

Local Grievance # _____

Issue Statements (Block 15 on PS Form 8190):

1. Did the Postal Service violate Articles 3, 5, 14, 19 or 21 of the National Agreement, or ELM 546.142 or Handbook EL 505 when, on **[date]** and continuing, when it withdrew and/or failed to provided limited duty? If so, what is the remedy?
2. Did the Postal Service violate Articles 3, 5, or 21 of the National Agreement, or 5 USC 8151, or 5 CFR 353 when, on **[date]** and continuing, it withdrew and/or failed to provided limited duty? If so, what is the remedy?
3. Did the Postal Service violate Articles 2, 3, or 5 of the National Agreement, or the Rehabilitation Act of 1973 or EL 307 when, on **[date]** and continuing, it withdrew and/or failed to provided limited duty? If so, what is the remedy?

Union Facts and Contentions (Block 17 of PS Form 8190):

Facts:

1. Letter Carrier **[name]** was injured on the job on **[date]**. [Attach CA-1, CA-2 or CA-2a]
2. OWCP accepted Letter Carrier **[name]**'s claim on **[date]**. [Attach acceptance letter from OWCP]
3. The Postal Service provided limited duty job(s)/rehabilitation assignment(s) to Letter Carrier **[name]** on **[date(s)]**.
4. Letter Carrier **[name]** accepted limited duty job(s)/rehabilitation assignment(s) on **[date(s)]**. [Attach job offer(s)]
5. The assignment(s) consisted of the following tasks. [List tasks and time allotted to each one].
6. Management withdrew/reduced Letter Carrier **[name]**'s limited duty job(s)/rehabilitation assignment(s) on **[date(s)]**. [Attach Notice]
7. The tasks previously performed by Letter Carrier **[name]** are currently being performed by **[names]**. [Attach supporting documentation]
8. Letter Carrier **[name]** has the following medical restrictions. [Attach current medical restrictions/CA-17]
9. The Union submitted request(s) or information (RFI) on **[date(s)]**. [attach RFI(s)]

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Contentions:

1. The present language in Section 546 of the ELM was negotiated by the parties at the National Level and came into effect in 1979. This language has remained unchanged and enforceable for the last 40 years.
2. Up until 1979, the language in Section 546 of the ELM simply stated that the Postal Service make “**maximum efforts**” to provide “**productive employment**” to “**established jobs**” for injured Letter Carriers. [Attach Section 546 of 1978 ELM]
3. The NALC filed a National Level Dispute on the issue and in 1979, the parties agreed on a resolution. The 1979 National Level Settlement [M-1010] changed the Postal Service’s obligation under Section 546 of the ELM. The Postal Service agreed it “**must make every effort toward assigning the employee to limited duty consistent with the employee’s medically defined work limitation tolerance**”.
4. In addition to this new language, the Postal Service agreed to a “pecking order when it assigns limited duty to letter carriers.

ELM 546.142 states:

546.142 Obligation

When an employee has partially overcome the injury or disability, the Postal Service has the following obligation:

- a. *Current Employees.* 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 546.611). In assigning such limited duty, the Postal Service should minimize any adverse or disruptive impact on the employee. The following considerations must be made in effecting such limited duty assignments:

- (1) To the extent that there is adequate work available within the employee’s work limitation tolerances, within the employee’s craft, in the work facility to which the employee is regularly assigned, and during the hours when the employee regularly works, that work constitutes the limited duty to which the employee is assigned.

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- (2) If adequate duties are not available within the employee's work limitation tolerances in the craft and work facility to which the employee is regularly assigned within the employee's regular hours of duty, other work may be assigned within that facility.
- (3) If adequate work is not available at the facility within the employee's regular hours of duty, work outside the employee's regular schedule may be assigned as limited duty. However, all reasonable efforts must be made to assign the employee to limited duty within the employee's craft and to keep the hours of limited duty as close as possible to the employee's regular schedule.
- (4) An employee may be assigned limited duty outside of the work facility to which the employee is normally assigned only if there is not adequate work available within the employee's work limitation tolerances at the employee's facility. In such instances, every effort must be made to assign the employee to work within the employee's craft within the employee's regular schedule and as near as possible to the regular work facility to which the employee is normally assigned.

Note: Placement priority for rehabilitation assignment is the same as for limited duty.

5. Page 164 of the EL 505 correctly breaks down Section 546 of the ELM into 8 parts:

EL-505 Priority for Assignment

If it is necessary to change any of the elements to meet the employee's physical limitations or to provide the employee with suitable, the elements must be changed in this order:

| Priority of Choice | Regular Craft | Regular Tour | Regular Facility |
|--------------------|---------------|--------------|------------------|
| 1 st | Within | Within | Within |
| 2 nd | Outside | Within | Within |
| 3 rd | Within | Outside | Within |
| 4 th | Outside | Outside | Within |
| 5 th | Within | Within | Outside |
| 6 th | Outside | Within | Outside |
| 7 th | Within | Outside | Outside |
| 8 th | Outside | Outside | Outside |

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6. This specifies the steps that must be taken in seeking limited duty work in order to ensure the assignments are minimally disruptive to the ill or injured employee. The Step 4 Settlement G90N-4G-C 95026885, January 28, 1997 (M-01264 the provisions of ELM the provisions of ELM 546.141 (currently ELM 546.142) are enforceable through the grievance/arbitration procedure...”
7. This language from the J-CAM and the provisions of the ELM Section 546.142 are very clear as to what obligation the Postal Service has to injured employees. These provisions of the National Agreement not only require the Agency to seek to provide injured employees with a limited duty job, they also dictate the manner by which the Agency must offer limited duty work to injured employees.
8. The Postal Service has a continuing obligation to always search for work in accordance with Section 546 of the ELM. This principle was established in a National level arbitration in 1987. Arbitrator Bernstein ruled in case # H1N-1J-C 23247:

*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 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 language 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 be available at any point does not mean that it will never become available, because there are many changes that can take place. (Emphasis added)*

9. Since 1979, the Postal Service has had the obligation to seek to provide limited duty work assignments to injured letter carriers without regard to the work's operational necessity. Examples of limited duty work the Post Office has offered for the past 40 years include casing and delivering mail with accommodations, delivery of express mail, collection duties, delivery of auxiliary assignments, answering phones, various clerical and managerial duties, custodial work, edit books and case labels. These and other functions still exist today within the Postal Service.
10. Not only has the Postal Service historically provided this uniquely created work to injured letter carriers, they argued it in a national level grievance and contented they are contractually and legally obligated to do so.

Here's the background to the National arbitration for which the Service wrote the brief. The APWU filed a grievance protesting the fact that an

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injured letter carrier was given a rehabilitation assignment in the clerk craft. The APWU maintained that the work should not have been a rehabilitation assignment and should have, instead, been posted for bid for members of the clerk craft.

The Postal Service's position in that case is that it had not posted the work for bid by arguing that the limited duty work had no operational necessity and that the position was only created out of its contractual and legal obligations.

Here are just a few excerpts from the postal service's brief for Case E90C-4E-C 95076238. As a point of information, "Article 37 duty assignments" are operationally necessary duty assignments in the clerk craft as Article 41 duty assignments are in the carrier craft.

Excerpts from the USPS brief:

Article 37 duty assignments are created by management due to operational needs. Rehabilitation assignments are created as a result of legal, contractual, and regulatory requirements. But for the obligation to the injured employee, the rehabilitation assignment would not exist and would not be created under Article 37.

The rehabilitation assignments at issue are by definition uniquely created for employees who were injured on the job and continue to have work restrictions. A uniquely created rehabilitation assignment is therefore not an Article 37 duty assignment. It only exists as a result of the need to reassign an injured employee.

In the instant case. . .the rehabilitation assignment was created as a result of the injury compensation contractual requirements. The rehabilitation assignment did not exist before the employee was injured on duty and would not have been created by management because no need for the Article 37 duty assignment existed.

Article 37 duty assignments and Article 21 Rehabilitation Assignments are separate and distinct...Such Article 37 duty assignments are driven solely by management's operational needs. This is not true for rehabilitation assignments. Rehabilitation assignments are created as a result of legal, contractual and regulatory mandates.

If there was a bona fide operational need for the craft duty assignment it would have been created long before the rehabilitation assignment was created.

However, nothing in the Agreement impedes management's exclusive right to assign employees to work when and where they are needed and create Article 37 duty assignments to maintain efficiency of the operations.

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This is in sharp contrast to rehabilitation assignments created under Article 21, Section 4.

Arbitrator Das in his National Award (E90C-4E-C 95076238) denied the grievance and reiterated Management's (as well as the NALC) position that it has a legal and contractual obligation to create limited duty assignments that are not operationally necessary.

This issue, the Postal Service stresses, is predicated on the existence of a uniquely created rehabilitation assignment for an employee with work restrictions due to an on-the-job injury. The Postal Service contends that an assignment of this sort is not an Article 37 duty assignment. It only exists as a result of the need to reassign the injured employee. It is created under Article 21.4 and ELM Section 546. When the injured employee vacates the assignment, it will no longer exist.

Creation of duty assignments is based on management's operational needs. The present assignment, in contrast, was only created because of 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.

Moreover, in that case, the assignment would not exist, but for the obligation to reemploy the injured employee, it would not have been created.

The Postal Service is clearly required to "make every effort" to offer limited duty work without regard to operational necessity for the work to injured letter carriers. National Arbitration Das establishes that limited duty work must be offered to letter carriers in accordance with the pecking order as outlined in Section 546.14 of the ELM and Article 21.4 of the National Agreement.

11. Article 21, Section 4 (which covers Injury Compensation) states:

Employees covered by this Agreement shall be covered by Subchapter I of Chapter 81 of Title 5, and any amendments thereto, relating to compensation for work injuries. The Employer will promulgate appropriate regulations which comply with applicable regulations of the Office of Workers' Compensation Programs and any amendments thereto.

Workers' Compensation. Letter carriers who sustain occupational injury or disease are entitled to workers' compensation benefits under the Federal Employees' Compensation Act (FECA), administered by the U.S. Department of Labor's Office of Workers' Compensation Programs (OWCP).

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Sources of information concerning federal workers' compensation benefits are:

- *ELM Chapter 540 – USPS regulations governing workers' compensation;*
- *USPS Handbook EL-505, Injury Compensation (December 1995);*
- *Title 5 United States Code Section 8101 (5 U.S.C. 8101) – the Federal Employees' Compensation Act (FECA);*
- *Title 20 Code of Federal Regulations Section Chapter 1 (20 C.F.R. 10) – regulations of the Office of Workers' Compensation Programs;*
- *Title 5 Code of Federal Regulations Part 353 (5 C.F.R. 353) – regulations concerning the restoration to duty of employees who sustain compensable injuries.*

12. The Postal Service not only has contractual requirements to injured letter carriers, but legal obligations as well. The Step 4 Settlement (M-01316) states in relevant part,

...However, the parties agreed that pursuant to Article 3, grievances are properly brought when management's actions are inconsistent with applicable laws and regulations.

13. Laws regarding the Postal Service's obligation to restore partially recovered compensably injured letter carriers to employment can be found at 5 CFR 353.

The Office of Personnel Management (OPM) took the authority granted to it by 5 U.S.C. 8151 and issued regulations regarding restoration to duty in the Code of Federal Regulations (CFR). The regulations are found in 5 CFR Part 353 – "Restoration to Duty from Uniformed Service or Compensable Injury."

5 CFR Part 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. This right is agency wide and applies for a period of 1 year from the date of eligibility for compensation begins. After 1

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year, the individual is entitled to the rights accorded individuals who fully or partially recover, applicable. [Emphasis Added]

5 CFR Part 353.301 (d):

Partially recovered. 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 way as other handicapped individuals under the Rehabilitation Act of 1973.” [Emphasis Added]

The phrase “must make every effort” provides strong protection for letter carriers. The law requires the Postal Service to do more than make some effort. It must also do more than make a lot of effort. The Postal Service must make every effort.

The Agency falls woefully short of passing the every effort test in this case.

The law gives the Postal Service an example of the bare minimum way that injured workers must be treated – the Rehabilitation Act of 1973.

29 CFR 1614.203 Rehabilitation Act.

- a. Model employer. The Federal Government shall be a model employer of individuals with disabilities. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities.**
- b. ADA Standards. The standards used to determine whether section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791), has been violated in a complaint alleging no affirmative action employment discrimination under this part shall be the standard applied under Title I and V (sections 501 through 504 and 510) of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101, 12111, 1201), as such sections relate to employment. These standards are set forth in the Commission’s ADA regulations at 29 CFR part 1630.”** [Emphasis Added]

The Postal Service must act as a “model employer” and must give “full consideration” to the placement of injured workers because 5 CFR 353 holds the Postal Service to at least the standards of the Rehabilitation Act.

ADA Regulation: 29 CFR 1630.9 - Not making reasonable accommodation.

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- c. **It is unlawful for a covered entity not to make reasonable accommodation to** the known physical or mental limitations of an otherwise qualified applicant or **employee with a disability**, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business. [Emphasis Added]

It is unlawful for a covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual's physical or mental impairments.

14. Article 2, Section 1 of the National Agreement sets forth unambiguous contractual and legal obligations. Article 2, Section 1 of the National Agreement states:

The Employer and the Union agree that there shall be no discrimination by the Employer or the Union against the employees because of race, color, religion, national origin, sex, age or marital status.

In addition, consistent with the other provisions of the Agreement, there shall be no unlawful discrimination against handicapped employees, as prohibited by the Rehabilitation Act.

Reasonable accommodation is the Postal Service's obligation to find "reasonable ways to accommodate" an injured worker.

The Postal Service's Handbook EL 307 is how the Post Office meets its obligation under the Rehabilitation Act.

EL-307 Reasonable Accommodation – Section 131, The Rehabilitation Act

The Rehabilitation Act prohibits discrimination against qualified employees and job applicants with disabilities in the federal government, including the United States Postal Service. 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/she desires. [Emphasis Added]

EL-307 Reasonable Accommodation – Section 531, Reassignment as a Reasonable Accommodation

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Reassignment is a form of reasonable accommodation that may be appropriate if no other accommodation will allow the employee to perform the essential function of the position. Barring undue hardship, reassignment will be considered as a reasonable accommodation if it is determined that no other reasonable accommodation will permit the employee with a disability to perform the essential function of his/her current position. [Emphasis Added]

The EL-307, Section 531 provides that another type of reasonable accommodation is “reassignment”. If no other accommodation enables the injured employee to perform the duties of his/her position, the Rehabilitation Act provides for reassignment to other work.

The Postal Service has been providing reasonable accommodation for years. Now the Postal Service, through its actions, states it is no longer required to provide an employee a reasonable accommodation. This is a direct violation of the Rehabilitation Act and contradicts the Service’s own Handbook EL-307, which requires the Service to “consider ways to change the manner of doing a job.”

Remedy (Block 19 of PS Form 8190):

1. Immediately restore Letter Carrier **[name]** to his/her previous Limited Duty/Rehabilitation Assignment.
2. Make Letter Carrier **[name]** whole for all lost wages and benefits, including but not limited to, annual and sick leave (lost and used), TSP benefits, out of schedule premium (if applicable) and overtime pay (if applicable).
3. Any or all remedies Step B or Arbitrator deems appropriate.

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National Association of Letter Carriers Request for Information

To: _____
(Manager/Supervisor)

Date _____

(Station/Post Office)

Manager/Supervisor _____,

Pursuant to Articles 17 and 31 of the National Agreement, I am requesting the following information to investigate a grievance concerning a violation Articles 2, 3, 5, 14, 19, and 21:

1. Copy of the letter from Office of Workers' Compensation Programs (OWCP) accepting Letter Carrier **[name's]** claim.
2. Copy of the written Limited Duty Job Offer (LDJO)/Rehabilitation Assignment the postal service withdrew from Letter Carrier **[name]**.
3. Copy of the current medical restrictions of Letter Carrier **[name]** (such as CA-17's or OWCP-5).
4. Written notice from management that LDJO/Rehabilitation Assignment is withdrawn from Letter Carrier **[name]**.
5. Copies of all prior LDJO's/Rehabilitation Assignments given to Letter Carrier **[name]**.
6. Copies of any past medical restrictions for Letter Carrier **[name]**.
7. Copies of PS Forms 50 for Letter Carrier **[name]**.
8. Copies of TACS Overtime Alert Reports for all employees in the **[Station/Post Office name]** (Prior to employee sent home and after)
9. Copies of TACS Employee Everything Report for all employees in the **[Station/Post Office name]** (Prior to employee sent home and after)

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10. Copies of Weekly and Monthly Flash Reports for the last 12 months for the **[Station/Post Office name]**.

I am also requesting time to interview the following individuals:

1. **[name(s)]** at the **[Station/Post Office]**

Your cooperation in this matter will be greatly appreciated. If you have any questions concerning this request, or if I may be of assistance to you in some other way, please feel free to contact me.

Sincerely,

Shop Steward
NALC

Request received by: _____

Date: _____

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**National Association of Letter Carriers
Request for Steward Time**

To: _____
(Manager/Supervisor)

Date _____

(Station/Post Office)

Manager/Supervisor _____,

Pursuant to Article 17 of the National Agreement, I am requesting the following steward time to investigate a grievance. I anticipate needing approximately _____ (hours/minutes) of steward time, which needs to be scheduled no later than _____ in order to ensure the timelines established in Article 15 are met. In the event more steward time is needed, I will inform you as soon as possible.

Your cooperation in this matter will be greatly appreciated. If you have any questions concerning this request, or if I may be of assistance to you in some other way, please feel free to contact me.

Sincerely,

Shop Steward
NALC

Request received by: _____
Date: _____

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PRIVACY ACT AUTHORIZATION AND

I

authorize the NALC and/or its authorized representatives to disclose information received through the U.S. Department of Labor/Office of Workers' Compensation Programs deemed necessary to investigate and/or process grievances.

This authorization is effective on the date it is signed and is effective until revoked by me in writing. A copy of this authorization shall have the same force and effect as the signed original.

Signature of Claimant

Printed Name

Date

Privacy Act Statement: By signing this form you authorize the disclosure of your information regarding workers' compensation claims to the NALC and/or its representatives to investigate or to determine if a grievance exists. This form will be maintained by the NALC and will only be disclosed as part of a grievance should it be determined a violation of the National Agreement or FECA Regulations exists.