C-32696

REGULAR ARBITRATION PANEL

IN THE MATTER OF THE ARBITRATION BETWEEN: **THE UNITED STATES POSTAL SERVICE** **AND** **THE NATIONAL ASSOCIATION OF LETTER CARRIERS**	**GRIEVANT: LAKENDRA WILLIAMS** **ISSUES: 1) ARBITRABILITY** **2) FAILURE TO PROVIDE FULL-TIME SCHEDULE** **FACILITY: JEFFERSON PARK STATION CHICAGO, ILLINOIS** **USPS NO. J11N-4J-C-15244583** **NALC NO. 2015-1310**

BEFORE:	**Steven M. Bierig, Arbitrator**
APPEARANCES: **For the U.S. Postal Service:**	**Lisa Tolbert, Labor Relations Specialist**
For the Union:	**Carl Oefelein, Advocate**
Location of Hearing:	**433 W. Harrison** **Chicago, Illinois**
Date of Hearing:	**November 3, 2016**
Date of Award:	**November 30, 2016**

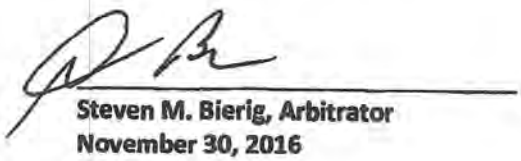
AWARD:

For the reasons stated in this Opinion and Award, the Arbitrator finds:

The Grievance is arbitrable, as this matter constitutes a continuing violation. As to the merits, the Grievance is sustained in part. While the Service did show that it attempted to provide Grievant with work in the Carrier Craft, it appears that there was work available in the Clerk Craft for Grievant. However, because the Clerk Craft Union was going to file a grievance, the Service stopped providing said work to Grievant. Therefore, to the extent that there was Clerk Craft work for Grievant, and for which Grievant did not receive said work based on the threatened grievance, based on the Snow Award, Grievant should have been placed on Leave with pay for this time period.

The matter is remanded to the parties to determine the amount of Clerk Craft work that was available, but denied to Grievant based on the threatened grievance, during the period of June 27, 2015 until the time that Grievant returned to full-time work. Once that amount is determined, Grievant shall be credited with that time.

With the permission of the parties, I shall retain jurisdiction to resolve any questions of interpretation, application or remedy of this Award.



Steven M. Bierig, Arbitrator
November 30, 2016

I. INTRODUCTION

The Hearing in this case was held on Thursday, November 3, 2016 at the Postal Facility located at 433 W. Harrison in Chicago, Illinois, commencing at 10:00 a.m. before the undersigned Arbitrator who was duly appointed by the parties to render a final and binding decision in this matter. At the Hearing, the parties were afforded a full opportunity to present such evidence and arguments as desired, including examination and cross-examination of all witnesses. No formal transcript of the Hearing was prepared, but the Arbitrator did record the proceedings. Subsequent to the conclusion of the Hearing, the parties presented oral closing arguments, whereupon the evidentiary portion of the Hearing was declared closed. Both parties stipulated at the Hearing to this Arbitrator's jurisdiction and authority to hear this case and issue a final and binding decision in this matter.

I. ISSUES

1) Is the Grievance arbitrable?

2) If so, did the Service violate Articles 3, 5, 8, 15, 19, 29 and 41 of the National Agreement by not allowing Grievant LaKendra Williams to work 8 hours per day at the Jefferson Park Station of the Chicago Installation?

3) If so, what is the appropriate remedy?

III. RELEVANT NATIONAL AGREEMENT PROVISIONS

A. National Agreement Provisions

ARTICLE 3 – Management Rights

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

A. To direct employees of the Employer in the performance of official duties;
B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;
C. To maintain the efficiency of the operations entrusted to it;
D. To determine the methods, means, and personnel by which such operations are to be conducted;
E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and
F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

(The preceding Article, Article 3, shall apply to City Carrier Assistant Employees.)

* * * *

ARTICLE 8 - Hours of Work

Section 1. Work Week

The work week for full-time regulars shall be forty (40) hours per week, eight (8) hours per day within ten (10) consecutive hours, provided, however, that in all offices with more than 100 full-time employees in the bargaining units the normal work week for full-time regular employees will be forty hours per week, eight hours per day within nine (9) consecutive hours. Shorter work weeks will, however, exist as needed for part-time regulars.

Section 2. Work Schedules

A. The employee's service week shall be a calendar week beginning at 12:01 a.m. Saturday and ending at 12 midnight the following Friday.

B. The employee's service day is the calendar day on which the majority of work is scheduled. Where the work schedule is distributed evenly over two calendar days, the service day is the calendar day on which such work schedule begins.

C. The employee's normal work week is five (5) service days, each consisting of eight (8) hours, within ten (10) consecutive hours, except as provided in Section 1 of this Article. As far as practicable the five days shall be consecutive days within the service week.

* * * *

ARTICLE 15 - Grievance-Arbitration Procedure

Section 1. Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

Section 2. Grievance Procedure—Steps
Informal Step A

(a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. This constitutes the Informal Step A filing date. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative. During the meeting the parties are encouraged to jointly review all relevant documents to facilitate resolution of the dispute. The Union also may initiate a grievance at Informal Step A within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance. In such case the participation of an individual grievant is not required. An Informal Step A Union grievance may involve a complaint affecting more than one employee in the office.

* * * *

ARTICLE 19 - Handbooks and Manuals

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

* * * *

Article 19 shall apply in that those parts of all handbooks, manuals and published regulations of the Postal Service, which directly relate to wages, hours or working conditions shall apply to transitional employees only to the extent consistent with other rights and characteristics of transitional employees negotiated in this Agreement and otherwise as they apply to the supplemental work force. The Employer shall have the right to make changes to handbooks,

manuals and published regulations as they relate to transitional employees pursuant to the same standards and procedures found in Article 19 of this Agreement.

* * * *

ARTICLE 29 - Limitation on Revocation of Driving Privileges

An employee's driving privileges may be revoked or suspended when the on-duty record shows that the employee is an unsafe driver.

Elements of an employee's on-duty record which may be used to determine whether the employee is an unsafe driver include but are not limited to, traffic law violations, accidents or failure to meet required physical or operation standards.

The report of the Safe Driver Award Committee cannot be used as a basis for revoking or suspending an employee's driving privileges. When a revocation, suspension, or reissuance of an employee's driving privileges is under consideration, only the on-duty record will be considered in making a final determination. An employee's driving privileges will be automatically revoked or suspended concurrently with any revocation or suspension of State driver's license and restored upon reinstatement. Every reasonable effort will be made to reassign such employee to non-driving duties in the employee's craft or in other crafts. In the event such revocation or suspension of the State driver's license is with the condition that the employee may operate a vehicle for employment purposes, the employee's driving privileges will not be automatically revoked. When revocation or suspension of an employee's driving privileges is under consideration based on the on-duty record, such conditional revocation or suspension of the state driver's license may be considered in making a final determination.

Initial issuance—an employee shall be issued a Certificate of Vehicle Familiarization and Safe Operation when such employee has a valid State driver's license, passes the driving test of the U.S. Postal Service, and has a satisfactory driving history.

An employee must inform the supervisor immediately of the revocation or suspension of such employee's State driver's license.

* * * *

IV. FACTUAL BACKGROUND[1]

The instant case arose at the Jefferson Park Station in Chicago, Illinois and involves Grievant LaKendra Williams ("Grievant"). The Grievance was filed pursuant to the National Agreement between the National Association of Letter Carriers (the "Union") and the United States Postal Service (the "Service"). Grievant is a full-time Letter Carrier employed at the Jefferson Park Station.

Grievant has been employed with the Service since October 23, 2012. It appears that sometime in either 2013 or early 2014, Grievant's Illinois driver's license was revoked. Grievant reported this to the Service and the Service did attempt to accommodate Grievant by allowing her to work routes that involved walking. In addition, Grievant was temporarily assigned to the Clerk Craft. Both Acting Manger LaShonda Davis-Hayman and Supervisor Aleatha LaGarde testified that Grievant was driven to areas where she could work by walking a route. At times, Grievant was driven to a route and a truck was left on her route to act as a relay. However, as testified to by Davis-Hayman, none of the routes in Jefferson Park are only walk-out routes. According to Grievant, these accommodations lasted until approximately March 2015, at which time Grievant no longer received a full-time schedule at Jefferson Park. Davis-Hayman further testified that while Grievant was provided with Clerk Craft work, this temporary assignment ceased when the Clerk Craft indicated that it would file a grievance over Grievant's assignment to the Clerk Craft.

It is uncontested that although the Service began to schedule Grievant less than full-time in March 2015, she did not file the instant Grievance until approximately July 11, 2015,

[1] All of the evidence in this case is comprised of the testimony of the witnesses, Joint Exhibit 1, which consists of the National Agreement and the JCAM, and Joint Exhibit 2, which consists of the 292-page case file.

approximately 4 months later. Grievant further testified that since approximately July 2016, Grievant has returned to a full-time schedule.

According to the testimony of Davis-Hayman and LaGarde, Grievant was scheduled full-time until approximately March 2015. During that time period, the Service made every effort to accommodate Grievant's lack of a driver's license. However, in about March 2015, it was no longer possible to continue these accommodations based on the configuration of the Jefferson Park Station, the amount of work available and the fact that all of the routes at Jefferson Park are mounted routes. At the time that Grievant was removed from a full-time schedule, there were 38 routes at Jefferson Park. As of early 2016, the number of routes at Jefferson Park increased to 43½, and this increase in routes led to additional work for Grievant; she is now again a full-time Letter Carrier. As of the time of the Arbitration Hearing, Grievant has not regained her driver's license.

According to the testimony of Union Steward Holly Dexter, sufficient work was available for Grievant at the Jefferson Park Station at all relevant times. Further, on cross-examination, Davis-Hayman admitted that there were CCAs at Jefferson Park that were working when Grievant was not working full-time. Based on these facts, the Union contends that Grievant should have been employed on a full-time basis at all times.

During the grievance procedure, the Service took the position that the Grievance was untimely, and the Union characterized the matter as a "continuing violation", which provides that a contract violation occurs each and every day that the incident occurs. The matter proceeded through the grievance procedure and was heard in Arbitration on November 3, 2016.

V. POSITIONS OF THE PARTIES

A. The Union

The Union first contends that the Grievance is arbitrable. While it is uncontested that Grievant did not file the instant Grievance until July 11, 2015, alleging a violation since March 2015, this is a continuing violation. Grievant stopped receiving full-time work in March 2015. Therefore, every day that Grievant, who was entitled to full-time employment, did not receive full-time employment, a new violation occurred. Further, during the course of the grievance procedure, the Service indicated that the Grievance was timely.

As to the merits, the Union contends that the Service acted improperly and unreasonably when it did not provide Grievant with a full-time schedule beginning in March 2015. According to Article 29, every reasonable effort must be made to accommodate those employees who do not have a valid driver's license, including assigning Grievant to different crafts when such work is available. In this case, the Service has the burden to prove that every effort has been made to accommodate Grievant. No such proof has been provided. According to the Union, it has presented sufficient evidence to prove that there was sufficient work available at Jefferson Park to allow Grievant to work a full-time schedule during the relevant period. The Service has not been able to substantially rebut the Union's evidence.

The Union asks that the Grievance be sustained in its entirety and that Grievant be made whole for all lost pay and benefits, including reinstatement of Grievant's used accumulated leave time.

B. The Service

First, the Service contends that the matter is not arbitrable. The Grievance was not filed until approximately 4 months after Grievant began to not receive full-time employment. This is

well beyond the 14 days that the National Agreement requires to file a grievance. The instant Grievance is clearly untimely and must be dismissed. Further, the Service's assertion during the course of the grievance procedure that the matter was timely applied only to one phase of the grievance process and did not apply to the initial filing of the Grievance.

As to the merits, the Service claims that this is a contract interpretation case and as such, the burden of proof falls to the Union to show that the Service violated the National Agreement. The Service contends that based upon the evidence presented, the Union has been unable to sustain its burden of proof.

The Service argues that it acted with every reasonable effort in this case. According to the Service, it has proven that there was insufficient work available for Grievant to work full-time at Jefferson Park after approximately March 2015. The Service contends that it expended every reasonable effort to provide Grievant with full-time work, but only limited work was available each day at Jefferson Park. Thus, when the Service assigned Grievant to less than a full-time schedule at Jefferson Park, it was acting reasonably and therefore, did not violate the National Agreement.

The Service contends that it used its best efforts to accommodate Grievant, including temporarily assigning her to the Clerk Craft, allowing her to walk routes whenever possible, driving her to routes and allowing her to use a truck as a relay. Further, the Service contends that when additional work was available, it restored Grievant to a full-time schedule.

The Service claims that the Union has not met its burden of proof to show that the National Agreement was violated when Grievant was assigned to less than a full-time schedule at Jefferson Park during the period between approximately March 2015 and July 2016. For all of the above reasons, the Service asks that the Grievance be denied in its entirety.

VI. DISCUSSION AND FINDINGS

A. Introduction

I have determined that the Grievance is arbitrable, as this matter constitutes a continuing violation. As to the merits, the Grievance is sustained in part. While the Service did show that it attempted to provide Grievant with work in the Carrier Craft, it appears that there was work available in the Clerk Craft for Grievant. However, because the Clerk Craft Union was going to file a grievance, the Service stopped providing said work to Grievant. Therefore, to the extent that there was Clerk Craft work for Grievant, and for which Grievant did not receive said work based on the threatened grievance, based on the Snow Award, Grievant should have been placed on Leave with pay for this time period.

The matter is remanded to the parties to determine the amount of Clerk Craft work that was available, but denied to Grievant based on the threatened grievance, during the period of June 27, 2015 until the time that Grievant returned to full-time work. Once that amount is determined, Grievant shall be credited with that time.

With the permission of the parties, I shall retain jurisdiction to resolve any questions of interpretation, application or remedy of this Award.

B. Discussion

It appears that sometime in either 2013 or early 2014, Grievant's Illinois driver's license was revoked. Grievant reported this to the Service and the Service did attempt to accommodate Grievant by allowing her to work routes that involved walking. Grievant was also temporarily assigned to the Clerk Craft. Davis-Hayman testified that while Grievant was provided with Clerk Craft work, this temporary assignment ceased when the Clerk Craft

indicated that it would file a grievance over Grievant's assignment to the Clerk Craft. Grievant was driven to areas where she could work by walking a route. Grievant was driven to a route and a truck was left on her route to act as a relay. These accommodations lasted until approximately March 2015, at which time Grievant no longer received a full-time schedule at Jefferson Park.

It is uncontested that although the Service began to schedule Grievant less than full-time in March 2015, she did not file the instant Grievance until approximately July 11, 2015. Grievant further testified that since approximately July 2016, Grievant has returned to a full-time schedule.

According to the testimony of Davis-Hayman and LaGarde, in about March 2015, it was no longer possible to continue these accommodations. As of early 2016, the number of routes at Jefferson Park increased to 43½, and this increase in routes led to additional work for Grievant; she is now again a full-time Letter Carrier.

According to the Union, sufficient work was available for Grievant at the Jefferson Park Station at all relevant times. Further, Davis-Hayman admitted that there were CCAs at Jefferson Park that were working when Grievant was not working full-time.

The first issue in this case is one of arbitrability. It is uncontested that the instant Grievance was filed on or about July 11, 2015 and alleged that the event in question began in March 2015. If the incident that led to the Grievance was an isolated event, I would agree with the Service. However, the Union has alleged that the issue involved in the instant case is a continuing violation. According to the Union, when a contract violation recurs each day and continues on an ongoing basis, said violation is a new violation each and every time it occurs. In the instant case, the Union contends that the continuing violation occurred each day between

approximately March 2015 and July 2016 when Grievant was denied the right to full-time employment.

The JCAM discussed the issue of a continuing violation:

> **Time Limits.** The fourteen days for filing a grievance at Informal Step A begins the day after the occurrence or the day after the grievant or the union may reasonably have been expected to have learned of the occurrence. For example, if a grievant receives a letter of warning, day one of the fourteen days is the day after the letter of warning is received.
>
> **Continuing violations** are an exception to the general rule stated above. In H1N-5D-C 297, June 16, 1994 (C-13671), National Arbitrator Mittenthal explained the theory of continuing violations as follows:
>
> > Assume for the moment, consistent with the federal court rulings, that the Postal Service incorrectly calculated FLSA overtime for TCOLA recipients under the ELM. Each such error would have been a separate and distinct violation. We are not dealing here with a single, isolated occurrence. Management was involved in a continuing violation of the ELM. The affected employees (or NALC) could properly have grieved the violation on any day the miscalculation took place and such grievance would be timely provided it was submitted within the fourteen-day time limit set forth in Article 15. This is precisely the kind of case where a "continuing violation" theory seems applicable. To rule otherwise would allow an improper pay practice to be frozen forever into the ELM by the mere failure of some employee initially to challenge that practice within the relevant fourteen-day period.

In the instant case, the Union has alleged that the Service's failure to provide Grievant with a full-time schedule based on Article 29 was ongoing and was a new violation each and every day that Grievant was not provided with full-time work. I agree with this contention. This was what Arbitrator Mittenthal had in mind when he discussed the concept of a continuing violation. Therefore, I find that the matter is arbitrable. However, while I do not find the

Grievance to be untimely, I note that any remedy awarded could only go back 14 days prior to the filing of the instant Grievance, or June 27, 2015.

As to the merits, the issue in the instant case involves whether the Service violated the National Agreement when it did not assign Grievant to a full-time schedule between March 2015 and July 2016 when Grievant failed to have a valid Illinois driver's license. I note that the relevant provision of the National Agreement is Article 29, which provides as follows:

> Every reasonable effort will be made to reassign such employee to non-driving duties in the employee's craft or in other crafts.

The question in this case is whether the Service made "every reasonable effort" to provide Grievant with full-time work. I note that Davis-Hayman and LaGarde testified that it made every effort to provide Grievant with full-time work in the form of driving her out to walk routes, providing her with a truck to act as a relay and temporarily assigning her to the Clerk Craft, although this cross craft assignment ceased when the Clerk Craft threatened to file a grievance over Grievant's assignment. Further, when work increased at Jefferson Park in 2016, Grievant was returned to a full-time schedule. The Union has presented evidence to show that it believes that there was sufficient work for Grievant to work full-time during the relevant period. Statements by Union Representative Holly Dexter indicated that there was sufficient work available to Grievant to have allowed her to work a full-time schedule during the relevant period.

I note that the JCAM does discuss the issue of "every reasonable effort":

> **Every Reasonable Effort to Reassign.** Even if a revocation or suspension of a letter carriers driving privileges is proper, Article 29 provides that, "every reasonable effort will be made to reassign the employee in non-driving duties in the employee's craft or other crafts." This requirement is not contingent upon a letter carrier making a request for nondriving duties. Rather, it is management's responsibility to seek to find suitable work.

National Arbitrator Snow held in I94N-4I-D 96027608, April 8, 1998 (C-18159), that management may not reassign an employee to temporary non-driving duties in another craft if doing so would result in a violation of other craft's agreement. If it is not possible to accommodate temporary cross-craft assignments in a way that does not violate another craft's agreement, a letter carrier who is deprived of the right to an otherwise available temporary cross-craft assignment to a position in another craft must be placed on leave with pay until such time as he may return to work without violating either unions' agreement. In accordance with Arbitrator Snow's award, in situations where city letter carriers temporarily lose driving privileges, the following applies:

- Management should first attempt to provide non-driving city letter carrier craft duties within the installation on the carrier's regularly scheduled days and hours of work. If sufficient carrier craft work is unavailable on those days and hours, an attempt should be made to place the employee in carrier craft duties on other hours and days, anywhere within the installation.

- If sufficient work is still unavailable, a further attempt should be made to identify work assignments in other crafts, as long as placement of carriers in that work would not be to the detriment of employees of that other craft.

- If there is such available work in another craft, but the carrier may not perform that work in light of the Snow award, the carrier must be paid for the time that the carrier otherwise would have performed that work.

In the instant case, I have carefully reviewed the record and find that while the Service has shown that it made every reasonable attempt to provide Grievant with Carrier Craft work, it appears that there was Clerk Craft work available, but not assigned, for Grievant. Davis-Hayman testified that while she did temporarily assign Grievant to the Clerk Craft, that assignment ceased when the Clerk Craft threatened to file a grievance. Thus, it does appear that there was some level of Clerk Craft work available to Grievant, but because of the threatened grievance, this stopped. Pursuant to the JCAM:

- If there is such available work in another craft, but the carrier may not perform that work in light of the Snow award, the carrier must be paid for the time that the carrier otherwise would have performed that work.

Therefore, I find that to the extent that Clerk Craft work was available for Grievant, but not provided because the threatened grievance during the relevant time period, Grievant should have been placed on Leave with pay. However, I note that the record does not disclose the amount of said Clerk Craft work that Grievant was denied for this reason.

Therefore, to the extent that there was Clerk Craft work available for Grievant during the relevant time, and for which Grievant did not receive said work because of the threatened grievance from the Clerk Craft, based on the Snow Award, Grievant should have been placed on Leave with pay for this time period.

The matter is remanded to the parties to determine the amount of Clerk Craft work that was available, but not provided because of the threatened grievance, during the period of June 27, 2015 until the time that Grievant returned to full-time work. Once that amount is determined, Grievant shall be credited with that time.

With the permission of the parties, I shall retain jurisdiction to resolve any questions of interpretation, application or remedy of this Award.

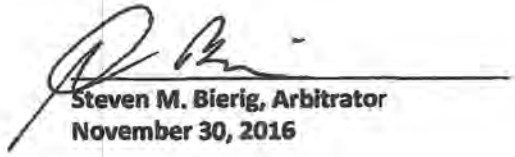
VII. AWARD

For the reasons stated in this Opinion and Award, the Arbitrator finds:

The Grievance is arbitrable, as this matter constitutes a continuing violation. As to the merits, the Grievance is sustained in part. While the Service did show that it attempted to provide Grievant with work in the Carrier Craft, it appears that there was work available in the Clerk Craft for Grievant. However, because the Clerk Craft Union was going to file a grievance, the Service stopped providing said work to Grievant. Therefore, to the extent that there was Clerk Craft work for Grievant, and for which Grievant did not receive said work based on the threatened grievance, based on the Snow Award, Grievant should have been placed on Leave with pay for this time period.

The matter is remanded to the parties to determine the amount of Clerk Craft work that was available, but denied to Grievant based on the threatened grievance, during the period of June 27, 2015 until the time that Grievant returned to full-time work. Once that amount is determined, Grievant shall be credited with that time.

With the permission of the parties, I shall retain jurisdiction to resolve any question of interpretation, application or remedy of this Award.



Steven M. Bierig, Arbitrator
November 30, 2016