28478

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	*	
between:	*	Grievant: M. Naufel
United States Postal Service	*	Post Office: Naples, FL
and	*	USPS Case No: H06N-4H-C 09178860
National Association of Letter Carriers, AFL,CIO	*	NALC Case No: 20-12-MN-09 09-12900

BEFORE: Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Lynne Chiocchi

For the Union: William K. Sullivan

Place of Hearing: Postal Facility, Naples, FL

Date of Hearing: September 29, 2009

Date of Award: October 21, 2009

Relevant Contract Provision: Article 13

Contract Year: 2006

Type of Grievance: Contract

Award Summary:

The Grievance is sustained. The Grievant will have his sick leave reinstated and he will be made whole in that respect. In addition, the Grievant shall be compensated for the overtime he lost due to his having to take leave from work. The matter of the overtime is remanded back to the parties and the arbitrator shall retain jurisdiction over the matter until the compensation issue is resolved. While the Grievant was on sick leave he was compensated for that time so there was no loss of normal compensation.

Lawrence Roberts

Lawrence Roberts, Panel Arbitrator

JUDITH R. WILLOUGHBY, NALC
National Business Agent

OCT 26 2009

SUBMISSION:

This matter came to be Arbitrated pursuant to the terms of the Wage Agreement between United States Postal Service and the National Association of Letter Carriers Union, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on 29 September 2009 at the postal facility located in Naples FL, beginning at 9 AM. Testimony and evidence were received from both parties. A transcriber was not used. The Arbitrator made a record of the hearing by use of a tape recorder and personal notes. The Arbitrator is assigned to the Regular Regional Arbitration Panel in accordance with the Wage Agreement.

OPINION

BACKGROUND AND FACTS:

The Grievant in this case is a Letter Carrier employed at a Naples, FL Postal facility. The record indicates he has been working for the Service for some 21 years.

The Grievant suffered with back pain for several months during which time he accomplished all of his assigned duties without complaint or incident. The Grievant's back pain was not a result of any work related injury. Since the pain persisted for several months without relief, the Grievant opted to see a physician.

As a result, the physician recommended a modification of work activities. He provided the Grievant with a medical slip outlining several restrictions.

The Grievant then spoke with his Supervisor and requested a light duty assignment. The Grievant was told to make a formal written request. As a result, on 19 March 2009, the Grievant wrote the following to the Postmaster:

> **"I am requesting a temporary light duty assignment as prescribed in the attached work status report by Dr. Mark Rubino. I am able to perform carrier functions with little modification. Please review this work status report along with my request for temporary light duty.**
>
> **I anticipate your prompt response to this request as outlined in Article 13 of the National Agreement. Thank you in advance for your time and consideration."**

The above letter was faxed to the Officer in Charge and was accompanied by the Grievant's medical documentation.

The following day, the Officer in Charge replied with the following:

> **"Thank you for the Light Duty Request. I must disagree on your position that there is little modification in your actual duties. The restrictions are very general and quite ambiguous in some respects. In addition, our mail volume year to day is minus 16.1% in Naples, therefore work is scarce. This light duty request is denied.**
>
> **Please accept my wish for a speedy recovery."**

In addition to the above, the Grievant was informed that he could not continue working under those current medical restrictions.

The Union insisted the Employer violated the Wage Agreement because they did not give the Grievant's request the proper consideration. As a result, the instant grievance was filed.

It was found the matter was properly processed through the prior steps of the Parties Grievance-Arbitration Procedure of Article 15, without resolve. The Step B Team declared an impasse on 4 May 2009. Therefore, the matter is now before the undersigned for final determination.

At the hearing, the Parties were afforded a fair and full opportunity to present evidence, examine and cross examine witnesses. At the conclusion of the hearing, the respective Parties presented oral closing arguments and the official record was closed at that time.

JOINT EXHIBITS:

1. Agreement between the National Association of Letter Carriers Union, AFL-CIO and the US Postal Service.
2. Moving Papers

UNION'S POSITION:

It is the Union's opinion that Article 13.2.A.2 mandates an Employee requesting light duty do so in writing, plus estimate the anticipated duration of the request and that the request must be supported by medical documentation as well.

Furthermore, according to the Union, that same Article states that the person requesting light duty must submit to further examination by a physician designated by the Installation Head, if that official so requests.

Additionally, the Union points out the Parties Agreement also requires Management give the matter "the greatest consideration" and "careful attention." However, the Union argues the Postal Service denied the Grievant's request based on the lack of mail volume, as well as the alleged ambiguity of the Grievant's medical documentation.

It is the Union's argument that the Employer could have sent the Grievant for further examination for clarification of his physical condition, yet, failed to do so.

The Union also mentions this case file is devoid of any evidence to support the Agency's claim of declining mail volume. And, according to the Union, any attempt by the Employer to advance such a position at arbitration must be recognized as new argument.

The Union requests the instant grievance be sustained, the Grievant be paid for lost time, consisting of eight (8) hours per day plus the average overtime for the zone per day.

COMPANY'S POSITION:

Management first mentions this being a contract case, the burden of proof in this matter is that of the Union to prove the Parties Agreement was violated.

According to the Employer, the Installation Head gave the "greatest consideration" to the Grievant's request for a light duty assignment. It is the Agency's contention that the Officer in Charge replied, in writing, in accordance with the contract, that he was unable to provide light duty due to the Grievant's restrictions.

In Management's view, being a long time Employee as well as a Union Steward, the Grievant must assume some of the

responsibility. Management mentions it is not their responsibility to provide medical documentation. Instead, according to the Service, it is Management's responsibility to reasonably interpret the documentation submitted by the Employee, and with that, make an informed decision based on the medical evidence provided.

It is the view of the Agency that Article 13 requires Management to make every possible effort in locating and assigning light duty work to ill or injured Employees. However, according to Management, such assignments are not absolutely mandatory upon the Employer.

Specifically, it is pointed out by the Service that, specifically, Article 13.2.C states, "when a request is refused, the installation head shall notify the concerned Employee in writing, stating the reasons for the inability to reassign the Employee." And the inclusion of such language, according to the Employer, makes it obvious these alternative work assignments are neither automatic or required in all cases.

And, in this matter, it is the opinion of the Employer that the Grievant was given full consideration and every effort was made to provide light duty work to the Grievant within his medical restrictions.

Therefore, the Employer requests the instant grievance be denied in its entirety.

THE ISSUE:

Did Management violate the provisions of the National agreement when they denied the Grievant's request for a light duty assignment? If so what is the proper remedy?

PERTINENT CONTRACT PROVISIONS:

ARTICLE 13
ASSIGNMENT OF ILL OR INJURED REGULAR WORKFORCE EMPLOYEES

DISCUSSION AND FINDINGS:

Initially, I would like to commend both Advocates on an excellent presentation of their respective facts as well as

argument. This enabled the undersigned to exit the hearing with a full and complete understanding of the Parties respective arguments regarding the issue at hand.

And with that in mind, I would also mention the Parties Agreement, namely Article 15.4.A.4 restricts any of my findings to the four corners of that particular document.

Specific to this case, Article 13 is certainly controlling. The language is somewhat broad, yet unambiguous at the same time. The negotiators require Management to make every possible effort in locating and assigning light duty work to ill or injured Employees. However, in my reading of this Article, such assignments, unlike limited duty assignments, are not mandatory upon the Employer to grant in every instance.

Specifically, Article 13.2.C states, **"when a request is refused, the installation head shall notify the concerned employee in writing, stating the reasons for the inability to reassign the employee."** By the inclusion of such language, it is obvious these alternative work assignments are neither automatic or required in all cases.

Instead, the specific language directs "**Installation Heads shall show the greatest consideration for full time regular or**

part-time flexible employees requiring light duty or other assignments, giving each request careful attention, and reassign such employees to the extent possible in the employee's office."

While that language is broad, the Employer is still directed to provide each bargaining unit Employee, who properly submits a request, "greatest consideration" and "careful attention." Again, those are broad terms.

Specifically, to this type of case, broad terms, albeit my reference point, suggests the burden of proof on the Union may rise an octave, while the defense of the Employer is lessened by a similar scale. Since the language is broad in scope… "greatest consideration"… "careful attention"… require more specifics from the Union in order to become enforceable. This specific requirement set forth by the negotiators leaves room for interpretation, based on the facts of each unique case.

Yet those terms suggest the intent of the negotiators was, at the very least, to require the Employer to make some sort of effort to locate light duty work for any bargaining unit Employee making a formal request. And that request was properly made by the Grievant in this case.

And since the negotiators were not specific in carefully outlining their intent, the facts of each case must be compared to the available language, in this case, specifically controlling, are the phrases "greatest consideration" and "careful attention."

With the burden of proof being on the Union, it's up to their evidence to show either one or both of those requirements were not met by the Employer. Initially, the Union's contractual mandate is simple, only requiring a written light duty request from the Grievant, along with supporting medical documentation in support of the request. In this case, that particular portion of the requirement was met.

Hence, the burden shifted to the Agency to show that request made by the Grievant was given the consideration and attention called for by the Agreement.

And with that in mind, the Service's only witness, the Officer in Charge, at first blush, seemed convincing. Part of his testimony only reiterated the content of his 20 March 2009 denial letter, cited previously.

The document states the restrictions of the physician are general and ambiguous. Yet later on in his testimony, there was a conflict.

When asked by the Employer Advocate:

> **"What did you do between getting his request and issuing your response?"**

He responded:

> **"A few things. First of all, I interacted with the Station Manager, as well as the Supervisor, to see what their situation was regarding a backlog of work that I didn't know about and if there was any work available that could make Matt's restrictions doable."**

In my considered opinion, the Supervisor's testimony at this hearing was in direct conflict with a letter written he authored some six (6) months earlier. In the 20 March 2009 Letter, he referenced the restrictions to be "very general" and "quite ambiguous." Yet, at the hearing, he testifies that he spoke with both a Station Manager and Supervisor about "work available that could make Matt's restrictions doable."

In my view, if the Supervisor didn't understand the restrictions in the first place, it would have been impossible for him to search for work that would, or could, make the same "doable." At best, the documentation, when compared to his

testimony provided at the hearing, by even the most liberal of standards, collided severely.

Even though the contractual requirement presents a very broad requirement, clearly, in this instance, "greatest consideration" and "careful attention" were not provided, as required by the Agreement. After carefully analyzing all the evidence in this case, it was crystal clear to me the Employer failed to satisfy that very basic requirement of Article 13.

Additionally, the case file documentation also supports a similar conclusion. The Grievant faxed his written request to the Officer in Charge sometime on 19 March 2009. The Officer in Charge provided a written answer sometime the next day, on 20 March 2009.

That dated evidence, in and of itself, certainly leads to the similar observation. Management's decision maker in this process failed in providing "greatest consideration" or "careful attention" in that general process described by the negotiators. Given that short time span, it was rather obvious, the Officer in Charge, invoked very little time, given the general thought process directed by the Parties Agreement.

By mere title, the Officer in Charge is assuredly faced with many decision making tasks throughout the course of any work day. This only suggests to me that particular title holder spent very little time, throughout the course of a single day, at best, in providing the Grievant greatest consideration and careful attention.

Also, his testimony did not indicate this task was assigned to another subordinate to assure speedy resolution. Instead, all this evidence in this case suggests the Officer simply opted to reject the request, instead of really listening and evaluating the request of the Grievant.

The Grievant admitted that after receiving the denial letter of 20 March 2009, he did not attempt to make further contact with the Officer in Charge. Yet, that is not an Employee or Union requirement mentioned by the negotiators. Instead, the language requires the Employer to consider the request and make an attentive effort to consider. At the very least, in this particular case, the Officer in Charge should have made contact with the Grievant and queried his concerns.

Additionally, the testimony of several Union witnesses further convinced me the Grievant's medical restrictions did not affect his ability to complete any of the work associated with

his route. Instead, I was convinced Management failed to respond to a simple request made by the Grievant.

As it turns out, the Grievant only needed a stool while casing mail. And instead of satisfying the request, the Grievant was ordered not to report to work.

And in this case, Management's actions resulted in a clear violation of the Agreement.

With the exception of the Grievant needing a stool while casing his mail, the Union's presentation and testimony of several witnesses convinced me that the restrictions outlined by the Grievant's physician did not affect his ability to complete the work associated with his route. The fact that the Naples mail volume diminished by some sixteen percent is not a defense and had absolutely no bearing on my decision.

The fact of the matter is, the Grievant's route still had to be delivered. The evidence reveals his condition did not disable him from performing the task, in any way. Instead, it was clear Management simply opted to mute a very simple accommodation request, made by the Grievant. And I was convinced that request would not diminish in any way, the Grievant's ability to successfully complete his work.

The Grievant's request letter clearly stated that he was "able to perform carrier functions with little modification." And the evidence was clear that Management never attempted to really identify the request of the Grievant.

It is my considered opinion this entire issue would have been avoided had Management provided the required consideration and attention. And that did not happen, therefore, the instant grievance will be sustained.

Had the Manager given proper consideration to the Grievant's request, he too would have learned that the Grievant could in fact have continued working on his assigned route. The Employer's argument that the workload had diminished is offset by the fact that the Grievant's route continued to be worked by other Employees. Additionally, the Union showed that most of the other Letter Carriers were working overtime.

As a remedy, the Grievant's sick leave will be reinstated. In addition, the Grievant shall be compensated for the overtime he lost due to his having to take leave from work. The overtime matter only, is remanded back to the Parties and the undersigned shall retain jurisdiction to ensure final resolution, noting that since the Grievant was on sick leave, he was already duly

compensated for that time, so there was no monetary loss in that regard.

AWARD

The grievance is sustained in accord with the above.

October 21, 2009
Fayette County PA