

RECEIVED BY

OCT 29 1981

INDUSTRIAL
RELATIONS

IN ARBITRATION

ART. III; X; XV; XIX (EELRM) - VITENSE, J.L.
Med. Cert. on holiday. Arbitra. Issue.
Madison WI-APWU - Cohen, G. - Won - 10/81

21333 (C8C-4J-C)

CASE # ~~2064~~

10-16-81

UNITED STATES POSTAL SERVICE,) Case No. C8C-4J-C 21333;
and) Arbitrator's File 81-12-582;
UNITED STATES POSTAL SERVICE,) Date of Hearing: C#00418
JUDY VITENSE, Grievant.) March 31, 1981,
Madison, Wisconsin.

APPEARANCES

For the Postal Service:

RODNEY STONE
Labor Relations Specialist
United States Postal Service
433 W. Van Buren
Chicago, IL 60699

FROM THE OFFICE OF
JOHN P. RICHARDS
DIRECTOR
INDUSTRIAL RELATIONS
APWU AFL-CIO

For the Union:

LARRY GERVAIS
National Vice-President, Clerk Craft
American Postal Workers Union
15 South Ninth Street - Suite 100
Minneapolis, MN 55402

O P I N I O N

Issue

The issue as set forth in the Brief of the Postal Service
is an objective statement of the case:

"Is the grievance of Judy Vitense arbitrable?

If so, did the employer violate the terms of
the 1978 Agreement in requiring the grievant to
substantiate her absence?"

Facts

On the evening of August 30, 1980, Grievant commenced

her tour at her regular starting time of 10:30 P.M.. According to her testimony, she was not feeling well at the time she started her tour. She thought she might be coming down with the flu, but she was not certain of her problem. She said she advised her supervisor that she was not feeling well but would try to work.

Grievant testified that about four hours after the shift started, she felt so ill she decided to leave work. She went to her supervisor and requested a Form 3971 to apply for sick leave for the balance of the tour. The supervisor advised her that she would be required to produce medical documentation for the sick-leave request.

Evidence of Grievant and the Union indicated that there was a rule in the installation that any request for sick leave prior to a holiday would require medical documentation to substantiate it.

Grievant's supervisor testified that he requested the medical certification because there was a bulletinboard notice stating that, for holiday work, no excuse for not working would be accepted unless an emergency occurred regarding the particular employee. He saw no evidence of an emergency in Grievant's case. He stated that he did not doubt that Grievant was sick, and did not feel that she was abusing her sick leave. He would have accepted Grievant's statement that she was too ill to work, but felt that he could not do so because the next day was a holiday,

and Grievant did not appear to be involved in any emergency.

Discussion and Opinion

The first issue to be determined is the arbitrability of the grievance.

Grievant seeks reimbursement for expenses attendant to her production of medical documentation of sick leave in compliance with the request of her supervisor.

Several sections of the National Agreement and the Handbooks and Manuals bear on the question of arbitrability of such a request. The first Article which should be consulted is Article III, the Management Rights section of the contract. The contents of this Article are well known, and there is no necessity for setting it forth verbatim. It can be summed up by saying that it gives to the Postal Service the exclusive right of management of the Postal operation and the work force, subject to other provisions of the Agreement. Therefore, other sections of the National Agreement must be taken into consideration to determine their impact on Article III.

In the view of all parties, Article X, the "Leave" article, is significant to a determination of this grievance. Section 1 of this article states:

"The Employer shall continue funding the leave program so as to continue the current leave earning level for the duration of this Agreement."

Section 2 sets forth:

"The leave regulations in Subchapter 510 of the Employee and Labor Relations Manual, insofar as such regulations establish wages, hours, and working conditions of employees covered by this Agreement, shall remain in effect for the life of this Agreement."

Section 5 of Article X, "Sick Leave", states:

"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 as reason for an absence."

Also pertinent is Article XI, "Holidays", Section 6:

"Holiday Schedule. The Employer will determine the number and categories of employees needed for holiday work and a schedule shall be posted as of the Wednesday preceding the service week in which the holiday falls. As many full-time and part-time regular schedule employees as can be spared will be excused from duty on a holiday or day designated as their holiday. Such employees will not be required to work on a holiday or day designated as their holiday unless all casuals and part-time flexibles are utilized to the maximum extent possible, even if the payment of overtime is required, and unless all full-time and part-time regulars with the needed skills who wish to work on the holiday have been afforded an opportunity to do so. An employee scheduled to work on a holiday who does not work shall not receive holiday pay, unless such absence is based on an extreme emergency situation and is excused by the Employer."

Article XV, "Grievance-Arbitration Procedure", should also be considered. Section 4, "Arbitration", Paragraph (6), states:

"All decisions of an arbitrator will be final and binding. All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator. Unless otherwise provided in this

Article, all costs, fees, and expenses charged by an arbitrator will be shared equally by the parties."

Section 511.43 of the Employee and Labor Relations Manual states:

"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."

Certain sections of Chapter 513, Sick Leave, of the Employee and Labor Relations Manual are pertinent:

".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."

".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.

.362 Over 3 Days. For absences in excess of 3 days, employees are required to submit medical documentation or other acceptable evidence of incapacity for work.

"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."

The first argument advanced by the Postal Service on the question of arbitrability is that, in order for the Arbitrator to grant what Grievant seeks, he would have to rewrite the contract, and he is specifically prohibited from doing that. The Postal Service reaches that conclusion from the fact that Article X, Section 5-E, states that a supervisor may accept an employee's certification for absence for periods of 3 days or less. The supervisor also has a right not to accept it, and, under the Handbooks and Manuals explanatory of Article X, 5-E, can require medical documentation. The Postal Service contends that, because the supervisor has refused to accept the employee's absence without documentation, the Arbitrator would be re-writing the contract if he should order the Postal Service to bear the expense of such documentation.

The Union's answer to this argument is that it is well known, and it has been previously held, that an arbitrator has a right to shape a remedy when a violation of the National Agreement occurs. The decision in Grievance No. NC-C-6085 so states. In that case, delivery routes for the Letter Carriers were improperly assigned, and the union requested that it be made whole for the error. There was no specific section in the National

Agreement providing for such a remedy, but the arbitrator found that, when a wrong has occurred, there is a remedy to right it.

The Union also advanced the argument that there were several grievances similar to this one in which the Postal Service had not raised the question of arbitrability, and therefore, in its view, it is a foregone conclusion that the issue is arbitrable. While it did not say so in so many words, the Union apparently took the position that the Postal Service has waived the right to raise this arbitrability issue because it did not do so in several previous grievances.

In rebuttal, the Postal Service states that, from time to time, for various reasons, it does not choose to assert certain defenses. That occurs most frequently in connection with the question of timeliness. On occasion, the Postal Service will not raise an objection to a discharge matter being heard even though the time requirements may not have been observed.

I believe the Postal Service is correct when it asserts that it has a right to raise the issue of arbitrability at any time that it chooses in any case that it chooses. It can seek a determination of the question of arbitrability based on the facts and circumstances of the particular case in which the issue is raised. Further, I believe that a failure to assert a right in one instance does not preclude the Postal Service thereafter from raising the issue in another instance. If it could not do

so, then the Postal Service would be obliged to raise the question of arbitrability in each and every grievance which proceeds to arbitration. That, of course, would place an unreasonable burden on all parties involved in the arbitration process. The issue of arbitrability should only have to be faced when it is raised, and a failure to raise the issue should not prejudice the Postal Service in later grievances.

The issue of arbitrability must therefore be ruled on in this grievance.

The Postal Service contends that the Union is attempting to obtain by arbitration what it could not get by negotiation. In other words, the Union sought to acquire a benefit in negotiations, but failed to do so, and it now seeks to gain this benefit by arbitration.

This same situation arose between the Postal Service and the National Association of Letter Carriers in a local impasse matter in Raleigh, North Carolina, where the Letter Carriers sought to have included in the Local Memorandum of Understanding reimbursement for medical reports requested by Management. The well known arbitrator, Bernard Cushman, handed down the award in that grievance. He held that such a benefit was "inconsistent with the contractual benefits structure and the intent of the parties in negotiating the National Agreement and Article X".

In answer to that decision, the Union argues that it is not seeking a blanket benefit, but only recompense for specific

damage occasioned by abuse of discretion in this particular grievance.

According to the Union's argument, if the Union was seeking a blanket payment to all employees who must furnish medical documentation at the request of the Postal Service, then it would be seeking a contractual benefit. However, when it seeks only an individual recompense on an individual basis for an individual employee under individual circumstances for a particular abuse of discretion, it is not seeking a benefit which is general in nature, but only something specific by way of damage to that particular employee. The Union therefore draws the conclusion that it is not attempting to obtain by arbitration what was not obtainable by negotiation.

I think that the Union's view of what it seeks is correct. A blanket benefit is something that applies equally to all employees. For instance, a certain period of vacation time is granted to all employees who have worked for certain periods of time. It is a contractual benefit, and there is no discretion in the matter. However, the Union here is not seeking a general payment to all employees who are requested to furnish medical documentation. This Grievant is only asking that a payment be made to her for what she claims is damage sustained as a result of an abuse of discretion and a breach of the contract. The Union, therefore, is not seeking to obtain a benefit of a general nature.

The Postal Service cites the decision of the highly respected arbitrator, J. Fred Holly, in Case No. NC-S-4445, in which the Arbitrator refused to require the Postal Service to pay an EEO representative for travel time. In that case, the Arbitrator pointed out that EEO representatives assume that role on a purely voluntary basis, and they are not assigned to EEO work by the Postal Service. In short, the Postal Service had absolutely nothing to do with EEO representatives. Hence Mr. Holly found it inequitable to require the Postal Service to be responsible for their expenses.

That situation is not analogous. Grievant here did not bring in medical documentation of her own volition. The Postal Service took affirmative action with regard to Grievant here, whereas in the EEO representative case it did not. That is the distinction between the two situations.

The Union sums up its position by stating that it seeks the arbitration of a complaint against discretionary action taken by the Postal Service. It argues that when such discretionary action is arbitrary or capricious, then such action may be grieved successfully, provided that the necessary proof is offered of the arbitrary and/or capricious nature of those actions.

The Union further argues that arbitrary or capricious actions are frequent, common and customary, and are some of the

most frequent causes of grievances. I agree with the Union that such grievances are common, and that discretion is easily abused. Let us suppose, for instances, that a supervisor dislikes an employee, and merely as a matter of annoyance requires the employee to produce evidence of illness where it is obvious that such evidence is not needed. I think it fair to say that everyone would agree that this is a violation of Management's right to exercise reasonable discretion in issuing orders.

The discharge of an employee is also a discretionary matter. The National Agreement provides for a standard of judgment, i.e., just cause, but nonetheless, an arbitrator is often called upon to determine whether the discretionary actions taken in connection with the discharge comply with the standard of just cause.

Neither more nor less is being asked by the Union here. The grievance is arbitrable.

Concerning the merits of the grievance, the Postal Service argues that Grievant has failed to prove an emergency which would entitle her to holiday pay. I believe this indicates a misunderstanding of what Grievant seeks. She is not asking for holiday pay after having left work under emergency circumstances, as set out in Article XI, Section 6. She is seeking reimbursement for her expenses in having to justify her sick leave. The fact that it might have been in relation to a holiday pay is immaterial, because Grievant is not seeking holiday pay, but the expense of

having to document the need for sick leave. Therefore, Grievant does not have to prove an emergency, but only that the supervisor abused his discretion in seeking proof of her illness.

I believe that it would be advantageous to the parties if I set forth my general view as to the burden which Grievant undertakes when she seeks reimbursement of her expenses for medical documentation of this sick leave. In my view, her burden is heavy. She must prove that the supervisor was arbitrary and unjustified in his request. Since, on its face, Management's request is reasonable, her burden is great.

In spite of the heavy burden imposed on Grievant, I conclude that she has sustained it. The supervisor stated that he had no reason to doubt Grievant's statement that she was sick, and, in fact, she appeared to be unwell and tired. He said that he requested sick-leave documentation solely because the request was near a holiday, and in effect **he acted automatically and without regard to Grievant's particular circumstances. I consider such action to be arbitrary.** The supervisor actually stated that he ignored the facts and blindly followed an order for production of medical documentation. **Ignoring facts that are apparent is a classic case of arbitrary conduct.**

In case No. SSC-3W-C 2610, the arbitrator held that medical documentation is required only when the employee is on restricted sick leave or when the supervisor deems documentation

desirable for the protection of the interests of the Postal Service. Grievant here was clearly not on restricted sick leave. In addition, since Grievant appeared to the supervisor to be actually ill, no protection of the interests of the Postal Service are at stake because Grievant's actions were therefore legitimate. The Postal Service's interests cannot be adversely affected when employees act honestly with regard to it and themselves.

There is another more compelling reason for sustaining the grievance. By requiring medical documentation for absences prior to a holiday, the Postal Service has rewritten the Handbooks and Manuals without affording the Union a chance to grieve the new regulation, as required by Chapter 19.


Section 513.361 requires medical documentation when the employee is on restricted sick leave or when it seems documentation is desirable for the protection of the interests of the Postal Service. By requiring medical documentation for leaves of less than three days when occurring prior to a holiday, the Postal Service has added a new requirement to section .361 without giving the Union the right to grieve the new requirement. Clearly that is a violation of Chapter 19.

The grievance is sustained, and Grievant is entitled to be reimbursed for the costs attendant to her medical documentation. She is also entitled to be made whole for the minimum

time spent traveling to and from the doctor's office.

The costs are assessed equally.

Dated this 16th day of October, 1981.


GERALD COHEN, Arbitrator
722 Chestnut Street
St. Louis, MO 63101
(314) 231-2020.