C# 01659

IN THE MATTER OF ARBITRATION BETWEEN	)	OPINION AND AWARD
National Association of Letter Carriers, Branch No. 11	)	
-and-	)	Case No. C8N-4A-C 20164 (Grievance of Kevin Wolff) Chicago, IL
U. S. Postal Service Chicago, Illinois	)	

The hearing in the above-matter was held on August 19, 1981 in Chicago, Illinois before Bernard Dobranski, designated as Arbitrator in accordance with the provisions of the Collective Bargaining Agreement in effect between the parties.

Appearances: Stanley J. Cisek
For the Union

L. G. Handy
For the Employer

Full opportunity to present evidence was afforded the parties. Post-hearing briefs were filed by the September 21, 1981 deadline.

ISSUE

The Union urged that the issue was whether the grievant was on-the-clock at the time he suffered injuries from an automobile accident on June 13, 1980.

The Postal Service presented a threshhold issue of arbitrability on the ground that the issue posed by the Union is a matter properly for the Department of Labor as part of its resolution of the grievant's COP claim and, therefore, not one properly before the Arbitrator under the National Agreement.

BACKGROUND FACTS

The facts which emerged from the brief testimony of the grievant, the documentary evidence, and extensive discussion by the parties are as follows:

The grievant, Kevin Wolff, is employed by the Postal Service as a letter carrier at the Elsdon Station. He also uses his car for work under contract with the Postal Service. (Joint Exhibit 6). On June 1980, the grievant was involved in an automobile accident while on his way home from the Post Office. Wolff ended his tour of duty that day at approximately 2:45-2:50 P.M. He proceeded directly home. The accident occurred at approximately 3:00 P.M. - 10 or 15 minutes after he clocked out - a short distance from his home. As a result of the accident - an accident which was the fault of the other driver - the grievant suffered personal injuries which prevented him from working again until July 17, 1980. Shortly before his return to work on July 17, the grievant asked his supervisor for a Form CA-1, Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay/Compensation.[1] At first, the supervisor refused the form on the ground that Wolff was not entitled to continuation of pay (COP) because he was not on-the-

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[1] The exact date of this request is not clear. The grievant's testimony suggested that this occurred after his return to work on July 17. I note, however, that Joint Exhibit 7, which includes the portions of the CA-1 filled out by the grievant and his supervisor, is dated July 14, 1980. It is likely, therefore, that this conversation occurred either on or shortly before this date.

clock at the time the accident occurred and the injuries suffered. The grievant disagreed with the supervisor's assessment of his entitledment to COP and subsequently was given the CA-1. Both Wolff and the supervisor completed their respective portions of the CA-1. On Item 42, in answer to the question "Does the employing agency controvert continuation of pay," the supervisor checked the "no" box. He commented, however, that the "employee was not in the performance of his duty, he had clocked out and was driving home after leaving the premises. See attached letter."[2] Although the supervisor advised the grievant that he would forward the fully completed CA-1 to the Department of Labor, OWCP District Office, apparently he did not do so.

Sometime after the accident - the date was not identified in

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[2] The "attached letter" referred to in the comment was not identified at the hearing, although the Postal Service representative speculated that it might have been a July 14, 1980 letter from Dr. Bubolz, which indicated that the grievant was under Dr. Bubolz's care and unable to work because of the accident. The basis of this speculation was that the date corresponds to the date the CA-1 was completed by the supervisor. Moreover, this letter was the only one included in the grievant's file.

After much argument and discussion, the Union representative at the hearing was permitted to examine the grievant's workmen's compensation file for the existence of some other document which might have been the "attached letter" described in item 42. Although the union representative was not satisfied with the opportunity afforded him, I am convinced that he had an opportunity to examine all the documents up to and slightly beyond July 14, 1980, the only date pertinent to his request. In any event, the existence and/or contents of such a letter is not relevant to my conclusion in this matter.

in Wolff's testimony - the grievant informed the Department of Labor that he was injured and requested the appropriate forms for filing a claim. The Department of Labor sent him four or five forms (the exact nature of which he could not recall) to be filled out by himself and his physician. These forms were filled out and returned to the Department of Labor.

On July 24, Mr. Grieco, the secretary of Branch No. 11, pursuant to a July 21 phone conversation with someone in the OWCP office, summarized the grievant's case to OWCP in a letter. The letter stated in pertinent part:

> Mr. Wolff neglected to fill out a Form CA-1 prior to July 12, 1980 because his supervisor (Mr. Sieben) informed him that he was not entitled to COP due to the fact that he was "off-the-clock" at the time of the accident. This action is now being questioned because this is not a stipulation on the "A to G" schedule, therefore, the grievant should have been paid.
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> Upon learning from his supervisor that COP was unwarranted, the employer requested and received paid leave. When he returned to work he was informed by his shop steward that perhaps COP was due him. The Union contends that the sick and annual leave used by this employee should be charged to COP.

On August 5, 1980, OWCP replied to Mr. Grieco's letter and indicated that his communication was the first written information that it received concerning the grievant's injury. It also pointed out that since the employee had not filed a Form CA-1, it was not in a position to give any advice concerning the merits of a potential claim. It advised the employer to immediately file a notice of injury without further delay and submit this notice to the U. S. Postal Service for transmission to OWCP.

On July 25, 1980, the instance grievance was filed. In essence,

it indicated that the grievant was hit by another car on his way home and that the grievant was on car contract at the time. The corrective action requested was that his sick and annual leave be restored, that he be made whole for his losses, and that all bills for the accident be paid. The grievance was processed through the various steps of the grievance procedure and was denied at each step.

On January 5, 1981, OWCP informed the grievant that:

> It has been determined that you are not entitled to continuation of pay (COP) during your absence from work from June 13, 1980 to July 17, 1980. The reason for this decision is as follows: The factual and medical evidence is insufficient to establish that you sustained an injury in the performance of duty. The information requested of you by letters of September 2, 1980 and October 29, 1980 was not received.

At the hearing, the grievant could not recall what information was requested in the letters of September 2 and October 29, 1980. He also stated that after he received the January 5, letter he talked to his Union representative about it. The representative indicated that he would follow up on the matter. Although the grievant was not sure whether the representative followed up with OWCP, he was pretty certain that he did.

It is upon these facts that the case now comes before the Arbitrator.

POSTITIONS OF THE PARTIES

Postal Service's Position

The Postal Service argues that the matter is not properly before the Arbitrator because the nature of the issue places it

outside the scope of the powers given to the Arbitrator under the Agreement. Section 541.12 of the Employee and Labor Relations Manual makes it clear that matters under the Federal Employees' Compensation Act, which includes the claim in this case, are administered by the Office of Workers' Compensation Programs (OWCP), United States Department of Labor. In fact, this matter was considered by OWCP and the grievant's claim was denied. It is OWCP which administers the program, and not the Postal Service. If OWCP found the grievant entitled to COP, the Postal Service would give it to him. If, however, it says he is not entitled to COP - which is what it said on January 5, 1981 - then the Postal Service will not pay him COP. The Arbitrator, however, has no authority to reverse the decision of the OWCP nor does the Arbitrator have the right to make findings on issues of fact which in any way bind OWCP. In short, the arbitral forum is not the proper or correct one for determination of the matter in issue.

The Postal Service further contends that regardless of what was submitted or not, it is clear that the Department of Labor considered the grievant's claim, gave reasons why it was denied, and provided information on procedures to be followed for reconsideration of its denial. There is no way under the National Agreement that the Arbitrator can overrule the Department of Labor procedures. The issue is strictly between the Department of Labor and the grievant, and not between the grievant and the Postal Service.

For these reasons, the grievance, should be dismissed.

Union's Position

The Union contends in its brief that Wolff was in the performance of duty at the time of the accident. Union Exhibit 5, which is FECA Program Memorandum No. 142, states that a postal employee who uses his personal vehicle in the performance of his duties, with the knowledge and consent of his employer, is in the performance of duty while traveling in his vehicle to and from work and home. What the Union seeks to establish in this case is that grievant was covered by this Memorandum, which was issued by the Department of Labor. It merely seeks from the Arbitrator a decision as to whether the grievant was in the performance of duty status at the time of the accident. It is not asking the Arbitrator for a decision in the COP aspect of this case. In response to a question from the Arbitrator at the hearing as to the precise nature of the grievance presented, the union representative stated that it was whether the grievant was on the clock when he was injured on June 13 on his way home. He further acknowledged that this request for a determination of whether the grievant was on-the-clock was for purposes of COP.

The Union further points out that management had the responsibility to provide the CA-1 to OWCP. Although the supervisor signed it and indicated to the grievant that he would submit it, he failed to do so. Thus, OWCP did not have all the information necessary.

For these reasons, the grievance should be sustained.

DISCUSSION AND OPINION

For the reasons set forth below, it is my conclusion that the

grievance is not arbitrable and, therefore, should be dismissed.

The Union requests the Arbitrator find that the grievant was in the performance of duty or on-the-clock when his injury occurred. It further states in its brief that it is not asking the Arbitrator for a decision on the COP aspect of this case. However, the question of whether the grievant was on-the-clock is inextricably intertwined with the COP request, and thus can not be severed from it. The Union is not asking the Arbitrator to make a finding that the grievant was in performance of duty in the abstract or in a vacuum but for purposes of aiding its request for continuation of pay (COP). As the Union indicated at the hearing, should the Arbitrator determine the merits of the claim in its favor, it would then present this finding to the OWCP in the COP case as evidence of the fact that the grievant was on-the-clock at the time and thus entitled to the benefits requested. An examination of Subchapter 540 of the EE & LRM, the injury compensation regulation, makes it clear, however, that this determination is not one for the Arbitrator but for OWCP. In other words, there is a forum for the resolution of the claim presented here but it is one provided by the Department of Labor and not the arbitral one.

Not only is such claim within the jurisdiction of OWCP but, in fact, such claim was filed and a determination of it made by OWCP. On January 5, 1981, OWCP denied the claim with a statement that the additional information that it had requested from the grievant on September 2 and October 29, 1980 was not received and, therefore, the factual and medical evidence presented was insufficient to establish that the grievant has sustained an injury in the performance

of his duty. Thus, OWCP, based on the evidence before it, concluded that the grievant was not in the performance of duty - the very issue the Union now wants the Arbitrator to address. If additional evidence exists to show that the grievant was in the performance of duty at the time of the accident, it is incumbent upon the grievant or the Union acting on his behalf to provide such evidence directly to OWCP, and not to submit it to the Arbitrator in an attempt to elicit from him a favorable finding, which will then be presented to OWCP in an attempt to force it to change its decision. For the Arbitrator now to adjudicate the issue presented by the Union would constitute an improper intrusion into the OWCP processes.

Moreover, I cannot agree that the supervisor's apparent failure to submit the Form CA-1 to OWCP gives the Arbitrator jurisdiction in this case. There may well be merit in the Union's argument that such failure somehow prejudiced the grievant's OWCP claim. However, the proper forum for the determination of the merits of this argument is OWCP. As the January 5 letter denying the grievant's claim indicates, the grievant, if he has other evidence which he believes is pertinent, may ask for reconsideration of the decision. Even if all available evidence had been submitted, the grievant had the right to appeal to the Employees' Compensation Appeals Board for review of the initial decision. Thus, there is (or was) ample opportunity to raise with OWCP the issue the Union now seeks to raise here.

Similarly, the Union's argument that Department of Labor FECA Program Memorandum No. 142 controls the performance of duty question

is one properly addressed to OWCP and not the Arbitrator. Again, if the Union disagrees with OWCP's interpretation or application of this memorandum, it has a right to reconsideration or to appeal to the Appeals Board for review of the decision.

AWARD

For these reasons, the grievance of Kevin Wolff is dismissed on the grounds that it does not present an arbitral matter.

October 20, 1981
South Bend, Indiana

Bernard Dobranski
Arbitrator