M-01807

MEGAN J. BRENNAN
CHIEF OPERATING OFFICER
EXECUTIVE VICE PRESIDENT

UNITED STATES POSTAL SERVICE

March 19, 2012

AREA VICE PRESIDENTS

SUBJECT: Employee Medical Restrictions

When craft employees provide medical documentation indicating that they have a disability and cannot work more than eight hours, or that they require other accommodations that may impact their ability to deliver the mail in an efficient manner, this can be challenging for a manager with limited resources who is trying to move the mail. However, the answer is neither to work disabled employees outside of their restrictions, nor to discipline them for being unable to complete their route. Significant liability may result from those courses of action.

A decision was recently issued against the Postal Service in an Equal Employment Opportunity Commission (EEOC) case based upon a finding of disability discrimination and retaliation. The EEOC Administrative Judge awarded the employee, a letter carrier, $200,000 in compensatory damages, 39 days of back pay, $12,420 for psychological treatment, and $118,659 in attorney fees, expert witness fees and costs.

This case is significant because it highlights a growing trend in USPS EEOC complaints—allegations that managers are disregarding employees' medical restrictions. In this particular case, the judge found that management was on notice of the carrier's restrictions by virtue of medical documentation she had submitted to management, as well as her statements regarding those restrictions. The carrier's primary restrictions were a limitation that she could work no more than eight hours per day and a requirement that she be granted a ten minute stretch break every hour. The judge determined that the carrier was frequently required to work more than eight hours and that her workload was not adjusted to allow for the ten minute breaks. There was also a finding that the carrier was harassed when she attempted to abide by her medical restrictions.

Human Resources and the Law Department have more appropriate ways to work through these issues. Therefore, it is critical that operations managers seek their assistance when faced with medical restrictions to ensure that the proper process is followed, and to ensure that Postal Service operational and financial resources are not compromised. There are valuable resources at http://blue.usps.gov/uspslaw/ReasonableAccom.htm on reasonable accommodations, including area law office contacts.

Thank you for your usual support.

Megan J. Brennan

475 L'Enfant Plaza SW
Washington, DC 20260-1000

LABOR RELATIONS

M-01360

UNITED STATES POSTAL SERVICE

RECEIVED
OCT 1 1998
CONTRACT ADMINISTRATION UNIT
N.A.L.C. WASHINGTON, D.C.

Mr. Vincent R. Sombrotto
President
National Association of Letter
Carriers, AFL-CIO
100 Indiana Avenue, NW
Washington DC 20001-2197

Re: E94N-4E-C 98057013
Timmons, M.
Phoenix, AZ 85026-9511

Dear Mr. Sombrotto:

On August 14, 1998, I met with your representative to discuss the above-captioned grievance currently at the fourth step of our contractual grievance procedure.

After reviewing this matter, we mutually agreed that no national interpretive issue is fairly presented in this case, with the following understanding (from the Snow award in Case Number H1C-5K-C 24191):

> An inability to work **overtime** does not necessarily prohibit an employee from performing his or her normal assignment. Accordingly, such an individual working with such a restriction is not necessarily on **"light duty."** Employees restricted from working **overtime** may bid on and receive assignments for which they can perform a regular eight hour assignment.

Accordingly, we agreed to remand this case to the parties at Step 3 for further processing or to be scheduled for arbitration, as appropriate.

Please sign and return the enclosed copy of this decision as your acknowledgment of agreement to remand this case.

Time limits were extended by mutual consent.

Sincerely,

Richard A. Murmer
Labor Relations Specialist
Grievance and Arbitration

Vincent R. Sombrotto
President
National Association of Letter Carriers,
AFL-CIO

Date: 10/22/98

475 L'ENFANT PLAZA SW
WASHINGTON DC 20260-4100

USPS #815301

C# 18906

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration between AMERICAN POSTAL WORKERS UNION and UNITED STATES POSTAL SERVICE	GRIEVANT: C. Hernandez POST OFFICE: Phoenix, AZ CASE NO. H1C-5K-C 24191

BEFORE: Professor Carlton J. Snow

APPEARANCES: Mr. Martin I. Rothbaum

Mr. C. J. "Cliff" Guffey

PLACE OF HEARING: Washington, D.C.

DATE OF HEARING: December 11, 1990

POST-HEARING BRIEFS: March 4, 1991

AWARD:

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer violated Article 37 of the National Agreement when, on approximately March 28, 1984, management denied the grievant a bid assignment due to her inability to work overtime. Because the grievant was the senior bidder for the open position and met all published qualification standards, she should have been awarded the position. An inability to work overtime does not necessarily prohibit an employe from performing his or her normal assignment. Accordingly, such an individual working with such a restriction is not necessarily on "light duty." Employes restricted from working overtime may bid on and receive assignments for which they can perform a regular eight hour assignment. The parties did not intend the 1987 Memorandum of Understanding to control individuals who are unable to work overtime but have no other medical restrictions.

The parties shall have sixty days from the date of this report to negotiate a remedy for the specific grievant involved in the case. If they are unable to accomplish this objective, they, by mutual agreement, may activate the arbitrator's jurisdiction any time during the ninety days period following the date of this report or by the request of either party after sixty days have passed from the date of this report but expiring ninety days after the date of this report. Further evidentiary hearings might be necessary

in order for the arbitrator to fashion an appropriate remedy. It is so ordered and awarded.

Date:_____

_____
Carlton J. Snow
Professor of Law

IN THE MATTER OF ARBITRATION BETWEEN AMERICAN POSTAL WORKERS UNION AND UNITED STATES POSTAL SERVICE (Case No. H1C-5K-C 24191) (C. Hernandez Grievance)	ANALYSIS AND AWARD Carlton J. Snow Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to an appeal to arbitration from the American Postal Workers Union on January 18, 1985. The matter came to arbitration pursuant to Article 15, Sections 2 and 4 of the National Agreement. A hearing occurred on December 11, 1990 in a conference room of the United States Postal Service headquarters located at 475 L'Enfant Plaza, S.W., in Washington, D.C. Mr. Martin I. Rothbaum, Labor Relations Program Analyst, represented the United States Postal Service. Mr. C.J. "Cliff" Guffey, Assistant Director of the Clerk Division, represented the American Postal Workers Union.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The advocates fully and fairly represented their respective parties. Ms. Ashorethea

Cleveland of the Diversified Reporting Services, Inc., recorded the proceeding for the parties and submitted a transcript of 91 pages.

At the hearing, the Employer challenged the substantive arbitrability of the dispute. The parties agreed, however, that the issue of arbitrability was so enmeshed in the merits of the case that the arbitrator should hear all relevant evidence and proceed to an award on the merits of the case only if the matter proved to be substantively arbitrable. The parties elected to submit post-hearing briefs, and the arbitrator officially closed the hearing on March 4, 1991 after receipt of the final brief in the matter.

II. STATEMENT OF THE ISSUE

The parties failed to agree at the arbitration hearing regarding a statement of the issue before the arbitrator. The Employer maintained that the issue is" "Was there a violation of Articles 13 and 37 of the National Agreement when an employe was denied a bid assignment on or about March 28, 1984 due to her inability to work the full duties of the assignment?" According to the Union, the correct issue before the arbitrator is: "Did the Postal Service violate Article 37 when the Service denied the grievant, who was the senior qualified bidder, bid Assignment 3711?"

The primary difference between the issues presented by the parties is whether Article 13 of the National Agreement

was violated by management. At the arbitration hearing, the Union alleged that only Article 37 of the National Agreement had been violated. According to Mr. Guffey, the Union "never alleged that they [management] violated Article 13." (See, Tr., 6). According to Mr. Rothbaum, management believed "it was the Union's position all along that Articles 13 and 37 were the issue, and there are Union documents that substantiate that." (See, Tr., 9).

A careful review of evidence submitted to the arbitrator supports a conclusion that the Union is claiming only a violation of Article 37 of the National Agreement. At Step 2, documents in the grievance procedure refer to a possible violation of Article 19 of the National Agreement; but no one has argued to the arbitrator that Article 19 is a focal point of this dispute. Based on authority from the parties, the arbitrator states the issues as follows:

1. Is the grievance substantively arbitrable?
2. If so, did the Employer violate Article 37 of the National Agreement when, on approximately March 28, 1984, the Employer denied the grievant a bid assignment due to her inability to work overtime? If so, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 37 - CLERK CRAFT

Section 1. Definitions

B. Duty Assignment. A set of duties and responsibilities within recognized positions regularly scheduled during specific hours of duty.

Section 3. Posting and Bidding

A. 1. All newly established craft duty assignments shall be posted for full-time regular craft employees eligible to bid within 10 days. All vacant duty assignments, except those positions excluded by the provisions of Article 1, Section 2, shall be posted within 21 days unless such vacant duty assignments are reverted or where such vacancy is being held pursuant to Article 12.

E. Information on Notices

Information shall be as shown below and shall be specifically stated:

1. The duty assignment by position, title and number (e.g., key or standard position)

4. Hours of duty (beginning and ending) and tour.

6. Qualification standards.

F. Results of Posting

1. The senior qualified bidder meeting the qualification standards for the position shall be designated the successful bidder.

IV. STATEMENT OF FACTS

In this case, the Employer has challenged the arbitrator's subject matter jurisdiction. On the merits, the Union has challenged the decision of management to deny a work assignment based on an employe's inability to work overtime. Although the meaning of the facts is in dispute, there is substantial agreement on the underlying context of the dispute. The grievant became an employe of the U.S. Postal Service some time prior to October of 1980. On October 4, 1980, she suffered an injury which resulted in her subsequent inability to perform certain normal work duties. From October of 1980 until January of 1984, the grievant underwent various medical treatments and was classified during this time with either a "limited duty" or a "light duty" status. At one point, the grievant's doctor limited her to answering the telephone at work.

On January 31, 1984, the grievant's doctor signed a "work limitation" slip which indicated that the grievant "may return to regular duties with no limitations on January 31, 1984." The doctor also indicated that the grievant "may work eight hours per day." (See, Union's Exhibit No. 5, p. 2). On January 31, 1984, a medical doctor for the Employer concurred with the report of the grievant's personal physician. According to the Employer's doctor, the grievant "is medically approved for regular duty, eight hours only, per day." (See, Union's Exhibit No. 5, p. 1).

On approximately February 17, 1984, management posted job No. 3711, a job entitled "Mark-up Clerk--Automated."

The job involved operating an electro-mechanical operator paced machine used to process mail that was undeliverable as addressed. On March 9, 1984, the Employer announced that the grievant was the senior bidder and that job No. 3711 had been awarded to the grievant. (See, Union's Exhibit No. 7).

On March 16, 1984, management notified the grievant that she did not meet physical requirements for the job because of her "limited duty restrictions." (See, Employer's Exhibit No. 3(R)). The Employer asked the grievant to provide medical documentation of her ability to meet physical requirements of the position, or she would risk losing the bid. The grievant responded by re-submitting the form completed by her doctor on January 31, 1984 which allowed her to return to regular duties but limited her to no more than eight hours of work a day. On March 28, 1984, the Employer acknowledged receipt of the doctor's statement and added that

> The documentation provided states that you may work 8 hours per day. Your job duty requirements may require you to work more than 8 hours per day.
>
> Please provide us with a current evaluation of your ability to meet the physical requirement of this position prior to April 4, 1984.
>
> Failure to provide the required documentation will result in your bid being disallowed, and you will not be awarded the position.. (See, Employer's Exhibit No. 3(S)).

On April 11, 1984, the grievant submitted a Step 1 complaint in the matter. Subsequently, she submitted a work limitation slip prepared by her doctor on April 12, 1984 which referred to notes of April 3, 1984. (See, Employer's

Exhibit No. 3(T) and (U). The grievant's doctor recommended the following:

> The patient is apparently being asked to work a 50 hour a week shift. That is, 10 hours a day, 5 days a week. She's willing to work an 8 hour shift, a regular 40 hour work week, and I think it is reasonable to try this. I'm concerned, however, with the fact that, in time, that still she may not be able to handle this repetitive type of activity; and although I will give her medical clearance to try this on a 40 hour work week schedule, I would wish to indicate to her administrators . . . that it may become necessary for her to be considered for a job transfer to a job that does not include this kind of repetitive activity. (See, Employer's Exhibit No. 3(U).

On receiving this medical documentation, management concluded that the employe was not able to perform all requirements of the position and that she could not be awarded job No. 3711. The grievance was denied at each step of the procedure, and the Union appealed it to arbitration on January 18, 1985. When the parties were unable to resolve their differences, the matter came for hearing on December 11, 1990 with no challenge on the basis of procedural arbitrability.

V. POSITION OF THE PARTIES

A. The Employer

According to the Employer, the arbitrator is without subject matter jurisdiction in this case because "the parties resolved any national interpretive issue discussed in the grievance procedure in September of 1987 with the signing of a Memorandum of Understanding." (See, Employer's Post-hearing Brief, p. 11). The Employer has offered two distinct arguments for its theory of the case that the grievance is not arbitrable. First, the Employer maintains that the parties consistently considered the grievant to be in a "light duty" status during all relevant times, including the time period immediately before she bid on job No. 3711. Second, the Employer maintains that changes in language of the Local Memorandum of Understanding highlight a Union agreement to the effect that an inability to work overtime amounts to "light duty" status. In either case, the Employer believes that "light duty" status is a condition which the parties fully addressed and is controlled by the 1987 Memorandum of Understanding between the parties and that no national interpretive issue remains for resolution by the arbitrator.

Mr. George S. McDougald, General Manager of the Grievance and Arbitration Division for the Employer, and Mr. William Burrus, Executive Vice-president for the Union, signed the Memorandum of Understanding on September 1, 1987. This Memorandum established procedures to be followed when "an

employee, as a result of illness or injury or pregnancy, is temporarily unable to work all of the duties of his or her normal assignment. Instead, such an employee is working on (1) light duty; or (2) limited duty." (See, Employer's Exhibit No. 1).

The Employer contends that the grievant was on "light duty" during the time period when she bid on job No. 3711. Accordingly, it is the belief of the Employer that the grievance which arose out of management's denial of her bid must be resolved in accordance with the 1987 Memorandum of Understanding. Hence, it is the belief of management that no issue remains for the arbitrator to consider. The Union, likewise, has considered the grievant to be in a "light duty" status throughout the grievance process, according to the Employer. (See, Employer's Post-hearing Brief, p. 11).

As evidence of this proposition, the Employer has pointed to Union statements during the grievance procedure. At Step 3, the Union argued that "the Local Memoranda of Understanding [sic] reads 'Employees with a light duty status must be allowed to bid and be awarded a position provided he/she can perform the duties of the new assignment.'" (See, Joint Exhibit No. 2, p. 5). In addition to this document, the Employer maintains that the medical documentation confirms the fact that the grievant was never removed from "light duty" status. According to the Employer, notes of the grievant's doctor indicate that he was not certain the grievant could perform even a 40 hour work week schedule.

According to the Employer, the doctor gave the grievant permission to "try" to work. He was not saying she could perform the work even for an eight hour day, according to the Employer's interpretation of the doctor's statements. (See, Employer's Post-hearing Brief, p. 12).

The Employer has acknowledged that there was some discussion with the Union during the grievance procedure which suggested that the Union believed the grievant was able to perform the assignment for eight hours a day and that she should not be denied the job because she could not work beyond this time period. (See, Employer's Post-hearing Brief, p. 12). It is the position of the Employer, however, that this discussion failed to amount to a disagreement about the fact that the employe was on "light duty" status. According to management, the grievant's status was precisely the status which the parties had covered in their 1987 Memorandum of Understanding. The Employer described its position as follows:

> It is our position that a person being unable to work more than eight hours, being considered on light duty, is no different than a person with a sit-down job and unable to walk being considered on light duty. (See, Employer's Post-hearing Brief, p. 12).

Alternatively, the Employer argues that the grievant was never removed from "light duty" status because she was under the control of a "Disability Reassignment Board established by the Local Memorandum of Understanding for the Phoenix Post Office. The Local Memorandum of Understanding had a provision which stated that "if the employee being qualified

for permanent light duty bids off that assignment (with the approval of the Disability Reassignment Review Board, and supported by medical evidence), he will not be able to have his new assignment tailored to light duty." (See, Employer's Exhibit No. 2). According to the Employer, this contractual provision "required the approval of the Committee to bid off. She could not arbitrarily leave the control of the Committee." (See, Employer's Post-hearing Brief, p. 13). Management argues that, because the grievant was still under the control of the Committee, her circumstances were covered by the 1987 Memorandum of Understanding between the parties.

It is also the position of the Employer that bargaining history for the Local Memorandum of Understanding shows that it was the intent of the parties to cover the present case with the 1987 Memorandum of Understanding at the national level. The parties submitted a portion of the 1982 Local Memorandum of Understanding to the arbitrator. It states that:

> Light duty is defined as a restriction on the type of duties that can be performed by the clerk during the tour. Limited hours is defined as a restriction on the number of hours that may be worked on any tour and shall not be construed as light duty. (See, Employer's Exhibit No. 2, p. 8).

Management argues that this provision was marked by an asterisk in the 1982 agreement between the parties. The marking allegedly indicates that management considered the provision to be inconsistent or in conflict with the National Agreement. (See, Tr., p. 72). According to the Employer, the provision was one of a number of provisions

discussed at impasse in May or June, 1982; and the provision quoted by the arbitrator allegedly was negotiated out of the agreement prior to 1983. (See, Tr., 72).

It is the belief of the Employer that "the Union in agreeing to remove the existing language considered work beyond eight hours to be part of the light duty provisions." (See, Employer's Post-hearing Brief, p. 13). In other words, management argues that, when the parties agreed to remove the provision which stated "limited hours is defined as a restriction on the number of hours that may be worked on any tour and shall not be construed as light duty," this meant that a "limited hours" restriction for an employe would be construed as a "light duty" assignment for that employe.

B. The Union

The Union maintains that the grievance is substantively arbitrable. It acknowledges that the 1987 Memorandum of Understanding established a procedure to resolve situations in which an employe, "as a result of illness or injury or pregnancy, is temporarily unable to work all the duties of his or her normal assignment." (See, Union's Post-hearing Brief, p. 2). It is the belief of the Union, however, that there remains a legitimate dispute regarding the meaning of the words "normal assignment" in the 1987 Memorandum of Understanding. According to the Union, "whether a restriction to

not work overtime modifies the employee's normal assignment is not just the threshold issue, but is the core of the case" in dispute before the arbitrator. (See, Union's Post-hearing Brief, p. 3). The Union maintains that the dispute in this case concerns whether the ability to work overtime is included within the duties of a "normal assignment."

To resolve the dispute, the Union focuses on language in the National Agreement in an effort to help define the verbiage of the 1987 Memorandum of Understanding. That Memorandum applies to all employes "temporarily unable to work all the duties of his or her normal assignment." According to the Union, "regular" or "normal" assignments are identified in all contracts and manuals of the parties as eight hour work days. From this fact, the Union concludes that overtime is not part of a "normal duty assignment" and that, therefore, the 1987 Memorandum of Understanding does not apply to employes who are capable of working the normal eight hour work day. (See, Union's Post-hearing Brief, pp. 13-14). Further, the Union maintains that a limitation to work no more than eight hours a day does not necessarily constitute "light duty." According to the Union, Article 13 describes light duty as a "reassignment to other duties because employes are 'unable to perform their regularly assigned duties.'" (See, Union's Post-hearing Brief, p. 14).

It is the position of the Union that, regardless of what the grievant's restrictions were at other times, her doctor had released her to full duty at the time of her bid

on job No. 3711, with only a restriction that she not work overtime. Accordingly, the Union argues that the grievant, in fact, was able to perform her "normal assignment" and that, therefore, the circumstances of her case and others like hers do not fall within and are not covered by the 1987 Memorandum of Understanding. As a consequence, it is the conclusion of the Union that the dispute before the arbitrator is substantively arbitrable.

It is the belief of the Union that no weight should be accorded testimony and evidence which management introduced with regard to the 1982 Local Memorandum of Understanding. The Union argued that such evidence involved a new argument which had not been raised at prior steps of the grievance procedure. (See, Tr., 34-35). Furthermore, the Union argues that the 1982 Local Memorandum of Understanding included language which stated "limited hours is defined as a restriction on the number of hours that may be worked on any tour and shall not be construed as light duty." According to the Union, management's witness on the matter acknowledged that the local agreement which included this language was "the local memo we were being guided by at that time." (See, Tr. 61). The Union acknowledges that this language subsequently was deleted from the Local Memorandum of Understanding. It, nevertheless, is the Union's position that this subsequent deletion of local language "cannot add an 'overtime limitation' to the National Agreement's definition of light duty." (See, Union's Post-hearing Brief, p. 17).

VI. ANALYSIS

A. The Matter of Substantive Arbitrability

1. Did the Union acknowledge that the Grievant Was on "Light Duty"?

The Employer has argued the Union conceded in the grievance procedure that the grievant was on "light duty" status at the time she bid for the disputed job. As a consequence, it is management's conclusion that the present case is governed by the 1987 Memorandum of Understanding signed by Messrs. McDougald and Burrus on September 1, 1987. Hence, the parties already would have negotiated principles covering this dispute, and it would not present a justiciable issue for the arbitrator, according to management.

It is correct that the Step 3 appeal included a statement which said "employees with light duty status must be allowed to bid and be awarded a position provided he/she can perform the duties of the new assignment." (See, Joint Exhibit No. 2, p. 5). The Employer did not submit the status report at the appeal to Step 2 into evidence, although both were cited during the hearing. When management was attempting to demonstrate that the Union had acknowledged the grievant's "light duty" status, Mr. Rothbaum had Mr. Guffey read a portion of the Step 4 appeal. There occurred the following exchange:

Mr. Rothbaum: Go on. Read it.

Mr. Guffey: There is no dispute the employee can perform the job eight hours a day and forty hours a week. The problem is, management takes the position, because

the employee cannot work overtime, she is not entitled to the position. The Union takes the position, the employee is entitled to bid while on permanent light duty as long as it is within the medical restrictions.

Mr. Rothbaum: Acknowledgement that the person is on permanent light duty, Mr. Arbitrator,

Mr. Guffey: That is not an acknowledgement. Produce a document that put her on permanent light duty. Did she have five years in at the time? She couldn't be on permanent light duty. (See, Tr., 14).

The point is the Union took issue with management's contention that the grievant was always on "light duty" status. It is reasonable to understand earlier arguments of the Union within the context of concurrent arguments of management. In other words, it is clear that management has found an admission against interest or an acknowledgement where none existed.

From early stages of the grievance procedure, the Employer asserted that overtime is a requirement of regular positions in the bargaining unit. In its Step 2 response to the grievance on May 2, 1984, the Employer noted that the grievant had been restricted from working more than eight hours a day. Despite this observation, the Employer reached the following conclusion:

> It is management's position that overtime, as needed, is a requirement of regular positions in the Postal Service, and therefore the failure to award her this position was in compliance with the agreement. (See, Joint Exhibit No. 2, p. 6).

Later, in the Step 4 response of January 4, 1985, the

Employer stated that:

> The question in this grievance is whether the grievant was improperly denied a bid because of her physical inability to work overtime.
>
> It is the position of the Postal Service that the ability to work overtime is a bona fide physical requirement which must be met in order to qualify for the position involved. (See, Joint Exhibit No. 2, p. 2).

Throughout the grievance procedure, the Employer has maintained that the ability to work overtime is a part of an employe's "normal assignment." It is precisely this interpretation which the Union challenged, and the question of whether that interpretation is correct has not been answered by the 1987 Memorandum of Understanding between the parties. By focusing on whether or not the grievant was under "light duty status," the Employer failed to interact completely with the fundamental question in dispute between the parties. The 1987 Memorandum of Understanding established procedures to be used when an employe is "temporarily unable to work all of the duties of his or her normal assignment." This agreement between the parties failed to answer the question pursued by the Union into this arbitration proceeding. The 1987 Memorandum of Understanding did not answer the fundamental question regarding whether or not the ability to work overtime is part of the ability to work "all of the duties of his or her normal assignment."

Evidence submitted to the arbitrator makes it reasonable to conclude that the Union's past references to employes on light duties failed to constitute an admission against

interest that the grievant in this case was, in fact, in a "light duty" status. Union references to "light duty" status in various fields has not conclusively demonstrated that the Union considered the grievant in this case to be in a "light duty" status. The prior grievance procedure, including statements by the Employer which the arbitrator previously has discussed, support a conclusion that the continuing dispute has been about whether the ability to work overtime is a part of a "normal assignment." Management has acknowledged that "there was some discussion by the Union during the grievance procedure alleging that the employe was able to work the assignment for eight hours per day and should not be denied the job because she could not work beyond the eight hours." (See, Employer's Post-hearing Brief, p. 12). Although management considered this statement to be an insignificant concession, it acknowledged the core of the present dispute.

Testimony from Renee Breeden, Clerk Craft Director at the time the Union filed the grievance, demonstrated that the Union did not consider the grievant to be on a "light duty" assignment. The testimony was as follows?

> I'm saying, in this case, management took the position that it was light duty. The Union was saying, No, it is not light duty because we have this document that was dated 1/31/84 which goes to your previous question.
>
> She was on light duty prior to 1/31/84 by virtue of this document being marked in the second box, 'may be returned to light duty.'
>
> Those documents that you showed me said, yes, at that point in time, she was on light duty.

> However, in this document that she received on 1/31/84, it came back stating that she could return to regular duties with limitations. (See, Tr., 85-86).

The document referred to by the witness is the form completed by the grievant's doctor. (See, Union's Exhibit No. 5, p.2). The Union stressed the fact that the doctor did not check the box on the form signifying that the grievant "may return to light duty." Instead, the doctor checked the box next to the statement "a return to regular duties with no limitations on 1/31/84." (See, Tr., 70-71). The Union also established that the medical doctor for the Employer, who had authority to make the final decision with respect to the grievant's medical status, stated that the grievant "is medically approved for regular duty, 8 hours only/day." (See, Union's Exhibit No. 5, p. 1, and Tr., 57-58).

The Employer's contention that the medical examination conducted by the grievant's doctor after the grievant bid on job No. 3711 confirmed her ongoing "light duty" status was an unpersuasive contention. The analysis and comments of the grievant's doctor in April of 1984 were more complete than comments made in conjunction with the evaluation on January 31, 1984. Yet, the evaluation and recommendation were essentially the same. On January 31, the doctor indicated that the grievant "may return to regular duties with no limitations on January 31, 1984" and also that the grievant "may work eight hours per day." While definitely voicing a concern about the grievant working more than a regular forty hour a week shift, the doctor did not impose further

limitations on April 3, 1984 beyond those that existed in his report of January 31, 1984. The fact that the grievant or the grievant's doctor may have been aware that the job might have required overtime is not directly relevant to the issue of arbitrability.

2. The Local Memorandum of Understanding

Management argued that the 1987 Memorandum of Understanding resolved the present dispute because the grievant was under the control of a Local Disability Reassignment Review Committee. The 1982 Local Agreement cited by management established a Disability Reassignment Board, and the agreement stated that, "if the employee being qualified for permanent light duty bids off that assignment (with the approval of the Disability Reassignment Review Board and supported by medical evidence), he will not be able to have his new assignment tailored to light duty." Those provisions were marked with an asterisk, indicating that management believed the provisions were inconsistent or in conflict with the National Agreement. (See, Tr., 72). While management argued that the grievant "could not arbitrarily leave the control of the Committee," the Employer submitted no evidence which convincingly established that the grievant was under the control of the Committee in the first place. The closest it came was in questioning Mr. Deapen, a Labor

Relations representative in Phoenix from 1980 through mid-1984. There occurred the following exchange at the arbitration hearing:

> QUESTION: These are all restrictive documents, are they not, Mr. Deapen?
>
> ANSWER: Well, the document that I'm referring to, dated 6/21/83 is entitled, "Employee Work Limitation Slip," but the copy I have, I I don't see anything on it but a doctor's statement. I don't see any restrictions.
>
> QUESTION: OK. But it still says restrictions?
>
> ANSWER: Yes, it does. Beyond that, I don't see any of them that say that she could do the full duties of her position.
>
> QUESTION: Would a person who has this type of medical history have been covered by that Committee under the Local Agreement?
>
> ANSWER: I can't say that for a certainty because I don't have the documents; but certainly, she could apply under that Committee for an assignment. (See, Tr., 50-51, emphasis added).

Evidence submitted to the arbitrator failed to establish that the grievant, in fact, was under the control of the Disability Reassignment Review Board. Initially, neither of the letters which the Employer sent to the grievant on March 16 and March 28, 1984 made any reference to a requirement that the Disability Reassignment Review Board approve her bid for a new position. The correspondence merely asked for additional medical documentation. The evidence simply never established that the grievant was under the control of the Local Disability Reassignment Review Board. Although he speculated that the grievant might have been under the auspices of the Board, Mr. Deapen was unable to answer with

certainty about this matter. (See, Tr., 52).

Nor did testimony from Renee Breeden establish that the grievant, in fact, had been covered by the Disability Reassignment Review Committee. Because the Employer advanced the argument that the control of this Committee is relevant to the issue of substantive arbitrability, it was management's burden to prove the matter of control. Evidence submitted by the Employer simply was unpersuasive in this regard. Although the grievant might have been a logical candidate for committee review, witnesses who addressed the issue did so within the context of many disclaimers. Arguably, even if the Committee was controlling with regard to the grievant's status, the fact that it may not have released her from "light duty" status (if that had been the case) failed to require a conclusion that the 1987 Memorandum of Understanding is controlling in this case. Arguably, a limitation to eight hours a day did not require "tailoring" to light duty. It also could be argued that when an individual has shown an ability to perform work during the regular eight hour shift, he or she has established an ability to perform a new assignment. In other words, the grievant arguably satisfied the requirements which the Committee could have asserted under the local agreement. In other words, the ultimate question remained unanswered in the 1987 Memorandum of Understanding, namely, do the duties of a normal assignment include the ability to work overtime? This is the unanswered question the parties have placed before the arbitrator.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the grievance is substantively arbitrable and that the arbitrator has jurisdiction to proceed to the merits of the case. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow

Carlton J. Snow
Professor of Law

Date: April 29, 1991

B. Merits of the Case

1. Theories of the Case

It is instructive to review the positions the parties have taken on the merits of the dispute in order to place their arguments in context. The Union believes that, "whether a restriction to not work overtime modifies the employee's normal assignment is not just the threshold issue, but is the core of the case." (See, Union's Post-hearing Brief, p. 3). As the senior qualified bidder for job No. 3711, the grievant should have received the bid, according to the Union. Even though the grievant was unable to work more than eight hours a day, she, nevertheless, was able to perform fully the normally scheduled duties of the position and met all the published qualification standards for it. Consequently, when management denied the grievant the bid assignment for the job, it allegedly violated Article 37 of the parties' agreement.

According to the Union's theory of the case, Article 37 of the parties' agreement has set forth a clear procedure by which vacant assignments are filled. Section 1(B) of Article 37 has defined "duty assignment" as "a set of duties and responsibilities within recognized positions regularly scheduled during specific hours off duty. (See, Joint Exhibit No. 1, p. 91). There are clear-cut procedures for posting and bidding on vacant duty assignments. The parties have identified information which must be posted on notices of vacant assignments. Such notices must include hours of duty (beginning and ending) and tour as well as qualification

standards. (See, Joint Exhibit No. 1, p. 103).

The Union has argued that Article 37(3)(F) requires the Employer to designate the senior qualified bidder meeting the qualification standards as the "successful bidder." Article 37(3)(F)(2) states that the successful bidder "must" be placed in the new assignment. (See, Joint Exhibit No. 1, p. 103). As the successful bidder, the grievant should have been placed in the position, according to the Union.

According to the Union, the qualification standards on which the parties have agreed do not include the ability to work overtime, and any insistence that an individual meet this unpublished qualification allegedly is a violation of the National Agreement. The qualification standards set forth in the parties' agreement are specific and have been negotiated with precision. It is the belief of the Union that the qualification standards established for job No. 3711 included no requirement that the successful bidder be able to work overtime. It is the position of the Union that the "overtime" requirement of management is neither an element of a duty assignment nor any sort of bona fide requirement for the position. (See, Union's Post-hearing Brief, p. 11). It is the contention of the Union that the qualification standard set forth in the official handbooks and manuals of the parties are the sole source of job qualifications, and management has no authority to add to, delete, or alter the published qualification standards in the face of objection from the Union. Accordingly, the Union believes

that management is prohibited from adding the ability to work overtime as a qualification standard for job No. 3711 without first successfully negotiating the matter with the Union.

The Employer has argued just as vigorously that (1) the grievant always was in a "light duty" status; (2) that she did not request and was not released by the Local Disability Reassignment Review Board to bid on a new position; and (3) that she at all times had a restriction which prevented her from doing the work in the job for which she bid. It is the position of the Employer that negotiations for the 1982 Local Memorandum of Understanding and the removal of certain language from the Local Agreement demonstrated that "all parties to the Local Agreement understood that a person who could not work more than eight hours was considered on light duty." (See, Employer's Post-hearing Brief, p. 16).

The Union has responded that, despite those negotiations, a dispute remains between the parties with respect to whether a person who could work no more than eight hours was considered on light duty. The Employer has maintained that the Union has asserted a new argument in arbitration which is inappropriate and that it is a new position for the Union to assert that "the employee was not on light duty because she could work the posted schedule for the position for which she bid." (See, Employer's Post-hearing Brief, p. 16). Accordingly, the Union's argument should not be considered by the arbitrator, according to management.

In support of its contention, the Employer has relied on a case by Arbitrator Benjamin Aaron in which he stated:

> I am fully in agreement with Arbitrator Mittenthal that the provisions of Article XV require that all the facts and arguments relied upon by both parties must be fully disclosed before the case is submitted to arbitration should be strictly enforced. (See, Case No. H8N-5B-C 17682).

The Employer has offered the following justification for the rule:

> The reason for the rule is obvious; neither party should have to deal with evidence or argument presented for the first time in an arbitration hearing, which it has not previously considered and for which it has had no time to prepare rebuttal evidence and argument. (See, Employer's Post-Hearing Brief, p.17).

These principles have practical utility and should be closely followed in appropriate cases. The contention that the Union is raising a completely new argument which was not previously disclosed, however, is not persuasive. As previously noted, even at Step 2 of this grievance, management took the position "that overtime, as needed, is a requirement of regular positions in the Postal Service." (See, Joint Exhibit No. 2). This position of management is precisely what the Union is disputing in this case. It is not credible to argue that the issue previously has not been considered nor that management has had no time to prepare rebuttal evidence and argument since it articulated its position regarding the matter in 1984.

Management's position on the merits in this case is straightforward. It contends that:

> Overtime is an integral part of the job. It need not be placed in the job description or in the

> qualification standards any more than a need to be regular in attendance must be specified. (See, Employer's Post-hearing Brief, p. 17).

In this case, management allegedly proceeded on the premise that an employe must perform the entire job, including possible overtime.

The Employer has conceded that the published position description and qualification standards described an eight hour day and relevant physical abilities without mentioning the need to work overtime. Moreover, the Employer has acknowledged that relevant manuals and handbooks used by the parties refer to a basic eight hour work day. On the other hand, it is the position of the Employer that a requirement of an ability to work overtime need not be expressly included in the written qualification standards. It is the belief of the Employer that it retains an inherent managerial prerogative to require overtime from employes.

Since the Employer allegedly retained the right to require overtime of employes, there was no need to include the overtime requirement as part of a job description or as a qualification standard for the position. At the same time, the Employer has recognized that some positions within the operation require little or no overtime. The Employer argues that the difference in the amount of overtime which might be required of any given position is the precise reason why management needs to know the extent of an employe's ability to work overtime before the Employer can grant an employe a position.

2. Managerial Right to Require Overtime

It would be a daunting task to argue persuasively that, as a general rule, management may not require employes to work overtime. Such an argument would fly in the face of a deeply rooted presumption that it is a right of management to require employes to perform overtime assignments, absent some exceptions. As one arbitrator has stated:

> A long line of arbitration decisions has fairly well established the right of management to require its employees to work overtime unless there is a contractual restriction which specifically takes away this right. This right of management, however, requires that the overtime so assigned be of a reasonable duration under reasonable circumstances. There is also a requirement that management accept certain reasonable excuses advanced by employees to be excused from such overtime.
>
> If there is no reference to management's right to require overtime, the provisions of the agreemnent establishing pay for overtime work certainly imply that occasional overtime work may be mandated. (See, Pennwalt Corp., 77 LA 626, 631 (1981)).

There is general agreement among arbitrators that management may require overtime as long as the assignment is "of reasonable duration, commensurate with employee health, safety and endurance, and the direction is issued under reasonable circumstances." (See, Texas Co., 14 LA 146, 149 (1949)).

The collective bargaining agreement between the parties in this case is not silent on the issue of overtime assignments. In Article 8 of the parties' National Agreement, they have made extensive provision for the assignment of overtime work by management. Section 8.5(A) has codified the parties' agreement that management will establish an

Overtime Desired List. Article 8.5(D) of the National Agreement states:

> If the voluntary "Overtime Desired" list does not provide sufficient qualified people, qualified full-time regular employees not on the list may be required to work overtime on a rotating basis with the first opportunity assigned to the junior employee. (See, Joint Exhibit No. 1, p. 16).

This contractual provision makes clear that, when necessary, management is permitted to require overtime work even from employes who may not wish to work overtime. This conclusion is strengthened by other negotiated restrictions contained in the National Agreement as well as in handbooks and manual, which have been incorporated into the parties' agreement by Article 19. Article 8.5(F) and Section 432.32 of the Employee and Labor Relations Manual established maximum hours which the Employer may require of different employes except in emergency circumstances.

A logical implication of including Article 8.5(F) in the National Agreement and Section 432.32 in the Manual is that the parties expected management occasionally to need to require overtime of employes. Moreover, the provisions manifest a desire to place limitations on managerial discretion with regard to overtime requirements. The fact that the parties agreed to limit managerial discretion supports an implication that such discretion exists in the first place. In other words, the Employer has not negotiated away a presumption that management may require overtime from its employes. But this conclusion does not dispose of the dispute in this case.

3. Limitations on Management's Discretion

Some positions in the bargaining unit may require much overtime, while other positions require little or none. Even within the same type of position, some duty assignments require much overtime, while other duty assignments require little or none. Management has argued that the differences in the amounts of overtime that might be required in any given duty assignment constitutes a reason why the Employer must know of any limitations on an employe's ability to work overtime. Consequently, the Employer has concluded that the ability to work overtime must be considered an inherent qualification for any position.

Any decision with respect to whether the ability to work overtime is an inherent job qualification will have different effects depending on the size of the operation. In a large operation, if an employe does not want to work overtime, the availability of other willing workers in the same position would make it easy for an unwilling employe to avoid overtime and for management to accommodate the wishes of the unwilling employe. In the context of a large operation with many employes working the same position, it would be far less important for management to know the extent of an employe's ability to work overtime.

The guiding principle is the rule of reasonableness. For almost half a century in the United States, highly regarded arbitrators have maintained that an employer's right to require overtime must be analyzed within the context

of a reasonable person rule. In Connecticut River Mills, Inc., the eminent Saul Wallen confronted the following contractual provision:

> The eight (8) hour day and forty (40) hour week commencing Monday, at 12:01 A.M. and ending Friday (inclusive), shall be in effect without revision during the term of this contract. Time and one half shall be paid for all work done in excess of eight (8) hours in any day or forty (40) hours in any one week, and overtime paid for on a daily basis shall not be duplicated on a weekly basis. (See, 6 LA 1017 (1947)).

After the employer removed an employe for refusing to work overtime, Arbitrator Wallen overturned the discharge and stated that "once forty hours of service has been rendered, the obligation imposed by the contract has been met." (See, 6 LA 1017 (1947)). He found that the rule of reasonableness restricted the employer in scheduling overtime work. Numerous cases have followed the analysis used by Arbitrator Wallen. (See, e.g., National Electric Coil Co., 1 LA 468 (1945); Campbell Soup Co., 11 LA 715 (1948); and A.D. Julliard & Co., 17 LA 606 (1951)). The point is that, even if management has the right to require overtime work, there is an implied condition of reasonableness which must be applied in each case. Some decisions have found that the rule of reasonableness permitted even a legitimate employer request to work overtime to be refused. (See, e.g., Sylvania Electric Products, Inc., 24 LA 199 (1954)). The eminent Harry Shulman has taught that an employe has a right to reject overtime if there is a justified reason for doing so. (See, Ford Motor Co., 11 LA 158 (1948)).

The important point is that no single, simple formula can be applied to resolve all overtime problems. The facility in Phoenix, Arizona is a large one. The posting containing the position sought by the grievant included bid invitations for five other identical positions with the same regular hours. Management filled all five positions through the bidding process. (See, Union's Exhibit Nos. 6 and 7). Theoretically, all five individuals who received identical positions could place their names on the Overtime Desired List and be able to handle emergency situations requiring overtime.

It is also possible that the Overtime Desired List might not provide sufficient qualified people to fill all overtime requirements. In such a situation, management might be forced to consider less willing employes to work the overtime. This possibility would seem more likely in smaller facilities where a single position of a certain type might exist. In such situations, it could disrupt management's ability to direct the work force if it could not rely on every employe to perform overtime work.

4. An Express Limitation

The parties have established a precise method through which vacant positions are to be filled. Article 37 of the parties' National Agreement established a bidding process which requires that notices of vacant positions be posted and that the notice include qualification standards. Article 37.3(F)(1) makes clear that "the senior qualified bidder meeting the qualification standards for the position shall be designated the 'successful bidder'." (See, Joint Exhibit No. 1, p. 103). Article 37.3(F)(2) makes clear that "the successful bidder must be placed in the new assignment . . . ." (See, Joint Exhibit No. 1, p. 103).

No published qualification standard for the position sought by the grievant included the ability to work overtime. The EL-303 Handbook is equally clear about the fact that management may not alter posted qualification standards. Section 171 of the Handbook states:

> The qualification standard appropriate for the particular position is included in the announcement. This Handbook shall be the source of such qualification standards. No additions, deletions, or alterations will be allowed by any local, district, or regional office, except as provided in 142. (See, Union's Exhibit No. 4, emphasis added).

The EL-303 Handbook is clear about the fact that qualification standards are to be established on a national level but that pursuant to Section 142, local, district, or regional offices may add narrowly limited exceptions to the qualification standards, for example, the ability to type or drive when such needs constitute a bona fide occupational qualification. The parties, however, did not include

in Section 171 a qualification standard that applicants must be able to work overtime. The Handbook is the source of qualification standards, and it is inappropriate to expand the narrow exceptions provided for in Section 171. This conclusion finds support in Section 174 of the EL-303 Handbook. It states that:

> The senior bidders' qualifications will then be compared to the published qualification standard, and the senior bidder will be selected if qualified. (See, Union's Exhibit No. 4, emphasis added.)

The point is that bidders are to be evaluated by express, published qualification standards. The parties have limited management's presumptive discretion with regard to overtime work, and that limitation is inconsistent with the sort of implied qualification standard asserted by management. Rather, the express limitation has activated the rule of reasonableness.

The grievant in this case was performing the full duties of an eight hour day. Unrebutted testimony at the hearing established that, at the time the grievant bid for the position, she was working a regular eight hour day. Renee Breeden, Clerk Craft Director in Phoenix, testified as follows:

> QUESTION: Could you tell us what hours and days off she [the grievant] was working prior to the bid?
>
> ANSWER: Prior to the bid Christina Hernandez had Saturdays and Sundays as days off. She was working 1450 to 2300 hours, and she was performing her duty assignment for eight hours a day.
>
> QUESTION: Has she ever had a step increase withheld?
>
> ANSWER: No, she has not.

QUESTION: The hours and days off she was working, Saturday and Sunday off, 1450 to 2300, is that identical to the job that she was bidding?

ANSWER: Yes, it was. (See, Tr., 70).

5. Another Potential Limitation

There is another reason for concluding that the parties did not bargain for management to enjoy an unfettered right to include overtime as a requirement of any job. The parties intended their relationship to be circumscribed by the law, including such legislation as the Rehabilitation Act of 1973 and the ADEA. Such implicit limitations on the parties' relationship cannot be ignored.

The rule of reasonableness with regard to overtime assignments must be construed within the context of the Americans with Disabilities Act which President Bush signed into law on July 26, 1990. This legislation provides federal protection for persons with disabilities. It extends rights associated with the Rehabilitation Act of 1973 to private employers, while the 1973 Act focused primarily on the federal government.

The legislation defines a "physical impairment" as:

> Any physiological disorder or condition . . . or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; . . . (See, 45 C.F.R. § 84.3(j)(2)(i) (2989)).

If a person has such a physical impairment, it must substantially limit the individual in a major life activity.

The legislation also makes clear that the Americans with Disabilities Act extends to "persons who have recovered--in whole or in part--from a handicapping condition such as a mental or neurological illness, but who may nevertheless be discriminated against on the basis of prior medical

history . . . ." (See, 120 Cong. Rec. 30531, 30534 (Sept. 10, 1974). In other words, the definition of a disability under ADA extends to an individual who had an impairment in his or her life and who, then, recovered from the disability. The new legislation prohibits discrimination against such individuals.

The Americans with Disabilities Act also covers individuals who are "regarded" as having an impairment. In other words, even if an individual has a physical impairment that does not substantially limit a significant life activity, but the person has been treated by the employer as though the person had such a limitation, that person is protected by the legislation. (See, 45 C.F.R. § 84.3(j)(2)(iv) (1989)). That is, the new legislation prohibits discrimination against a person who has been treated by the employer as though the individual were impaired. (See, School Board of Nassau County v. Arline, 480 U.S. 273 (1987)).

It is important to recognize that an impairment under the ADA must not be of any particular duration. In other words, a person with a temporary impairment would be covered by the legislation. One need only establish an impairment that substantially limits a major life activity. It would be possible to establish coverage under the legislation without regard to the duration of the impairment.

If a worker is a qualified individual with a disability, management has an obligation to make a reasonable accommodation for that person. The legislation states that the

employer commits discrimination by

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation or business of such covered entity. (See, ADA § 102(b)(5)(A), 104 Stat. 332).

Section 101(9) of the legislation defines "reasonable accommodation" to include job restructuring as well as modifying work schedules. It is clear from the legislative history for the Act that the intent of the drafters was for management to make a determination about a specific accommodation on the basis of particular facts for individual cases. (See, Senate Rep. 116, 101 1st Cong., 1st Sess. 26, 31 (1989)). Legislators expected that management would be flexible with regard to job restructuring and modifying schedules. (See, Sen. Rep. 31). Legislators were clear about the fact that, even if the job restructuring or modified schedule reduced efficiency of an operation, it must be made, unless the inefficiencies could be defined as an "undue hardship" in specific cases.

The point is that the Employer has an obligation to look to laws such as the Americans with Disabilities Act for general guidance about the nature of the Employer's obligation to provide reasonable accommodation for individuals who are impaired. The Employer's obligation extends to all employment decisions. Decisions must be made on a case-by-case basis looking at the facts of each specific problem. The legislation suggests that the Employer must use a problem

solving approach to the matter. This means management must identify aspects of the job that limit the person's performance; determine potential accommodations; evaluate the reasonableness of the alternative accommodations in terms of their impact on the employer; and, assuming no undue hardship on the employer, implement the most effective accommodation. (See, e.g., Davis v. Frank, 711 Fed. Supp. 447 (N.D. Ill. 1989)).

Management's authority to assign overtime work must be understood within the context of laws such as the Americans with Disabilities Act. The Employer's authority to order overtime is not unfettered, and such overtime assignments cannot be viewed as an implied part of every job description. Management's right to require overtime of employes must be understood not only within the context of the parties' contractual agreement but also as informed by relevant legislation. Those sources make clear that the right of management to require overtime does not translate into an implied or inherent qualification for every postal position.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer violated Article 37 of the National Agreement when on approximately March 28, 1984, management denied the grievant a bid assignment due to her inability to work overtime. Because the grievant was the senior bidder for the open position and met all published qualification standards, she should have been awarded the position. An inability to work overtime does not necessarily prohibit an employe from performing his or her normal assignment. Accordingly, such an individual working with such a restriction is not necessarily on "light duty." Employes restricted from working overtime may bid on and receive assignments for which they can perform a regular eight hour assignment. The parties did not intend the 1987 Memorandum of Understanding to control individuals who are unable to work overtime but have no other medical restrictions.

The parties shall have sixty days from the date of this report to negotiate a remedy for the specific grievant involved in the case. If they are unable to accomplish this objective, they, by mutual agreement, may activate the arbitrator's jurisdiction any time during the ninety day period following the date of this report or by the request of either party after sixty days has passed from the date of this report but expiring ninety days after the date of this report. Further evidentiary hearings might be necessary

in order for the arbitrator to fashion an appropriate remedy. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow

Carlton J. Snow
Professor of Law

Date: April 29, 1991