

C# 00 268

In The Matter Of The Arbitration

- between -

UNITED STATES POSTAL SERVICE

- and -

AMERICAN POSTAL WORKERS UNION,
AFL-CIO

Grievant: W. Atkins

Post Office: Brooklyn, NY

Case No. N1C-1A-Q 15271

Before Edward Levin, Arbitrator

Appearances:

For the United States Postal Service:

Robert F. Condon, Labor Relations Executive; Mitch Sturman, Labor Relations; Nancy Tazlo, Witness;

For the American Postal Workers Union, AFL-CIO:

Steve Parise, National Business Agent; Wilbur Atkins, Grievant

Date of Hearing: September 4, 1984

Place of Hearing: Brooklyn, New York

Award: 1. The Postal Service violated Article 10 of the National Agreement with respect to Mr. Atkins' 160 hours annual leave by back option.

2. Mr. Atkins shall be granted the right to buy back the 160 hours of annual leave.

Date of Award: September 24, 1984

Pursuant to the Collective Bargaining Agreement between the United States Postal Service ("Postal Service") and the American Postal Workers Union ("Union"), the undersigned was designated Arbitrator to hear and determine the following issue:

Did the Postal Service violate Article 10 and 19 of the National Agreement by denying the grievant 160 hours of annual leave "buy back?"

If so, what shall be the remedy?

CONTRACT LANGUAGE

ARTICLE 10: LEAVE

Section 3 (B) Care shall be exercised to assure that no employee is required to forfeit any part of such annual leave.

Employee and Labor Relations Manual Chapter 5

512.11 Purpose

Annual leave is provided for rest, for recreation and emergency purposes. No employee is credited at the beginning of a leave year with more than 3 days of previously accumulated annual leave . . .

545.73 Employee's Rights. As stated in 544.14, an employee may elect to have regular pay continued for up to 45 days or to use annual leave or sick leave. The control office/control point ensures that the employee is informed of the following:

a. Continuation of Pay. A traumatically injured employee may request continuation of regular pay for the first 45 calendar days of disability. Such continued regular pay is subject to taxes and all other usual payroll deductions. If an employee elects continuation of regular pay and the claim for compensation is subsequently denied, the employee may treat the days for which regular pay continuation was received as sick or annual leave, if such leave is available. An employee may file a request for waiver of claim for erroneous payment of pay (See ELM 437).

b. Sick or Annual Leave

(1) The 45-day continuation of pay runs from the day of the injury or disability, and it is not extended by the use of annual or sick leave.

- (2) Leave is limited to the amount that the employee has accrued.
- (3) An employee who elects to take sick or annual leave during the 45-day period in which continuation of regular pay is available, is not entitled to buy back that leave with later compensation payments.
- (4) Pay that is attributable to the leave period is subject to taxes and all other usual payroll deductions.
- (5) An employee may use sick or annual leave after the 45-day regular pay continuation period expires, or during a period of disability due to an occupational illness. In that case, the employee is entitled to buy back the leave with compensation payments.

BACKGROUND

The grievant, Wilbur Atkins, was employed at the Brooklyn Mail facility as a clerk. On August 31, 1981 Mr. Atkins was injured. At the time of his injury he had 160 hours of earned annual leave for 1981 and 240 hours of earned annual leave from the previous year, 1980. After his injury on August 31, 1981 Mr. Atkins received 45 days of continuation pay. Mr. Atkins never returned to work and on June 22, 1983 he applied for disability retirement.

UNION POSITION

The Union contends that the Postal Service punitively denied Mr. Atkins the 160 hours of earned annual leave for 1981. As a result of Mr. Atkins' severe injury on August 31, 1981, he was unable to take his planned vacation and his excess annual leave was not carried over and therefore

forfeited. It is the Union's contention that the forfeiture of the annual leave was a direct result of management's failure to properly inform the grievant of his leave buy back option.

Mr. Atkins testified that he worked for the Postal Service for 18 years. In 1981, at the time of his accident, he fully intended to take annual leave. However, because of his injury he was unable to take his vacation. He subsequently found out from the Postal Service doctor that he had a broken neck. When he filled out the appropriate injury forms and spoke to Nancy Taylor, the Injury Compensation Specialist, she told him he had three options:

1. 45 days continuation pay
2. sick leave, or
3. annual leave

Mr. Atkins testified that he was not told anything about the consequences of not using excess annual leave. He stated it was not until the following year that he learned by word of mouth from other Postal Service employees that he lost his annual leave. He stated that he did not know that if he did not use his earned annual leave he would lose it or that there was a leave buy back provision that he could use. Mr. Atkins testified that his buy back option was never explained to him by management.

The Union believes the contract clearly places a responsibility to exercise care to assure no employee is

required to forfeit any part of their annual leave. It is unreasonable to conclude that if Mr. Atkins was informed of his buy back rights he would voluntarily lose the 160 hours of annual leave. The only evidence presented by the Postal Service in support of its contention that Mr. Atkins was informed of his buy back rights, besides Ms. Taylor's testimony, is a memorandum written on January 4, 1982 by her, over a year after she claims she explained to Mr. Atkins his buy back rights. The Union concludes that the Postal Service's failure to explain Mr. Atkins' buy back rights resulted in his losing 160 hours of annual leave and the Arbitrator is accordingly requested to make Mr. Atkins whole for his lost annual leave buy back opportunity.

POSTAL SERVICE POSITION

The Postal Service points out that the Union's reference to its action in this case as being punitive is unfounded and there is no evidence that the Postal Service intended to punish Mr. Atkins for any reason. It merely followed the rules concerning buy back of annual leave and Mr. Atkins forfeited his buy back rights voluntarily.

The Employee and Labor Relations Manual (E&LRM) clearly spells out an employee's rights and procedures. Part of the requirement is that an employee must be told about his rights concerning the use of annual leave prior to forfeiture. The Postal Service maintains that it followed the required proce-

dure and the grievant must therefore be deemed to have forfeited his buy back rights voluntarily.

Nancy Taylor, the Injury Compensation Specialist, testified that an injured employee is entitled to a 45 day continuation of regular pay. After the conclusion of those 45 days that employee has the right to elect sick or annual leave or apply for compensation disability. An employee may elect only one of the two options. If an employee opts for leave usage, that employee may apply for compensation benefits at the time such leave is exhausted. However, when applying for compensation benefits the employee may request leave buy back procedures which must be approved by the Department of Labor. This procedures takes a minimum of six months.

Ms. Taylor stated that the Postal Bulletin requires that buy back options must be explained to employees. She stated that she executed that responsibility on October 8, 1981 when she processed Mr. Atkins' compensation forms. She stated that at the expiration of 45 days continuation of regular pay she explained to Mr. Atkins that he could use sick or annual leave in lieu of compensation. When such leave was exhausted he could file for compensation benefits and request buy back of annual leave.

The Postal Service holds that it performed its responsibilities with respect to explaining the grievant's buy back rights and that Mr. Atkins' failure to exercise such rights constitutes a voluntary forfeiture for which the Postal Service should not now be held responsible.

ARBITRATOR'S OPINION

The question before the Arbitrator is whether or not the grievant was explained his annual leave buy back rights. The contract specifically states that care shall be exercised to assure no employee is required to forfeit any part of such employee's annual leave. The Postal Service also acknowledges its obligation in this regard.

In reviewing the record there is testimony from Ms. Taylor that she explained the buy back rights to Mr. Atkins. However, her memo, written over a year after she claims to have explained the buy back rights to Mr. Atkins, is insubstantial corroboration that this actually took place. While Ms. Taylor also claims that she gave Mr. Atkins a pamphlet, no pamphlet containing information concerning annual leave buy back rights was introduced at the hearing. Thus we are left with Ms. Taylor's recollection of having verbally informed Mr. Atkins of his buy back rights and that it was her procedure to routinely explain those rights to employees under similar circumstances.

Contradicting this claim by Ms. Taylor is Mr. Atkins' assertion that he was not told of such buy back rights and that if this right had been explained to him, it stands to reason he would have exercised it rather than lose that privilege.

The key phrase in the contract [Article 10 Section 3 (B)] dealing with forfeiture of annual leave is, "care shall

be exercised." The mere mentioning of the right as claimed by Ms. Taylor does not meet the higher requirement of the contract which implies that not only must the right be stated but some degree of effort must be expended to assure the right is understood by the employee involved. In this case there is no evidence that care was taken that Mr. Atkins knew of his right at the time it was explained and that he could have exercised an informed option in forfeiting his buy back right. If he was informed at all, it appears to the Arbitrator that it was a perfunctory explanation and not to the extent mandated by the contract.

Accordingly, the Arbitrator finds that the Postal Service violated Article 10 of the National Agreement in not exercising care to assure Mr. Atkins would not be required to forfeit his annual leave. Therefore, Mr. Atkins shall be permitted to exercise his buy back option with respect to the 160 hours of annual leave.

AWARD

The undersigned, after receiving and giving careful consideration to the testimony, evidence and arguments of the parties regarding the submitted issue, awards as follows:

1. The Postal Service violated Article 10 of the National Agreement with respect to Mr. Atkins' 160 hours annual leave buy back option.
 2. Mr. Atkins shall be granted the right to buy back the 160 hours of annual leave.

Date: September 24, 1984

Edward Levin
Arbitrator

STATE OF NEW YORK
COUNTY OF NEW YORK

Appeared before me this 24th day of September, 1984,
EDWARD LEVIN, to me known, who did swear and affirm that he
has executed the above and that all statements herein are
true and correct to the best of his knowledge and belief.

MELBA KAY HANNESSON
Notary Public, State of New York
No. 31-4713169
Qualified in New York County
Commission Expires March 30, 1986