Employee Claim
Hilary Blake
Milwaukee, WI

C8N-4J-C-11655
Dennis Diamond
Milwaukee, WI

C#01488A
B

VOLUNTARY LABOR ARBITRATION

IN THE MATTER OF ARBITRATION BETWEEN:

UNITED STATES POSTAL SERVICE
Milwaukee, Wisconsin

and

NATIONAL ASSOCIATION OF LETTER CARRIERS
Milwaukee, Wisconsin

Case Nos. 8 MIL EC 38
C 8 N-4 J-C 11655

Grievances of:

HILARY BLAKE (Personal eye glasses property damage claim)
and
DENNIS DIAMOND
(claim for reimbursement for medical certification - absence less than three days)

OPINIONS AND AWARDS

IMPARTIAL ARBITRATOR
ELLIOTT H. GOLDSTEIN

The hearing in these cases was held on Monday, December 15, 1980 at the Main Post Office, 345 West St.Paul Street, Milwaukee Wisconsin, before the undersigned arbitrator appointed by the parties pursuant to the rules of the United States Postal Service Regular Regional Level Arbitration Procedures. At the hearing, all parties were afforded full opportunity to present such evidence and argument as desired, including an examination and cross-examination of witnesses. No formal transcript of the hearing was made, with the parties waiving post hearing briefs in the Blake grievance and each party filing a post hearing brief in the Diamond grievance. Having received the final briefs of the parties on February 19, 1981, the hearing was thereupon declared closed.

The Union's presentation was made by Alvin T. Ostrenga, Regional Administrative Assistant, NALC. The employer's presentation was made by James K. Hellquist, Manager, Arbitration Branch, Central Region.

I. PERSONAL EYEGLASS DAMAGE CLAIM OF BLAKE

The witnesses presented were:

NALC	POSTAL SERVICE
Hilary Blake, grievant	Ronald Lee Burch, Supervisor

A. STATEMENT OF ISSUE

"Did the Postal Service violate the 1978 National Agreement, (Joint Exhibit 1) by refusing to pay the grievant, Hilary Blake, the sum of $59.00 for damage to a pair of personal eyeglasses while on duty?"

B. FACTUAL BACKGROUND

Grievant Hilary Blake is a full time, regular letter carrier at the Teutonia or Western Station, Milwaukee Wisconsin. She has been employed by the Postal Service since November, 1971. Both management and the Union concede that Ms. Blake has been an excellent letter carrier throughout her postal service career.

On September 17, 1979, grievant was working route 0666, a park and loop route. She approached an electrical firm at 3647 N. Teutonia Avenue, Milwaukee in her assigned jeep vehicle, locked all doors of the jeep and proceeded to deliver the mail along her prescribed route. As grievant was returning to the vehicle, she observed a male intruder inside the jeep. She began to shout at the man, and he burst out of the vehicle on the side away from grievant and began running. Grievant pursued the man for two

blocks (apparently in her postal service vehicle) but could not overtake or apprehend him. An immediate investigation showed that the intruder had pulled open the rear door of the vehicle to gain entry, the Union asserts. While in the vehicle the intruder had stepped on grievant's personal prescription eyeglasses which had concededly been left by the grievant in a four-sided plastic mail tray on the floor of the vehicle near the steering column. Grievant notified her supervision immediately after the incident and discussed the matter with John Briggs, acting supervisor on September 19, 1979. Since nothing was taken from the vehicle by the intruder, no police report was made out and no postal inspector investigated the attempted crime for method of entry of the suspected intruder. Instead, employer-witness Burch looked over the truck, but could find no physical evidence of a forced entry or signs that the back door locks had been broken or forced open.

Grievant Blake filled out a postal service form 2146, initially claiming damages of $65.00. The claim was made timely, according to the contract. See Joint Exhibit 2 Within a week, the postal service informed Blake that she would have to support her claim with some evidence of value, such as an estimate or sales receipt from the seller showing the price of the items to be replaced. (Joint Exhibit 3) Within a few days, Blake submitted Joint Exhibit 4, a receipt in the sum of $59.00 for a replacement pair of personal eyeglasses. Several months later, a more complete explanation by the dispensing optician was supplied the service by grievant Blake, Union Exhibit 1. This explanation convincingly proves that both the eyeglass frames and lenses were

damaged beyond repair by the September 17 incident.

C. UNION'S POSITION

Grievant's claim for reimbursement for her destroyed eyeglasses is made pursuant to Article XXVII of the National Agreement, Employee Claims:

> Subject to a $10 minimum, an employee may file a claim within fourteen (14) days of the date of loss or damage and be reimbursed for loss or damage to his/her personal property except for motor vehicles and the contents thereof taking into consideration depreciation where the loss or damage was suffered in connection with or incident to the employee's employment while on duty or while on postal premises. The possession of the property must have been reasonable, or proper under the circumstances and the damage or loss must have not been caused in whole or in part by the negligent or wrongful act of the employee. Loss or damage will not be compensated when it resulted from normal wear and tear associated with day-to-day living and working conditions.
> Claims should be documented, if possible, and submitted with recommendations by the Union steward to the Employer at the local level. The Employer will submit the claim with the Employer's and the steward's recommendation, within 15 days, to the original office for determination. The claim will be adjudicated within thirty (30) days after receipt at the regional office. An adverse determination on the claim may be appealed pursuant to the procedures for appealing an adverse decision in Step 3 of the of the grievance-arbitration procedure.

It is the position of the Union that under the provisions of the above-quoted Article of the contract between the parties, grievant Blake is entitled to reimbursement in the amount of $59.00 from the Service for the destruction of her eyeglasses. The eyeglasses were essential for driving, the Union contends, and possession by Blake was proper under the circumstances. Moreover, the Union asserts that there was no carelessness, no negligence, nor any wrongful act, in whole or in part, by the grievant in her actions as described above. Grievant locked her postal vehicle properly, according to her testimony. In addition, the keeping of her glasses in a tray in a locked vehicle is certainly not negligence or carelessness of any kind. It is to be noted, the Union asserted, that grievant testified that she used her glasses while

driving, and that glasses were prescription sunglasses which were not necessary for her other work activities.

The Union maintains that the grievant properly filled out Postal Service form 2146 and that this form was approved by her immediate supervisor, John Briggs, two days after the incident. Briggs stated on the form (Joint Exhibit 2) that "frame was bent and cracked, lenses appeared okay. recommend replacement of frames." Further, acting supervisor Briggs indicated that the "possession of the eyeglasses was reasonable, useful or proper under the circumstances existing at the time and place of loss or damage."

Thus, all elements for a successful claim have been met by this grievant. She filed her claim promptly and submitted both a receipt for replacement costs and, later an explanation of the need to replace her eyeglasses rather than to repair them since they were a total loss. She testified and submitted the appropriate forms containing information that revealed no carelessness on her part nor improper use of her eyeglasses. Based on the foregoing, this grievance should be sustained in its entirety, and the employer ordered to reimburse grievant Blake in the amount of $59.00 for the loss of the eyeglasses.

D. MANAGEMENT'S POSITION

The first issue raised by the Service in opposition to grievant's claim is that grievant was clearly contributorily negligent at least in part in this matter. The Service maintains that grievant was careless in two quite distinct ways. The

first act of carelessness was in leaving her eyeglasses on the floor of her jeep in a four-sided plastic mail tray. The Service cites to this arbitrator the prior decisions of arbitrators Cohen and Fisher as precedent for requiring grievant and others similarly situated to carry their glasses with them at all times, attached in some fashion to their bodies, if not worn on the bridge of the nose. Indeed, Arbitrator Fisher in case No. N-C-1147, decided July 12, 1974, found that where the involved grievant's glasses were really lost, that is disappeared from his person unbeknownst to him, and were later found smashed, no successful claim could be had. This is so, Fisher held, because the grievant's actions under those facts constituted simple negligence, which under the contemplation of Article XXVII is not compensable. It is to be noted, however, that Fisher specifically held the loss in that case was not due to the act of some other person; instead, Fisher specifically found that the damage to the glasses was caused solely by the action of the grievant.

Arbitrator Cohen, on the other hand, found in case No. 8 DET EC 26, AC-C-22851, dated October 12, 1979, not that a person must attach glasses to his body at all times, but that the grievant in that subject case "took those steps to safeguard his property which are usually taken by a reasonable person: i.e., he took his glasses off, put them in a glass case and put the case in his pocket with the clip over the pocket."

Thus, the Service maintains that both precedent arbitration cases illustrate the controlling principle that an ordinary person

exercising the required standard of care keeps his or her glasses on their person in a safe and secure manner.

The second major point is that employer witness Burch clearly testified that no signs of forcible entry or of a forced lock were present on the grievant's vehicle after the alleged break-in of September 17, 1979. The evidence indicates that the grievant left her truck unlocked and that this carelessness was the primary and proximate cause of destruction of her eyeglasses. If this is so, the employer contends, there is no question that Article XXVII of the National Agreement would not allow any compensation whatsoever.

The third issue, to the service, concerns the powers of the arbitrator. The advocate for the postal service cites to the arbitrator Article XV, Section 4A(6) of the National Agreement as a clear limit of the power of the arbitrator to fashion a remedy even if the arbitrator should find that the grievant has a valid claim under Article XXVII. The service argues that since there is no explicit provision for the ordering of compensation presented by the contract language in Article XXVII, the limits of Article XV control and preclude the arbitrator from awarding a specific dollar amount as compensation. The last argument presented by the postal service is that there was a procedural defect in the processing of this claim in that the specific claim should have been documented to the satisfaction of the postal service within fifteen days and, on its face, that Exhibit 2 reveals that such documentation was not forthcoming.

E. OPINION

After careful consideration of the evidence presented, I conclude that grievant Blake is entitled in the instant case to recover for the destruction of her eyeglasses.

First, I disagree with the Postal Service's reading of the two above-cited arbitrator's decisions. I believe that both Arbitrator Fisher and Arbitrator Cohen have articulated a reasonable person standard to which I can easily subscribe. As noted above, Arbitrator Fisher took great care to narrow the scope of his decision to a finding of an act of simple carelessness by the grievant. In other words, grievant in Fisher's case lost his glasses and in no way could tie in the loss to the act of some other person. Nor was there any evidence presented that the grievant took any reasonable measures to safeguard his property in any way. This is completely contrary to the facts presented here, where grievant left her driving eyeglasses in a locked vehicle, in a plastic container, carefully placed near the steering column. Certainly, these actions are consistent with the requirement of reasonable steps found by Arbitrator Cohen to allow compensation. I find that the placing of the eyeglasses in a container in a locked vehicle when not in use is just as reasonable a course of conduct as the grievant's actions in placing his eyeglasses in an eyeglass case clipped to his pocket in the above-described arbitration decided by arbitrator Cohen.

The postal service's second primary defense to grievant's claim is obviously that grievant actually forgot to lock her truck on the day in question, so that the intruder walked in and did not force his way into her vehicle. The only evidence pre-

sented by the service to substantiate this claim is that one supervisor found no physical evidence of forcible entry or a damaged lock. The grievant presented credible testimony, however, that Postal Service vehicles sometimes have defective locks and in other instances are easily susceptible of being forced open without any substantial physical damage. At any rate, the Postal Service chose not to thoroughly investigate this issue through use of the Police Department or its Postal Inspector Service. Thus, the grievant's forthright and credible testimony before me sustains the Union's burden in proving that the vehicle was locked at all relevant times. Therefore, no contributory negligence is found to have occurred under these facts, and grievant clearly has entertained a claim that should be compensated under Article XXVII.

With reference to the issue of authority to fashion a remedy, I note that arbitrator Cohen fashioned his remedy in the arbitration cited to me by the service. At any rate, I find that the employer's argument that Article XXVII makes employee claims subject to the grievance arbitration procedure but not susceptible to having a remedy afforded should such claim be found meritorious, to be unpersuasive. The effect of such a reading would be to allow arbitrators to make merely advisory opinions as to the merits without any ability to fashion an appropriate remedy once such a conclusion was drawn. This I do not believe to be the case.

The last question, then, as in arbitrator's Cohen above-quoted opinion, is how much is the grievant actually entitled

to recover for her loss. As was the case with Arbitrator Cohen, the parties seemed to have assumed that the proof of the loss is the cost of the replacement of the glasses. Certainly grievant and the acting supervisor apparently assumed so. Employee and Labor Relations Director Lynch also seems to have assumed this to be the case, as a matter of fact, since he requested evidence of the cost of the replacement of the glasses as substantiation for the claim. This request came on September 24, 1979. The receipt for the replacement costs (Joint Exhibit 4) was forthcoming on September 27. This paid receipt certainly seems to comply with the Service's request for an estimate revealing replacement costs.

Thus, I am faced with the same problem as arbitrator Cohen in the above-discussed case. The employer is apparently asserting lack of proof of the depreciated value of the eyeglasses means that the entire claim must fail. The Union is contending for replacement value as the index or standard to support the claim in the amount of $59.00. The lack of proof of original cost was only one of the reasons given by employer for ultimately denying, on November 23, 1979 (Joint Exhibit 5), the validity of the claim. It is to be noted that four other reasons for denying the claim were articulated in Joint Exhibit 5. These reasons are those asserted above in the discussion of the employer's position. Each of these reasons has been rejected by me in prior discussion.

Under these circumstances, I hold that employee has reasonably complied with the requirements of Article XXVII in making out the validity of her claim. The lack of proof of actual purchase date and purchase price of the original eyeglasses goes to how much the grievant is entitled to recover for this loss, and not her right to recover at all. Initially, the parties seemed to have assumed that the proof of the loss is the cost of the replacement glasses. Only on November 23 did the service request information which relates to the depreciated value of the actual glasses destroyed. The Union has consistently maintained that replacement value in this case, the amount of $59.00, is the appropriate monetary measure. However, I agree with Arbitrator Cohen that Article XXVII

> "does not make the value of the replacement of the property the amount of the loss. It says 'the employer may file a claim and be reimbursed for loss...to his personal property...taking into consideration depreciation...'. it is therefore quite clear that the amount of the loss to which Grievant is entitled is the depreciated value of the property lost and not the new, or replacement, value."

In the case before me, as in the matter before Arbitrator Cohen, no evidence was introduced as to the depreciated value of the property, that is, the value of the glasses on September 17, 1979, when the glasses were destroyed by the unnamed intruder. The grievant clearly has a meritorious claim for some compensable loss as developed above. Rather than conduct another hearing to seek evidence as to this value, I will presume, as Arbitrator Cohen did under virtually identical facts, that the eyeglasses were worth half the amount of the cost of the new glasses and

award to grievant Blake the amount of $29.50 for the new glasses.

E. AWARD

The grievance is hereby sustained, and grievant Hilary Blake is awarded the sum of twenty nine dollars and fifty cents ($29.50).

II. REIMBURSEMENT FOR MEDICAL CERTIFICATION REQUESTED OR REQUIRED OF GRIEVANT DIAMOND.

Witnesses presented were:

POSTAL SERVICE	NALC
Barbara J. Adkins, Supervisor	Dennis Diamond, Grievant.

A. STATEMENT OF ISSUES

1. Is the grievance arbitrable?

2. Did the Postal Service violate Parts 513.332 and 513.361 of the Employees and Labor Relations Manual by requesting grievant Diamond to provide medical or other acceptable evidence indicating he was unable to perform his normal duties on July 11, 1979? If so, what should the remedy be?

B. BACKGROUND

The grievant, Dennis Diamond, is a full-time regular letter carrier at the Fred John Station, Milwaukee, Wisconsin. Grievant has been employed by the Service fifteen years.

On July 11, 1979, at 6 a.m., the grievant telephoned his immediate supervisor, Barbara Adkins, and reported inability to

report for duty due to his having the flu. The grievant requested sick leave for this absence. Supervisor Adkins then informed grievant that medical documentation would be "highly recommended" upon his return to work. The grievant then inquired if this "suggestion" as to medical certification meant that a doctor's certificate was required in order for him to be paid for his time off. Adkins responded that is indeed what was the case. The grievant then informed Adkins that he believed that her "high recommendation" was really a requirement and that he would go visit the doctor. Responding to what grievant perceived to be his immediate supervisor's directive, the grievant did in fact visit a physician at the Sage Medical Clinic, was examined, and was given certification of illness. (See Union Exhibit 2). This certification was presented to the employer on July 12, 1979, whereupon the grievant demanded reimbursement for his expenses. The medical expenses involved here is the $13.00 charge for the doctor's visit.

A grievance was filed protesting supervisor Adkin's suggestion or demand for medical certification. For purposes of this case, arbitrator will treat Adkins discussion with the grievant as a demand for medical certification since both parties concede that, under these facts, her request or recommendation was tantamount to an affirmative requirement.

The parties having failed to reach a satisfactory resolution, the matter was submitted to me for final and binding resolution in accordance with the provisions of Joint Exhibit 1, the 1978 National Agreement.

C. PERTINENT CONTRACTUAL PROVISIONS

ARTICLE III. MANAGEMENT RIGHTS

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

ARTICLE X. LEAVE

Section 5. Sick Leave

"The Employer agrees to continue the administration of the present sick leave program which shall include the following specific items...

E. For periods of absence of three (3) days or less, a supervisor may accept an employee's certification for reason of an absence. . .

ARTICLE XV. GRIEVANT'S ARBITRATION PROCEDURE

Section 1. Definition

"A grievance is defined as a dispute, difference, disagreement or complaint between the parties relating to wages, hours, and conditions of employment...."

ARTICLE XIX. 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.

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least thirty (30) days prior to issuance. At the request of the Unions, the parties shall meet

concerning such changes. If the Unions, after the meeting, believe the proposed changes violate the National Agreement (including this Article) they may then submit the issue to arbitration in accordance with the arbitration procedure within thirty (30) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Unions upon issuance."

The employer has contended that the Employee and Labor Relations Manual, Chapter 5, Employee's Benefits, contains a comprehensive and clearly defined instruction that controls this case. The chapter is as follows:

"ARTICLE XIX
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.

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least thirty (30) days prior to issuance. At the request of the Unions, the parties shall meet concerning such changes. If the Unions, after the meeting, believe the proposed changes violate the National Agreement (including this Article), they may then submit the

issue to arbitration in accordance with the arbitration procedure within thirty (30) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Unions upon issuance."

Chapter 5

Employee Benefits

510 Leave

511 General

511.1 Administration Policy

The U. S. Postal Service policy is to administer the leave program on an equitable basis for all employees, considering (a) the need of the USPS and (b) the welfare of the individual employee.

511.2 Responsibilities

.21 Postal officials:

a. Administer the leave program.

...

c. Approve or disapprove requests for leave.

...

511.4 Unscheduled Absence

.41 Definition. Unscheduled absences are any absences from work which are not requested and approved in advance.

...

.43 Employee Responsibilities. Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence for absences when required.

...

513.3 Authorizing Sick Leave

...

.33 Application for Sick Leave

.331 General

Except for unexpected illness/injury situations, sick leave must be requested on Form 3971 and approved in advance by the appropriate supervisor.

.332 Unexpected Illness/Injury

An exception to the advance approval requirement is made for unexpected illness/injuries; however, in these situations the employee must notify appropriate postal authorities as soon as possible as to their illness/injury and expected duration of absence. As soon as possible after return to duty, employees must submit a request for sick leave on Form 3971. Employees may be required to submit acceptable evidence of incapacity to work as outlined in the provisions of 513.36, Documentation Requirements.

The supervisor approves or disapproves the leave request. When the request is disapproved, the absence may be recorded as annual leave, if appropriate, as LWOP, or AWOL, at the discretion of the supervisor as outlined in 513.342.

...

...

.342 Approval/Disapproval. The supervisor is responsible for approving or disapproving applications for sick leave by signing the Form 3971, a copy of which is given to the employee. If a supervisor does not approve an application for leave as submitted, the Disapproved block on the Form 3971 is checked and the reasons given in writing in the space provided. When a request is disapproved, the granting of any alternate type of leave, if any, must be noted along with the reason for the disapproval. AWOL determinations must be similarly noted.

...

.36 Documentation Requirements

.361 3 Days or Less. For periods of absence of 3 days or less, supervisors may accept the employee's statement explaining the absence. Medical documentation or other acceptable evidence of incapacity for work is required only when the employee is on restricted sick leave (see 513.36) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service.

...

.365 Failure to Furnish Required Documentation. If acceptable proof of incapacitation is not furnished, the absence may be charged to annual leave, LWOP, or AWOL.

.37 Restricted Sick Leave

.371 Reasons for Restriction. Supervisors (or the official in charge of the installation) who have evidence indicating that an employee is abusing sick leave privileges may place an employee on the restricted sick leave list. In addition, employees may be placed on the restricted sick leave list after their sick leave use has been reviewed on an individual basis and the following actions have been taken:

D. THE EMPLOYER'S POSITION

First, the employer argues that the clear language of Article X of the Contract, Leave, as set forth above, and relevant portions of Chapter 5 of the Employee and Labor Relations Manual, Joint Exhibit 8 clearly determine all the entitlements of eligible employees for sick leave. All relevant sections of Chapter 5 of the Employee and Labor Relations Manual supply a comprehensive, consistent, and detailed structure for these entitlements. Article X, Section 5E does allow on a permissive basis the supervisor the option to accept an employee's own certification as to a reason for an absence. Selection of the word "may" clearly reflects the existence of some circumstances when supervisors may elect not to accept an employee's own certification of the reasons for absence of three days or less. Furthermore, E and LR Section 513.361, set forth above, clearly provides that supervisors are empowered to require documentation "when the supervisor deems documentation desirable for the protection of the interests of the Postal Service."

Thus, the central argument posited by the employer is that the supervisor was clealy within her rights in recommending or directing medical documentation to be provided by the grievant. Nowhere in the language expansively quoted above is there a provision requiring the Postal Service to reimburse employees for expenses incurred in obtaining such documentation. Furthermore, the provisions of Article XIX of the 1978 National Agreement allowed the Union to file a grievance at the national level within thirty (30)days of the issuance of any change in this structure. No such grievance on the national level was filed.

Since there is no provision requiring reimbursement for medical fees paid by employees whowere properly required to furnish medical documentation for an alleged illness in either the National Agreement itself or in the Employee and Labor Relations Manual, it is quite obvious that the Union is requesting the Arbitrator to go far outside the bounds of his authority in fashioning a remedy requiring reimbursement, the employer asserts. Since this arbitrator has absolutely no authority under Article XV, Section 4A, (6), this grievance fails as to substantive arbitrability. The employer cites seven arbitration decisions which it perceives to be similar as to legal principle and which do indeed find defects as to substantive arbitrability either when the Union sought to incorporate through a local memorandum of understanding reimbursement for medical documentation required of an employee not on restricted sick leave, or other instances when the Union sought through local memorandum of understanding or through grievances to change broad sections of the National Agreement.

With reference to the merits of the dispute, the employer contends that the supervisor involved herein, employer witness Adkins, acted reasonably in demanding medical documentation. First, the employer argues that the testimony of Adkins and the data presented in employer exhibit 2 reveal that the grievant's sick leave requests historically occur before or after a scheduled off day. Second, supervisor Adkins asserted at hearing that grievant was sick after an off day which he had traded with another carrier, and that this peculiar coincidence - allowing two days off in a row - had occurred before also. Third, the employer maintained that supervisor Adkins had had general attendance problems at the

Fred John Station, and she had instituted firm attendance control to improve overall attendance.

Based on the foregoing, the employer urged the arbitrator to find that the grievance filed herein is beyond the scope of authority granted by the parties and that no authority to hear and determine the merits exist. In the event the merits are reached, the employer asserts that this grievance should still be denied in its entirety, since supervisor Adkins had acted reasonably under these facts, and certainly was protecting the interest of the Service, as allowed under Section 513.361 of the Employee and Labor Relations Manual.

E. THE UNION'S POSITION

The Union contends that the issue of arbitrability raised by the employer and extensively discussed above is in reality a smokescreen and not a contention to be dealt with seriously. First, the Union cites to the arbitrator two decisions by different arbitrators to show that this Union and the Postal Service have arbitrated this precise issue numerous times. (See attachments 1 and 2 to the Union's brief herein). Moreover, the Union submitted internal Postal Service correspondence (attachment #3) and certain settlement letters (attachments #4 and 5) to show that the employer has agreed that reimbursement for required medical certification under the above-cited sections is sometimes appropriate. The Union emphasizes that the arbitrator has a particular grievance before him, not a general class action, and that the real issue is not a change in contract language or a new interpretation of national import, but merely the review of whether

supervisor Adkins acted reasonably herein. In other words, the Union asserts it is not trying to establish general rules that a reasonable request for medical certification should be reimbursed, but instead is seeking review of a patently arbitrary and capricious error in judgment on the part of supervisor Adkins. Thus, no issue can be considered by the arbitrator with reference to substantive arbitrability and the potential interpretation of the national agreement beyond the usual incidental application of any regional level arbitrator's decision.

With reference to the merits, the Union contends that clearly the Postal Service is liable for the $13 expense incurred by the grievant under the facts presented. There is no dispute that grievant did phone in to report his illness on January 11, 1979, the Union notes. Moreover, the documentary evidence introduced reveals that grievant did in fact incur an unnecessary medical examination. There is no issue in this case that the grievant was on restricted sick leave. Thus, the Service is clearly relying on suprvisor Adkin's requiring documentation "for the protection of the interest of the postal service." Yet, as a matter of fact, evidence adduced at hearing and through employer's own documentary evidence (employer exhibit 2) revealed no historic pattern of calling in after a day off and no reason to suspect improper conduct when grievant had traded his off day. As to the off-day trade, the evidence revealed that the other participant had been instrumental in this trade and not the grievant. As to the absence record of grievant Diamond, the evidence shows only three instances of sick leave during the relevant time period, April 22, 1978 through July 10, 1979 for a total use of

only 22 hours. Certainly, the Union contends, the actual record of attendance bears no resemblance to any pattern of calling in for sick leave in conjunction with scheduled off-days. Moreover, no evidence whatsoever was presented as to a high incidence of sick leave at the Fred John station. Nor was evidence presented (other than casual asides from supervisor Adkins) that any organized and structured attendance control programs was in effect with articulated standards and application.

Thus, the Union contends that the case before me is a classic case of a supervisor acting in an arbitrary and capricious manner. Supervisors indeed do have the right to ask for medical certification and documentation of sick leave absence under three days, under limited circumstances and genuinely to protect the interests of the Postal Service. The sections set forth above all tie into the ability of employees to file grievance to protest irrational, arbitrary or capricious conduct. Therefore, specific actions involved herein were outside the mandate of the National Agreement, and the Postal Service should make this grievant whole for the specific abuse clearly presented here.

F. OPINION

After careful consideration of the documentary evidence and testimony presented at hearing by the parties through their briefs, I find as follows:

With reference to the substantive arbitrability issue, I agree with the analysis of Arbitrator Cohen in the two American Postal Workers Union - cases concerning position descriptions for

maintenance and control clerks. See Grievances of Kenneth Bullock and Gary Kloepfer, dated September 17, 1980. In these cases, Arbitrator Cohen carefully delineates the standards to be used in determining whether grievances are substantively arbitrable. He finds that the arbitrator must determine in a most careful way just what exactly it is the grievant seeks to arbitrate in these cases.

In Bullock and Kloepfer, Cohen notes that the two grievants filed specific claims stating that each individual was performing work at a level higher than the general level at a particular position involved. Arbitrator Cohen noted that this type of grievance may be filed at any time and any number of times as the circumstances warrant. This is so, because the grievance is applicable to only one individual at one installation as the person's work circumstances vary. If the actual harm claimed was that the initial job description was erroneous and should involve an upgrading, then clearly the controls of Article XIX and its thirty day limit would prevent a consideration on the merits, and the grievance would indeed not be substantively arbitrable. In the case before me, as with the two above-described grievances decided by arbitrator Cohen, the real nub of the dispute is determination of what grievant Diamond seeks to arbitrate. If the grievant, and the NALC, are attempting to grieve the broad right of supervision to properly require medical certification if a supervision deems such document desirable for the protection of the Postal Service, this grievance is clearly not subject to arbitration before me. Such a grievance could only occur when the Employee and Labor Relations Manual section involved herein, part 513.361,

was first promulgated, or thirty days thereafter, It is clear that this is not the grievance before me, and that I would have no authority to hear such a grievance in this forum.

The actual grievance before me Joint Exhibit 2, manifestly questions the reasonableness of the particular judgment used by supervisor Adkins in demanding a doctor's certification after a one day absence from an employee who has a leave balance of 124 hours and no prior record of sick leave abuse.

Based on the foregoing, I reject the employer argument that the grievance calls for a remedy outside the scope of the National Agreement and therefore a modification or addition to the contract before me. I note that arbitrators Walt, Holly, Britton, and Scearce all dealt with precisely this issue as formulated by the Union by reviewing the particular fact situation under the abuse of discretion standard urged by the Union here. None of these arbitrators perceived that the actual grievance before them called for a general declaration either that management's discretion was unfettered and non-reviewable in its determination as to what constitutes the best interest of the Service or that the requirement for medical certification under the subject language must always be improper and permit automatic reimbursement whenever supervision makes such a demand. As noted by Arbitrator Cohen, arbitrators should attempt, wherever possible, to keep their rulings consistent with each other. This obviously prevents confusion and allows predictability for the parties to the labor contract. More important, the normal arbitration rule is that discretionary acts of management may be reviewed for abuse of discretion. The arbitrary, capricious and unreasonable standard is clearly supported by the intertwined

contract sections set forth above, I believe. The precedent arbitration cases cited to me by the employer, except as analyzed above, are clearly distinguishable from the facts at bar. Therefore, based on the foregoing, I find this dispute to be arbitrable, and I specifically reject employer's arguments to the contrary.

In analyzing the merits of this grievance, I find particularly persuasive the opinion by Arbitrator Walt in the Heinfeld, Case No. C8N-4F-C 4678. In Heinfeld, the arbitrator analyzed the factual matrix which precipitated the supervisor's request for medical certification of an employee with less than three days absence who was not on restricted sick leave. In Heinfeld, crucial factors to the arbitrator's finding of no abuse of discretion in management's demand were that the annual route inspection was to occur during the week of the absence; the grievant curtailed susbtantial amounts of mail on the day prior to his absence; the immediate supervisor ordered grievant to come in on the day claimed as a sick day to do the task management perceived should have been performed the prior day; and the grievant never mentioned to the immediate supervisor any illness during their numerous discussions on the day prior to the absence. Under these highly suspicious facts, the Union's assertions that the grievant's clean attendance record, the lack of restricted sick leave, and the actual illness of grievant were rejected by Walt. In so holding Walt found that the supervisor's action was indeed reviewable, "since that action must be evaluated under the circumstances existing at the time of grievant's telephone call." The standard for review was the abuse of discretion standard normally used by arbitrators in similar cases.

Certainly, none of the facts present in Heinfeld which would allow a reasonable person to have sufficient reason to require submission of medical documentation exist in the case before me. Grievant's attendance record showed no pattern of abuse, nor the asserted historical pattern of illnesses occurring either before or after a scheduled day off. No evidence was presented concerning rampant absenteeism at the Fred John Postal facility. Nothing unusual was presented to supervisor Adkins at the time of her decision to require documentation. Thus, nothing developed at this hearing which would suggest to a reasonable supervisor the need for medical documentation to protect the interest of the postal service. I so hold.

The only circumstance before supervisor Adkins on July 11 was that the grievant had had an off-day on the day immediately prior to his request for sick leave time, and this I might add, was at the behest of the other party to the trade. Under these facts, and bearing in mind the clean attendance record of grievant (Employer Exhibit 2), I find an abuse of discretion in Adkins' demand for medical certification. Given her unreasonable demand, Supervisor Adkins did not act in accordance with the terms of Part 513.361 of the Employee and Labor Relations Manual (Joint Exhibit 8). Inasmuch as the grievant was in effect ordered by his supervisor to go to the doctor and bring in a medical certificate, I hold that the postal service should be responsible for the cost of obtaining the medical certificate in the amount of $13.00.

Having concluded my analysis of the susbstantive arbitrability issue and the merits of the instant case, the arbitrator feels it is his duty and obligation to call attention to the serious question of propriety as regards the attachments to the post-hearing briefs filed by the Union.

The alleged use for the attachments is in reference to the arbitrability issue and the question of whether the remedy called for either is beyond the scope of this arbitrator or requires an issue of national interpretation beyond the regional level purview. Attachments 4 and 5 are settlement documents which should have been introduced into evidence if admissible at all. I therefore disagree with the Union that these submissions are the same as or can be compared to precedents, articles and the like which may be used for the first time in post-hearing briefs. See Union letter to this arbitrator dated February 26, 1981. While the submission of these attachments is improper, the arbitrator finds them not to be so damaging as to cause this discussion.

The arbitrator wishes to exprss strong objection and criticism to the introduction of attachment #3 which the Union denominates as management internal correspondence. See Union post hearing brief, page 2. Presumably, this letter was introduced on the arbitrability issue to show that other arbitrators have found jurisdiction. In any event, the real nature of this letter is an internal legal memorandum which lawyers commonly call "attorney work product." Universally, such internal correspondence or work product are privileged as to content and analysis. Certainly, the incidental purpose of showing arbitrability does not outweigh

the sensible and important privilege of both sides to discuss, in-house, arbitrators awards and legal arguments and postures to be taken in response thereto. At any rate, the parties are well aware, or should be, that the incorporation of evidentiary material for the first time in a post-hearing brief is improper and has been unanimously condemned by arbitrators as well as courts. An arbitration hearing is designed to accord due process to all of the interested parties. The parties are entitled to direct confrontation with the witnesses, the presentation of evidence in the presence of both parties, together with proper safeguards as related to admissibility of evidence.

In the instant case, all the foregoing safeguards were flagrantly disregarded by the improper injection of attachment #3 in the post hearing brief without notice to the employer or an opportunity to answer until after the objectionable material had been read by the arbitrator. The arbitrator has made it crystal clear that such "information" provided to him by the medium of a post-hearing brief is highly improper and prejudicial and will be totally disregarded by me.

G. AWARD

For the reasons above-stated, the grievance is sustained in its entirety and it is directed that the grievant Dennis Diamond be made whole for the cost of the doctor's visit in the amount of thirteen dollars ($13.00).

March 23, 1981

Elliott H. Goldstein

ELLIOTT H. GOLDSTEIN
Arbitrator