C#10692

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION, AFL-CIO

GRIEVANT: J. O'Niel

POST OFFICE: LOS ANGELES

CASE NO. W7C-5D-C19372

BEFORE: ROBERT M. LEVENTHAL, ARBITRATOR

APPEARANCES:

For the U.S. Postal Service:	John Marks
For the Union:	Johnny Wilson
Place of Hearing:	7001 S. Central, Los Angeles, CA
Date of Hearing:	July 16, 1990

AWARD: The Postal Service violated Article 19 of the contract when the Grievant was denied continuation of pay for 45 calendar days. The Grievant is to be paid as if he was on COP for the period in question.

Date of Award: August 30, 1990

Robert M. Leventhal

AWARD IN ARBITRATION
W7C-5D-C19732

The above captioned matter was duly processed through the parties' grievance procedure, being unresolved, appealed to, and heard before the undersigned in regular arbitration on July 16, 1990.

At the outset of the proceedings, the parties stipulated the matter was properly before me for arbitral determination and the issue for resolution to be:

1. Did the Postal Service violate the Article 19 of the Collective Bargaining Agreement when it denied continuation of pay (COP) for the period of 45 calendar days from June 14, 1988?
2. If so, the Grievant is to be paid as if he was on COP for the period in question.

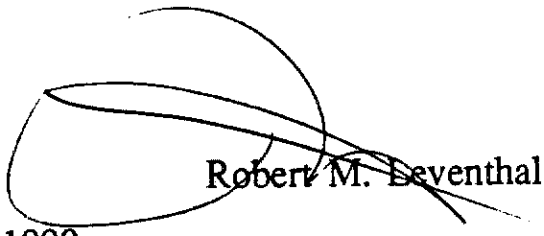
At the conclusion of the evidentiary portion of the proceedings, the parties elected to make oral argument whereupon this record was closed and the matter taken under consideration for the issuance of this award and opinion.

Having carefully reviewed the entire record in this case, it is my award that:

1. The Postal Service did violate the Article 19 of the Collective Bargaining Agreement when it denied continuation of pay (COP) for the period of 45 calendar days from June 14, 1988.

2. The Grievant is to be paid as if he was on COP for the period in question.

Respectfully submitted,



Robert M. Leventhal

Submitted: August 30, 1990

Culver City, California

BACKGROUND

Mr. Jarald O'Niel, hereinafter called the Grievant, suffered an injury that caused him to be on "light duty" since 1973. During the course of his Postal Service career, the Grievant served as a shop steward and in addition to his own injuries, from time to time advised others as to their rights and obligations when injured. The Grievant acknowledged he was familiar with the CA-1 and CA-2 forms and the requirements for reporting an injury.

The events that gave rise to the instant dispute occurred in 1988 and the parties were able to stipulate as follows;

1. The Grievant was employed as a manual distribution clerk and on or about May 16, 1988 the Grievant reported an injury.
2. On June 13, 1988 the Grievant visited the doctor and was informed by the doctor he would have to be "off" until at least July 11, 1988.
3. The Grievant submitted a doctor's note on June 13, 1988. However, that note did not have the Kaiser imprint. The Grievant returned to Kaiser, secured the imprint and then submitted and had that doctor's note accepted on July 14, 1988.
4. The Grievant was placed on COP for June 13-14 through July 11, 1988.
5. On or about June 14 the Grievant was in the injury compensation office and a CA-1 form was discussed.

6. On June 15, 1988 the Grievant had telephonic discussion regarding the injury and his leave status.
7. On June 16, 1988 the Grievant's wife came into the injury compensation office, had a note from her husband which she felt authorized her to complete the form, presented that to a Mr. Rieze, who said the Grievant had to complete the form.
8. The Grievant's wife took the form and left, had the Grievant sign and he completed his portion. The wife returned the form on the same day--June 16, 1988.
9. The Postal Service noticed the Grievant it was seeking controversion of COP.
10. The Department of Labor denied COP for the period in question.
11. On or about January 3, 1989 the Department of Labor determined the Grievant did sustain an on-the-job injury on May 16, 1988.

After the Grievant submitted a CA-1, the Postal Service, in the normal course of business, forwarded the paperwork to the Department of Labor. The parties did not dispute that the Department of Labor "serves" the Postal Service in evaluating claims. Procedures other than the negotiated grievance procedure exists whereby employees who believe their claims have been improperly denied, may appeal.

The Employee and Labor Relations Manual (October 7, 1988 issue), sets forth in pertinent part:

> 542.112 Time Limit: FECA requires that written notice of a traumatic injury be given within 30 days from the date on which the injury occurred. Failure to give notice within this time period will result in a loss of entitlement to continuation of regular pay and may also result in a loss of compensation rights, if the claim for compensation is not filed within 3 years. In order to protect their own interests and to ensure an uninterrupted income, employees should give notice or have someone give notice on their behalf within 2 days after the traumatic injury occurred.

The CA-1 form (revised 3/86) is given to injured employees and sets forth as a basis to controvert:

> 35 f: The injury was not reported on Form CA-1 within 30 days following the injury.

Handbook EL-505, Injury Compensation Procedures, issued 3 October 1985, sets forth under general provisions of FECA:

> b. Continuation of Pay (COP): An employee who sustains a disabling job-related traumatic injury is entitled to continuation of regular pay for a period not to exceed 45 calendar days of disability. Under normal circumstances, in order to qualify for continuation of pay, the traumatically injured employee must file written notice of injury on a CA-1 and claim for continuation of pay within 30 days of the date of injury. Continuation of pay is not defined as an injury compensation benefit for FECA purposes and is subject to all applicable taxes and other payroll deductions. The employee must make separate claim for monetary compensation on a CA-7 if the disability exceeds 45 days or results in any permanent disability.

By letter dated July 28, 1988 the Postal Service noticed Department of Labor that it wished to controvert the Grievant's claim.

Appended to that letter was the following statement in support of the Postal Service's request:

> Jarald O'Niel alleged that he sustained a traumatic injury to his back lower left side while in the performance of his duties for the Los Angeles Postal Service on May 16, 1988.
>
> After careful investigation the following facts were revealed:
>
> Jarald O'Niel had been treated by physician Sheade, M.D., at Kaiser Permanente on June 13, 1988, for herniation nucleus pulposus and given a disability slip to remain off work from June 14, 1988 through July 11, 1988. Claimant's initial date of medical treatment and total temporary disability began twenty-eight to twenty-nine days following the alleged date of alleged incident. Ex. #1.
>
> June 14, 1988, Mr. O'Niel visited the Injury Compensation Control Office and presented the above medical slip, where he was advised to contact his supervisor regarding filing a Form CA-1. Mr. O'Niel refused to contact his supervisor and insisted on getting off his feet, going to eat, taking a pill and going home! Mr. O'Niel's supervisor was available during the hour that claimant was in the ICCO, yet Mr. O'Niel insisted on sending his wife back to complete his Form CA-1. Ex. #2.
>
> Following May 16, 1988, excluding June 2, 1988 when Mr. O'Niel called and requested sick leave, he performed the full duties of his permanent light duty assignment until June 13, 1988 without any difficulty. Mr. O'Niel did not mention his condition to his supervisor or co-workers. Mr. O'Niel is a shop steward who has personally filed three previous traumatic injury claims. More importantly, he has on many occasions accompanied rank and file employees to the ICCO in preparation of their injury claims as their representative. O'Niel is very knowledgeable of our injury claim reporting system.

> Mr. O'Niel was grossly adamant concerning the process of his claim within the thirty days period and his entitlement to COP benefits, yet he refused to communicate with his supervisor on June 14, 1988 regarding the alleged injury. Moreover, on May 16, 1988 the date of the alleged incident, claimant had been previously scheduled to see his physician , yet failed to communicate any factors of the alleged incident to his physician on May 16, 1988.
>
> We view this claim as highly suspect! We feel that claimant is attempting to use FECA benefits for his own self serving purposes. Further, on July 21, 1988, we called the claimant's residence and was told by a young man that Mr. O'Niel was out of town on vacation. It is hoped that this investigation will aid in the adjudication of this claim and in your determination of employee's entitlement to benefits under the FECA.

Based on the above, the Department of Labor controverted the Grievant's claim for COP. The Grievant was noticed of the controversion, requested reconsideration, was denied, and the grievance filed in this case set forth:

> Appellant contends he is being discriminated against by management in the alleged untimely filing of his CA-1, CA-2 and denial of his request for COP. Appellant contends that he was incapacitated and was unable to come in personally to file a claim. Appellant notified his supervisor orally within a few days of the injury and authorized his wife to file a claim on the 30th day and sent the form to Mr. O'Niel who received and signed it on the 21st day. Appellant contends he followed proper procedures and it was his supervisor who delayed the paperwork. The Union contends denial of appellant's COP by the Department of Labor for actions taken by the supervisor is a violation of Article 2, 14, and 19 of the CBA.

This matter was processed, the Postal Service denying the grievance based on the fact the Department of Labor had determined

the Grievant was not eligible for COP and the Union had failed to demonstrate a violation of the National Agreement.

DISCUSSION

What appeared to be a relatively simple dispute became complicated as the various facts unfolded. Stated simply, the Grievant could not dispute a CA-1 for the injury in question was filed one or two calendar days after 30 days from the date he reported the injury.

The CA-1 form sets forth the employing agency may controvert a claim for any one of the nine reasons set forth. Failure to file a CA-1 within 30 days following the injury is one of the enumerated categories.

If all claims are to be automatically denied if the CA-1 is not filed within 30 days, such a finding would be dispositive of this dispute.

As I read the CA-1, the employing agency may (permissive) seek controversion.

The handbook and manual section submitted for my consideration raises questions. The procedures (EL-505) issued by the Postal Service set forth a CA-1 is to be filed in 30 days under "usual" circumstances. This instruction was issued in 1985. The Employee and Labor Relations Manual section, dated October 7, 1988 sets forth a mandatory act within 30 days and failure to so act works an automatic forfeiture. The CA-1 form (1986) appears consistent with the ELM.

Based on this record, I cannot (and perhaps should not as a regional arbitrator) determine which document is superior or supersedes. The thrust of the Postal Service' position is file within 30 days or forfeit. The Union's position is the 30 day requirement is to be followed "normally," leaving open consideration for unusual circumstances.

What emerges from this record is certain members of Postal Service management doubted if the Grievant had, in fact, injured himself, and doubted his representations as to how badly he felt when he declined their offer to stay and complete the CA-1 form.

It appears from the CA-1 form the Postal Service may, but is not mandated to seek controversion of claims. The Postal Service did not request controversion based on the filing date, but submitted a detailed statement of "facts" to support its position to controvert a claim that was filed a "few" days late.

The nature of the Postal Service' submission to the Department of Labor leads to the conclusion that absent the Postal Service' belief the Grievant was either not injured on the job or was grossly misrepresenting his condition on June 14th and immediately thereafter, it is questionable the Postal Service would have sought controversion.

Unanswered on this record is what Department of Labor would do with a claim that was a few days late with no request for controversion by the employing agency.

No dispute existed the Department of Labor evaluated claims and based on their findings, the Postal Service pays. Department of

Labor findings are not subject to review by arbitrators. It is my opinion that arbitrators may review the acts and decisions of the Postal Service as to what they elect to submit to the Department of Labor and if a permissive decision to controvert has been reasonably exercised.

I cautioned both parties in making a decision that impinged on the interrelationship between Department of Labor and the Postal Service and the Postal Service' right to exercise discretion as to what should be submitted or when to seek controversion, may be a national interpretive issue.

If this arbitration is reviewed and it is found I have "overstepped" my authority, this award is subject to vacation.

With the above caveat, it appears that Postal Service management has some discretion and but for the opinion of certain Postal Service managers the Grievant was misrepresenting his condition, this claim would not have been controverted.

The Postal Service made a number of factual allegations in its investigative report to Department of Labor. The critical testimony at the arbitration was the evidence to support the allegations of the Grievant's refusal to cooperate, insistence his claim be processed while refusing to discuss same, sending his wife to complete forms, etc., was not supported. The Postal Service, for whatever reason, was unable to present any credible evidence to support its allegations other than offering testimony the Department of Labor reviewed the forms and made the decisions.

The Grievant presented a very different story regarding his injury, his reporting of the injury, visits to the doctor, attempts to continue working until the pain increased to the point he could no longer stay on his feet for any meaningful time, and the use of medication to alleviate his pain.

The Grievant submitted the medical evidence to support his representations. The Grievant's conduct of attempting to continue working in hopes the injury would not be debilitating was not the conduct of an individual who was seeking a benefit to which he was not entitled.

Postal Service management did not dispute there were discussions, but at no time did anyone caution the Grievant his 30 days would toll. The Grievant asked if he could return or send his wife and I credit he was told that would be satisfactory. The Grievant discussed the matter again by phone (June 15) and received what he understood to be assurances it would be satisfactory if he sent his wife the next day.

The wife did appear on June 16, 1988 and then a "new" problem arose that required her to make two trips. The Postal Service acknowledged it was acceptable to allow a wife to turn in a CA-1.

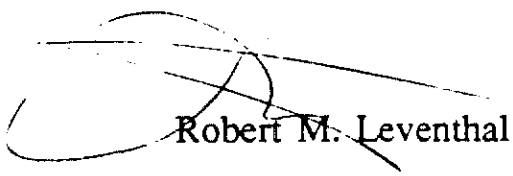
Based on this record the Grievant was under considerable stress and medication. He discussed filing the CA-1 and based on this record, I credit the Grievant's unrefuted testimony he was led to believe if he sent his wife in, as he was in too much pain, she could

file the CA-1 and he had reason to believe he was in compliance as of June 16, 1988.

Accordingly, Postal Service management made material misrepresentations of fact to the Department of Labor. What I cannot determine on this record is to what extent, if at all, the Postal Service management's misrepresentations to the Department of Labor its decision to controvert, affected the Department of Labor determination.

Without prejudice to how the misrepresentations affected the Department of Labor decision, Postal Service management did not have "clean hands." Based on these facts, the Postal Service is obligated to pay the Grievant the 45 days COP as set forth in the submission agreement.

Respectfully submitted,



Robert M. Leventhal

Submitted: August 30, 1990
Culver City, California