

28318

NALC and USPS REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

Between

Case No.: B06N-4B-C 09135342

The National Association of Letter Carriers

HPT-13-C

And

DRT#14-130014

The United States Postal Service

Before: Marilyn H. Zuckerman, Esq., Arbitrator

Appearances:

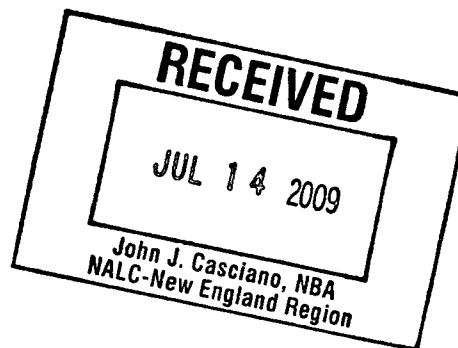
For the Union: Kenneth Janulewicz

For the Service: Ed Tierney

Date of Hearing: June 24, 2009

Place of Hearing: Worcester, MA

Date of Award: July 13, 2009



SUMMARY OF AWARD

The Postal Service violated Article 28 of the National Agreement when they issued a letter to the Grievant claiming that he is indebted to the USPS for the amount of \$2,768.74. The Service violated the provision of Article 28 which requires that:

In advance of any money demand upon an employee for any reason, the employee must be informed in writing and the demand must include the reasons therefore.

The Letter of Demand that was issued to the Grievant on December 12, 2008 did not provide a sufficient explanation or rationale for the demand, and, in fact, the demand was not explained to the Grievant until the arbitration. On the particular facts of this case, the Service violated Article 28 and the Letter of Demand is rescinded.

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## BACKGROUND

This case involves a Letter of Demand to Letter Carrier Joseph Tomaski for \$2,768.74.

At arbitration, the parties entered into the following stipulations:

Joseph Tomaski submitted a CA-2 for carpal tunnel syndrome and it was approved by the Department of Labor on June 19, 2007.

He was paid continuation of pay from pay period 18/07 week 2 to pay period 26/07 week 1.

The Grievant received an original statement for \$12,753.76.

He received a lump sum from the Department of Labor for \$9,985.02.

On June 17, 2008, he paid the Postal Service the \$9,985.02.

The Grievant's Postmaster authorized the COP payments made to the Grievant.

The Grievant applied for a waiver of payment on December 22, 2008 and the waiver was refused in a letter dated March 13, 2009.

At arbitration, the Grievant, Joseph Tomaski, testified that during his absence from work with carpal tunnel syndrome in 2007, he received Continuation of Pay from the Postal Service. He went to the Postmaster and explained that he did not think that he should be receiving COP because he had filled out a CA-7. The Postmaster replied that he was told to do the COP and that this was the easy way. During week 10 of Tomaski's absence, he went to the Postmaster and said that he could come back to work in 2 weeks. The Postmaster then said that there was a mistake in the way that he had paid the Grievant who should not have been receiving COP and that it would be corrected when the Grievant came back to work.

Tomaski received a check from the Department of Labor for Worker's Compensation in the amount of \$9,985.02 on May 30, 2008. Because he was erroneously on COP, the Service sent him an invoice saying that he owed \$12,753.76. Tomaski responded on June 17, 2008 by paying the Service back in the amount that he had received from the Department of Labor which was \$9,985.02. The Service then sent Tomaski another invoice for \$2,768.74. He did not pay back this amount because he did not understand why it was owed. His supervisor told him that she did not know what the difference was, although she thought that it might have been health benefits. The unpaid invoice became the December 12, 2008 Letter of Demand which was grieved. The Union contends that the following explanation of the alleged debt was insufficient:

Specifically you incurred an original debt of \$12,753.76 for receipt of five hundred and sixty (560) hours continuation of pay and thirty-two (32) hours holiday pay from Pay Periods 18/07 Week 2 through 26/07 Week 1. The hours were converted to Leave Without Pay (LWOP). Repayment in the amount of nine thousand and nine hundred eighty-five dollars and two cents (\$9,985.02) has been credited towards your debt leaving an outstanding balance of two thousand seven hundred and sixty-eight dollars and seventy-four cents (\$2,768.74) still owed by you.

Tomaski also filed a Request for Waiver which was denied on the basis that there was a coding error to which the request did not apply. However, the Greivant's Request for Waiver contained the following explanation:

When the error was corrected, the Postal Service took back vacation time, sick time, TSP (erroneous deposits had been made to TSP). This was all paid back by me when I returned to work. The money that I returned to the post office from Worker's Comp was more than what I received net by the Post Office.

Tomaski did not understand why he allegedly owed the Service the \$2,768.74. He tried to speak with Egan about it and they wouldn't speak with him.

At arbitration, John Stone, Financial Control and Support Analyst, testified that he became involved in this case in November 2008. He contacted the Postmaster in January 2009. Stone explained at arbitration that the Grievant was paid 75% of his pay by the Department of Labor because there were no taxes involved. He received 100% COP from the Postal Service because this was his full, normal salary. Because the COP was paid in error, this time and pay was changed to LWOP. Stone testified that he was asked to explain the discrepancy to the Grievant's Supervisor. He met with her twice because she had follow-up questions. Tomaski was not present when Stone met with the Supervisor. According to Stone, she told him that she had explained it to Tomaski.

Stone testified that no one from the Union asked to meet with him. He is occasionally asked by the Union to meet, but they did not ask him on this one. Stone explained at arbitration that no one could tell from the documents in the Joint File how Tomaski still owed the \$2768.74. The amount would have to be explained in detail before it was understood.

#### STATEMENT OF THE ISSUE

At arbitration, the parties stipulated to the following issue:

Did Management violate Articles 28 and 19 of the National Agreement when they issued a letter to the Grievant claiming he is indebted to the USPS for the amount of \$2,768.74? If so, what shall the remedy be?

#### POSITIONS OF THE PARTIES

##### The Union.

The Union argues that the Service failed to comply with Article 28 by not giving the Grievant a sufficient explanation of what the alleged debt was in the Letter of Demand.

The Union maintains that the Service was required to give an explanation pay period by pay period of the debt in a way that a reasonable person could understand it. The Letter of Demand did not include a breakdown or explanation. While data printouts were later provided to the Union, Letter Carriers can not be expected to understand these without further explanation. The burden under Article 28 is on the Postal Service to explain the data to the employee. At arbitration, Financial Control and Support Analyst Stone testified that the data printouts would not be understood without further explanation. Apparently, the Supervisor to whom he explained the documents did not understand them either because all she told the Grievant was that the discrepancy in what he owed had to do with health benefits. The Union argues that Tomaski was earnest in returning the \$9,985.02 to the Service. And he was reasonable in wanting to know why he still owed the \$2,768.74. This was never explained to him until the arbitration.

The Union points out that other Arbitrators have interpreted Article 28 and held that the Letter of Demand must contain the reasons in writing and that some “articulate and understandable explanation is required.” See Arbitrator Sherrie Talmadge in USPS and NALC, Case No. B06N-4B-C 08359883 (2009) and Arbitrator William Eaton in USPS and NALC, Case No. E90N-4E-C 97118232 (1999). See also Arbitrator Guy Parent in USPS and NALC, Case No. F94N-4F-C 97111839 (1999).

The Union argues that the error in paying Tomaski COP was not his, it was the Postmaster’s. Tomaski brought the concern he had about being paid COP to the Postmaster on two occasions and the Postmaster said that they would take care of it later. Then it was the Service’s error which was compounded in the process by which the

Service tried to recoup the monies from Tomaski because no reasonable explanation was given to him of why he still owed \$2,768.74.

The Union maintains that where the overpayment is due to errors on the part of the Service, there is a greater burden on the Service to give a detailed explanation to the employee of the reasons for the debt under Article 28. In this regard, the Union cites Arbitrator Jerome La Penna in USPS and NALC, Case No. A94N-4-A-C 98009485 (1998):

The effect that this opinion has on the determination of the arbitrator in this case is that the Service must give the reasons for its demand in a much more detailed and explanatory manner since the overpayment is entirely the fault of the Service and the Service is the only party who has the information relating to that payment and/or overpayment as to which it now complains and seeks repayment. Thus, the Service must go further in order to comply with Article 28 than it would in a case where an employee lost stamps or lost payment for inadequate postage or any case where the employee has caused the loss to the Service. Thus, the burden to explain the reason for the demand is expanded and must be met completely for the Service to claim compliance with the mandate of Article 28. In this case, it did not meet its burden of proof of compliance.

On the facts of the instant case where the error in paying the COP was on the part of the Service and where they had the facts to explain the alleged remaining debt to the employee, the Union concludes that the Service had every obligation under Article 28 to provide a detailed and understandable explanation to him. It was not the Grievant's burden to try to find out, although he did try to speak with his Supervisor and with Egan. And it was not the Union's burden to speak with Finance, because Article 28 places the burden squarely on the Service to explain the debt and the reasons therefore in writing to the employee.

The Union also maintains that the present Letter of Demand was untimely. The alleged debt was supposedly incurred during pay periods 18/2007 through 26/2007. According to the Union, the Service waited a year to contact the Grievant with the allegations. The Service did not provide an explanation of why they waited so long to collect on the alleged debt and they did not explain this debt in a detailed way.

Therefore, the Union asks the present Arbitrator to sustain the grievance and relieve Tomaski of paying the alleged debt of \$2,768.74. The Union also asks that his record be cleared of the matter.

The Service.

The Service contends that the reason for the Letter of Demand was that Tomaski was paid twice for an injury that he sustained while on duty. He was erroneously paid by the Service for 560 hours of COP and 32 hours of holiday pay. The Letter of Demand states this. The Grievant filed a CA-2, Notice of Occupational Disease and Claim for Compensation for carpal tunnel syndrome. The regulations contained in the EL-505 which is part of the National Agreement through Article 19 allows for an employee who is unable to report for work to choose his own leave or use LWOP. In this case, the Postmaster paid the COP in error.

While the Union argues that the erroneous payment was made by the Service and was not the fault of the Grievant and therefore he should not have to repay the debt, the Service argues that the debt is still valid. The Service's explanation is that normally the Grievant would have been required to use his own leave or LWOP while waiting for his claim to be accepted by the Department of Labor. Since he was mistakenly paid COP, he never had to use any leave during this period. Once the DOL accepted his claim, the

Grievant was paid \$9,985.02 or approximately 78% of his pay, tax free. It is undisputed that Tomaski paid the Service the amount paid to him by DOL. However, he was paid COP in the amount of \$12,753.76 which was 100% of his normal salary. According to the Service, he still owes the \$2,768.74 for the remainder. If he were not paid in error, he would have been compensated by the DOL and that would have been the end of the matter. However, the Service maintains that since he was paid twice and was paid by the Service for 100% of his salary, he still owes the difference between this and the approximately 78% that he received from DOL.

The Service maintains that the fact that there was an error in payment by the Postal Service does not relieve the Grievant from repayment of his debt. The Service argues that this is a contract case and the Union has not met its burden of proof to show that the contract was violated. The argument that the Grievant was not at fault and it was the Service's error is not enough to prove a contract violation.

The Service points out that the Grievant was given a Letter of Demand explaining why there was a debt and his options for appeal and repayment as required by regulations. The Service argues that the Grievant should be required to repay the debt because if he does not pay it, he will be unjustly enriched. In this regard, the Service cites Arbitrator Ernest Marlatt in USPS and NALC, Case No. S7C-3F-C 34551 (1991):

In an employment situation therefore, no employee is legally entitled to retain overpayments of wages, and must refund the excess to the employer even though the employer was responsible for the error. This obligation derives from the law, not the negotiated contract, although the contract may spell out certain procedures which the employer must follow to collect its money and may provide time limits within which the employer must present its claim.

The Service maintains that on the facts of the present case, the Grievant came into extra money by the payment of COP that he was not entitled to. The Postal Service is not arguing that he was underhanded in receiving this money, only that he owes on the debt and must repay it to its rightful owner.

The Service also argues that it supplied the Union with breakdown sheets on the debt. The COP for Tomaski was put back to LWOP. The Service maintains that if the Union did not understand the data, they could have asked the Service's Financial Control and Support Analyst, Mr. Stone. According to the Service, the Union is well aware of finance and injury comp issues and the Union has its own injury compensation specialists.

Next, the Service argues that the Letter of Demand in the present case was not untimely. The Grievant's claim was accepted by DOL on June 19, 2007. He was directed by DOL to complete a CA-7 for compensation for lost wages. He did not do so until May 2008. He was paid by DOL on May 30, 2008. He repaid the \$9,985.02 to the Service on June 17, 2008. The Letter of Demand for the \$2,768.74 was issued on December 12, 2008. Therefore, the delay was no more than 6 months. Furthermore, the Service argues that there is no statute of limitations for debts owed to the Postal Service and Arbitrators have so found. See the Decision of Roger Maher in USPS and NALC,

Case No.: B01N-4B-C 02259380:

Despite the reasonableness of the aforementioned NALC position, the Arbitrator finds Article 28 does not have a limitation on the timeliness of collecting a debt. In relevant part, Article 28.4a states: "...collection of the debt will be delayed until disposition of the grievance and/or petition has been had, either through settlement or exhaustion of the grievance or administrative remedies." Hence, given this controlling language, the time between the advancement of cash and its collection is unspecified

except that the collection cannot commence until exhaustion of contractual remedies which has now occurred as a result of the issuance of this award.

See also the Decisions of the undersigned Arbitrator in USPS and NALC, Case Nos.: B06N-4B-C 08314302 and 0814317.

The Service concludes that the Grievant still owes on the debt of \$2,768.74 and that the explanation in the Letter of Demand was sufficient. If he had further questions, either he or the Union could have pursued it. The Letter of Demand was timely because the Service waited no more than six months from the time that the Grievant repaid the \$9,985.02 to collect on the remaining debt. In any event, there is no statute of limitations on the collection of a debt owed to the Postal Service. The Service asks that the Arbitrator deny the grievance so that the debt will be repaid.

#### DISCUSSION AND DECISION

The Arbitrator concludes that the Postal Service violated Article 28 of the National Agreement when they issued a letter to the Grievant claiming that he is indebted to the USPS for the amount of \$2,768.74. The Service violated the provision of Article 28 which requires that:

In advance of any money demand upon an employee for any reason, the employee must be informed in writing and the demand must include the reasons therefore.

The Letter of Demand that was issued to the Grievant on December 12, 2008 did not provide a sufficient explanation or rationale for the demand. It was not enough for the Service to say that the Grievant had been erroneously paid 560 hours of COP and 32 hours of holiday pay from pay periods 18/07 week 2 through 26/07 week 1. The Grievant had paid back the \$9,985.02 which he had received from the DOL which

presumably included pay and holiday pay. He also contends that when he returned to work for the Service, he paid back vacation time, sick time, and TSP and that the money that he paid back from Worker's Comp was more than he had received net from the Postal Service.

The Service was obligated under Article 28 to explain to the Grievant specifically why and how he owed the \$2,768.74. The Service was required to give him a written explanation in detail of the debt owed. The explanation had to be in a form that a reasonable person would understand. Financial Control and Support Analyst Stone explained at arbitration that even the raw data that was subsequently given to the Union was not understandable unless it was further explained. On these facts, the Grievant could not be expected to understand it. Apparently, the Supervisor to whom Stone explained it did not understand it either.

The Union was not required to research the alleged debt. This was not a case like the one considered by the present Arbitrator in Case Nos. B06N-4B-C 08314302 and 0814317 where there had been a National Arbitration Award which resulted in certain pay adjustments of which the Union and the employees were aware. Tomaski's situation in being erroneously overpaid the COP by the Service was unique to him and the National Agreement at Article 28 required that the Service provide him with an articulate and understandable written explanation of the debt he allegedly owed. See the Decisions of Arbitrator Sherrie Talmadge in Case No. B06N-4B-C 08359883 (2009), Arbitrator William Eaton in Case No.: E90N-4E-C 97118232 (1999) and Arbitrator Guy Parent in Case No. F94N-4F-C 97111839 (1999).

This is particularly true because the alleged debt was the result of the initial error by the Postmaster in paying Tomaski COP. The overpayment was entirely the fault of the Service and the Service is the only party who has the data relating to the overpayment which it now seeks to recoup. See the Decision of Arbitrator Jerome La Penna in Case No.: A94N-A-C 98009485 (1998). On the present facts, the Service had every obligation under Article 28 to provide a detailed and understandable explanation to the Grievant of the debt which he allegedly owed .

This is not a case of unjust enrichment. The Arbitrator is not convinced that Tomaski actually still owes the \$2,768.74. This is not to doubt the testimony of Mr. Stone who is quite a competent witness. However, it is not clear to the Arbitrator how the \$2,768.74 was arrived at because we did not go through the calculations step by step at the hearing. Also, it is not clear from the records in the Joint File if the Postal Service actually took into account the monies that the Grievant paid back when he returned to work. If we assume that the figure of \$2,768.74 is correct, the Grievant should be relieved from having to repay it because there is a clear contractual requirement in Article 28 that the Service provide a sufficient explanation in writing of the debt to the employee. This was not done. If the contract language means anything, it means that therefore the debt must be rescinded.

The Arbitrator therefore rescinds the December 12, 2008 Letter of Demand to the Grievant and orders that his record be cleared of the matter.

July 13, 2009



Marilyn H. Zuckerman