not have the broad, preclusive effect the USPS imputes to it....

Judging from the courts' holdings in the aforementioned cases, I have concluded that deciding the remedy issues before me in this case does not require me to infringe in any way upon the jurisdiction of the Secretary of Labor, and that in any case an arbitrator is authorized to act within the arbitrator's sphere of authority even if doing so implicates

determinations of the Secretary of Labor regarding injury compensation matters.

And Francis awarded:

...the grievant can be afforded the salary and benefits he would have earned but for the violation of the contract.

C-21230 Levak 10/15/00

This case is similar to the above Francis case, and involves the same Post Office. Levak relied on Francis' analysis and ruled similarly. He wrote:

This leaves only the arbitrability defense, a defense totally lacking in merit. Indeed, taken to its illogical conclusion, that defense would, in every case, simply allow management to ignore with impunity every limited-duty work guarantee established by the Agreement and the ELM...(N)either the Union nor the Grievant has challenged OWCP's exclusive statutory authority to grant or deny FECA claims or to determine the amount of statutory compensation that may be payable to him; rather, they seek compensation and damages directly attributable to the Postal Service's breach of the National Agreement.

And Levak held:

...the Postal Service's contractual violations were the proximate cause – i.e., the direct cause – of the Grievant being paid only 66 2/3% of the amount of money that he would have earned had he worked, a loss of compensation equal to 33 1/3% of his wages. That breach also directly resulted, at the very least, in the loss of annual leave and sick leave, the loss of contributions to his retirement, and in the loss of contributions to his thrift savings plan.

C-09589 Lange 12/20/89

In this case, management had provided limited duty to the grievant, but outside his regular work locations, hours and craft. The arbitrator found a violation and explained why:

In order to successfully defend against an employee's challenge to a limited duty assignment, the Service must make at least a prima facie showing that it has attempted to implement the progression set out in the ELM and has been unable to make a successful accommodation at

each step prior to the level of the modification of craft duties, non-craft duties, work hours, or work location that was finally implemented. The showing may be made by way of documents, testimony, or other relevant and admissible evidence... (H)owever, a bare assertion that there was no available work, without additional substantiation, is insufficient to demonstrate compliance with Section 546.141 and does not shift the burden of proof to the Union to demonstrate that work was available.

The case underscores the importance of the steward documenting early in the grievance procedure precisely what efforts Management made, per the *make every effort* requirement. Note that while this is a “pecking order” case, not a “failure to provide” case, the same arguments apply, because management cannot know that work is unavailable without going through the pecking order.

C-11589 Barker 12/20/91

In this pecking order case, the Postal Service provided limited duty, but outside the carrier’s craft, hours and station. Arbitrator Barker commented on the burden of proof required in such cases:

... the Service must stand ready to document , by contemporaneous records relevant to the matter, and through testimony , the basis and reasons for the changes or assignment . In light of the contractual obligation, and the recurrence of disputes regarding limited duty assignments, prudent management would dictate the maintenance and perpetuation of written documentation relevant to the assignment .

This case also underscores the importance of the steward thoroughly investigating and establishing early in the grievance procedure precisely what efforts the Postal Service took in determining that no limited duty was available.

C-22990 Freitas 1/17/02

This is a pecking order case. The Postal Service provided limited duty for approximately two years in the grievant’s post office, during her regular hours. Then the Post Office offered her a Limited Duty Job 30 miles away during the night shift. The Arbitrator found a violation of the pecking order. The case underscores the importance of the steward documenting early in the grievance procedure precisely what efforts Management made, per the *make every effort* requirement. Note that while this is a “pecking order” case, not a

“failure to provide case”, the same arguments apply, because management cannot know that work is unavailable without going through the pecking order. Freitas wrote:

At the heart of this case, however, is whether the Service performed its responsibilities in gathering the facts required to be gathered in each step of the “pecking order”, rather than following pre-determined assumptions, when it concluded that Mrs. Hartman should be moved from the Layton Post Office to the Salt Lake City plant.

Freitas then quoted Barker, in C-11589 favorably:

...Barker stated that the fact-finding to be followed by the Postal Service when it implements the “pecking order” should be such that the testimony in support of its decision to make a limited duty job offer, if challenged, would be sufficiently “detailed precise and document to carry the burden imposed upon the Postal Service.”

The case also supports the proposition that the obligation of the Postal Service to “make every effort” is ongoing, and does not end with a particular decision.

The general rule in this regard was stated in a national decision by Arbitrator Bernstein and has been uniformly followed by other arbitrators when faced with the issue. Arbitrator Bernstein stated the rule in this fashion: “Section 546.14 must be read to impose a continuing duty on the Service to always try and find limited duty work for injured employees in their respective crafts, facilities and working hours. The fact that such duty might not be available at any point in time does not mean that it will never become available, because there are many changes that can take place.

C-12861

Abernathy

3/1/93

In this pecking order case, the Arbitrator wrote:

...(A)rbitrators have held that it is not sufficient for the Employer merely to assert that it considered each of these elements in the sequence described above. Rather, the Employer must substantiate any such assertions with documented testimony and other evidence...

He then quoted Lange as above and continued:

I agree and shall follow this principal in my analysis of the facts of this case.

C-11843

Britton

3/18/92

This is a pecking order case and is significant for the proposition that ELM 546 cases are arbitrable. Britton wrote:

Initially, the Arbitrator is called upon to address the threshold issue raised by the Employer as to the arbitrability of the subject grievance. The position of the employer in this regard is that this claim should be before the OWCP and heard by that agency rather than administered under the grievance procedure. With this the arbitrator cannot agree. This grievance is filed under the National Agreement and manuals relevant thereto, and alleges a violation by the Employer of failing to adhere to specific provisions of the ELM. Whether the Grievant has filed or should file a claim with OWCP, a separately constituted agency, cannot and should not have any direct bearing on this proceeding. Here, the Arbitrator is not being asked to rule on the Grievant's physical abilities to perform the work assigned. Nor is he requested to rule on items such as medical benefits, percentage of disability, or other matters properly within the jurisdiction of the Office of Workman's Compensation. Rather, the Arbitrator is called upon to consider whether the Employer followed the requirements of assigning limited duty work to an employee that fits within the obligations imposed by Section 546.141 of the ELM.