

C#10530

WESTERN REGION
REGULAR ARBITRATION PANEL

In the Matter of the Arbitration)
)
)
-Between-)
)
UNITED STATES POSTAL SERVICE)
)
)
-And-)
)
NATIONAL ASSOCIATION OF)
LETTER CARRIERS, AFL-CIO)
)
)

GRIEVANT:
Rick Kuchynka

POST OFFICE:
Miles City, MT

CASE NO.:
W7N-5K-C 18037

NALC GTS NO.:
4284

BEFORE: CARL B.A. LANGE III, Arbitrator

APPEARANCES:

For the U.S. Postal Service: L.G. HANDY
Manager, Labor Relations
1760 West 2100 South
Salt Lake City, UT 84199-9401

For the Union: JIM WILLIAMS
Regional Administrative Assistant
P.O. Box 84386
Vancouver, WA 98684-6545

Place of Hearing: 106 North 7th Street
Miles City, MT

Date of Hearing: May 1, 1990

AWARD:

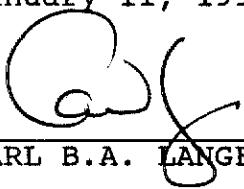
The Postal Service did not violate the National Agreement when it charged the Grievant 52 minutes of Absence Without Official Leave on August 31, 1989.

Date of Award: January 11, 1991

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JIM EDGE MON, NBA
National Association Letter Carriers


CARL B.A. LANGE III

BACKGROUND
(Kuchynka - AWOL)

Pursuant to the terms of the National Collective Bargaining Agreement ("National Agreement") between the **UNITED STATES POSTAL SERVICE** ("Service" or "Employer"), and the **AMERICAN POSTAL WORKERS UNION, AFL-CIO** ("APWU" OR "Union"), and the **NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO** ("NALC" or "Union"), the undersigned was selected from the USPS/NALC Western Region Regular Arbitration Panel to serve as the Arbitrator in this matter.

This matter arises as a result of the Service's issuance of a letter that charged the Grievant with 52 minutes of AWOL for August 31, 1989. At all times relevant to the events surrounding this grievance, the Grievant was suffering from, and receiving treatment for, symptoms of clinical depression. The Grievant had been placed on administrative leave effective on August 30, 1989. (The reasons for the leave, the events surrounding its imposition, and the Service's subsequent determination to terminate the Grievant are not at issue in this matter.) The terms of the administrative leave required the Grievant "to be available by phone or personal contact" during the regular workday. The administrative leave was further conditioned as follows:

"If you become medically incapacitated or wish to not be available during the period, you may submit a request for appropriate leave. Without advance approval of leave, non-availability during your normally scheduled workhours may be considered as an absence without official leave (AWOL)." (Employer Exhibit 1.)

On August 31, 1989, at about 2:08 p.m., the Grievant called the Miles City Post Office to report that he would be unavailable for contact between that time and 3:00 p.m., the end of his regular workday. The Grievant maintained that he told the Service that he was going to play golf. The Service maintained that it had been notified that the Grievant was going to his doctor's. The instant dispute hinges on the reason given to the Service regarding the purpose of the Grievant's absence. When the Service ascertained, and partially verified through the Grievant's own admission, that he had been at the golf course, it determined that the time would be charged to AWOL.

A Step 1 grievance meeting was held on September 27, 1989. The grievance was denied on October 2, 1989. A formal Step 2 grievance was filed shortly thereafter. The grievance alleged a violation of Articles 3, 15 and 19 of the National Agreement (Jt. Exhibit 1), as well as Sections 512.1, 512.411, 512.422, 516, 516.2, and 516.63 of the Employee and Labor Relations Manual ("ELM"). The grievance was denied at Step 2 on October 27, 1989. A Step 3 appeal followed. The Step 3 meeting was held on December 13, 1989. A Step 3

decision letter denying the Grievance was issued on December 29, 1989. The grievance was not settled through the formal grievance procedure and was processed to arbitration pursuant to the provisions of the National Agreement.

An evidentiary hearing was held on May 1, 1990, at the postal facility located at 106 North 7th Street, Miles City, Montana. The Service was represented by L. G. Handy, Manager, Labor Relations. The NALC was represented by Jim Williams, Regional Administrative Assistant. The parties agreed that there were no issues of procedural or substantive arbitrability to be resolved and that the matter was properly before the Arbitrator.

During the course of the hearing, the parties were afforded a full and complete opportunity to be heard, to call, examine, and cross-examine witnesses, to develop arguments, and to present relevant evidence. Rick Kuchynka ("Grievant" or "Employee"), a letter carrier at the Miles City Post Office since November 1985, was present at the hearing and testified on his own behalf. All witnesses who appeared before the Arbitrator were duly sworn. An official transcript of the hearing was made by a Registered Professional Reporter. A copy of the "Transcript of Proceedings" was submitted to the Arbitrator on May 11, 1990. The parties submitted written post-hearing briefs. The Union's post-hearing brief was received by the Arbitrator on November 29, 1990. The Service's post-hearing brief was received by the Arbitrator on December 11, 1990. The matter was deemed to be submitted for decision as of December 11, 1990.

The Issue

The Union's position was that the issue should be stated as:

"Did the Postal Service violate the National Agreement and relevant handbooks or manuals when they charged the Grievant 52 minutes of AWOL on August 31, 1989?

"If so, what is the appropriate remedy?"

The Service's position was that the issue should be stated as:

"Did the Postal Service violate the National Agreement, and specifically Article 19 which incorporates the ELM Manual, when they charged the Grievant with 52 minutes of AWOL on August 31, 1989?

"If so, what is the appropriate remedy?"

Since the parties were unable to agree to a statement of the issue, the matter was left for determination by the Arbitrator. After a

review of the transcript and relevant evidence, the Arbitrator determined that the issue should be stated as:

"Did the Postal Service violate the National Agreement when it charged the Grievant with 52 minutes of AWOL for August 31, 1989?

If so, what is the appropriate remedy?"

The Union's Position

The Union claims, as its primary position, that the Grievant adhered to the terms of his administrative leave instructions and notified the Service properly that he would be unavailable by phone on the day in question. Further, the Union argues that the Grievant specifically and unequivocally told the Service that he was going golfing, even to the extent of providing the telephone number at the golf course pro shop. At no time did the Grievant attempt to mislead the Service about where he was going or what he would be doing. The Union challenges the Service's contention that the Grievant told them that he was going to his doctor's. The Union asserts, finally, that the Grievant was entitled to eight hour's pay, not seven hours and eight minutes, for August 31, 1989, by operation of the ELM.

As to the Remedy, the Union urges the Arbitrator to order that the Grievant "be made whole for the 52 minutes of AWOL and that the Letter of Charges be expunged from his record."

The Service's Position

The Service's view of the situation is clearly expressed in the relevant paragraphs of the September 18, 1989 letter (Jt. Exhibit 2G), characterized above as the "Letter of Charges" by the Union, that notified the Grievant of the AWOL determination:

"[Y]ou called in at 2:08 p.m. and advised SPO Al Olson that you would be gone from the house until 3:00 p.m., as you were going to see Dr. Peterson. Management has confirmed that contrary to what you said to Mr. Olson, you went to the Miles City Golf Course, teed off at approximately 2:30 p.m. and proceeded [sic] to play a round of golf. On September 7, 1989, you contended that you had told Mr. Olson, on August 31, that you were going to be at the golf course and that you had left word with the golf pro to be contacted on the course if you received any calls between 2:30 p.m. and 3:00 p.m. Management has confirmed that your call to Mr. Olson did not relate to a visit to the golf course at that time and

has confirmed that no such arrangements, as alleged, were made with the golf pro.

"You were advised in the above referenced letter that you are to remain available by phone or personal contact during your normal work schedule while on administrative leave. You were advised that without advance approval of leave, non-availability during your normally scheduled workhours may be considered as an absence without official leave (AWOL). I have, therefore, directed that your non-availability for fifty-two (52) minutes from 2:08 p.m. to 3:00 p.m. on Thursday, August 31, 1989, be recorded as AWOL. You will not be compensated for that period of time."

The Service contended that either there was an unintentional miscommunication between the Grievant and Mr. Olson or there was a deliberate and intentional attempt by the Grievant to mislead management as to his whereabouts for the last few minutes of the workday on August 31, 1989. The Service also argued that its ultimate determination to charge the 52 minutes to AWOL was appropriate where the time would not have been authorized if it had been understood that the Grievant intended to play golf.

Relevant Provisions of the National Agreement

The Agreement between the United States Postal Service and the American Postal Workers Union, AFL-CIO, and the National Association of Letter Carriers, AFL-CIO, provides:

"ARTICLE 3

"MANAGEMENT RIGHTS

"The Employer shall have the exclusive right, subject to the provisions of this agreement and consistent with applicable laws and regulations:

"A. To direct employees of the Employer in the performance of official duties;

"B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;

"C. To maintain the efficiency of the operations entrusted to it;

"D. To determine the methods, means, and personnel by which such operations are to be conducted;

"E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and

"F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

...."

"ARTICLE 15

"GRIEVANCE-ARBITRATION PROCEDURE

"Section 1. Definition

"A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Unions which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

"Section 2. Grievance Procedure - Steps

"Step 1:

"(a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or Union representative. . . .

"(b) In any such discussion the supervisor shall have authority to settle the grievance. The steward or other Union representative

likewise shall have authority to settle or withdraw the grievance in whole or in part. No resolution reached as a result of such discussion shall be a precedent for any purpose.

"(c) If no resolution is reached as a result of such discussion, the supervisor shall render a decision orally stating the reasons for the decision. The supervisor's decision should be stated during the discussion, if possible, but in no event shall it be given to the Union representative (or the grievant, if no Union representative was requested) later than five (5) days thereafter unless the parties agree to extend the five (5) day period. . . .

"(d) The Union shall be entitled to appeal an adverse decision to Step 2 of the grievance procedure within ten (10) days after receipt of the supervisor's decision. Such appeal shall be made by completing a standard grievance form developed by agreement of the parties, which shall include appropriate space for at least the following:

- "1. Detailed statement of facts;
- "2. Contentions of the grievant;
- "3. Particular contractual provisions involved; and
- "4. Remedy sought.

"Step 2:

"(a) The standard grievance form appealing to Step 2 shall be filed with the installation head or designee. In any associate post office of twenty (20) or less employees, the Employer shall designate an official outside of the installation as the Step 2 official, and shall so notify the Union Step 2 representative.

"(b) Any grievance initiated at Step 2, pursuant to Article 2 or 14 of this Agreement, must be filed within 14 days of the date on which the Union or the employee first learned or may reasonably have been expected to have learned of its cause.

"(c) The installation head or designee will meet with the steward or a Union representative as expeditiously as possible, but no later than seven (7) days following receipt of the Step 2 appeal unless the parties agree upon a later date. In all grievances appealed from Step 1 or filed at Step 2, the grievant shall be represented in Step 2 for all purposes by a steward or a Union representative who shall have authority to settle or withdraw the grievance as a result of discussions or compromise in this Step. The installation head or designee in Step 2 also shall have authority to grant or settle the grievance in whole or in part.

"(d) At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31. The parties' representatives may mutually agree to jointly interview witnesses where desirable to assure full development of all facts and contentions. In addition, in cases involving discharge either party shall have the right to present no more than two witnesses. Such right shall not preclude the parties from jointly agreeing to interview additional witnesses as provided above.

"(e) Any settlement or withdrawal of a grievance in Step 2 shall be in writing or shall be noted on the standard grievance form, but shall not be a precedent for any purpose, unless the parties specifically so agree to develop an agreement to dispose of future similar or related problems.

"(f) Where agreement is not reached the Employer's decision shall be furnished to the Union representative in writing, within ten (10) days after the Step 2 meeting unless the parties agree to extend the ten (10) day

period. The decision shall include a full statement of the Employer's understanding of (1) all relevant facts, (2) the contractual provisions involved, and (3) the detailed reasons for the denial of the grievance.

"(g) If the Union representative believes that the facts or contentions set forth in the decision are incomplete or inaccurate, such representative should, within ten (10) days of receipt of the Step 2 decision, transmit to the Employer's representative a written statement setting forth corrections or additions deemed necessary by the Union. Any such statement must be included in the file as part of the grievance record in the case. The filing of such corrections or additions shall not affect the time limits for appeal to Step 3.

"(h) The Union may appeal an adverse Step 2 decision to Step 3. Any such appeal must be made within fifteen (15) days after receipt of the Employer's decision unless the parties' representatives agree to extend the time for appeal. Any appeal must include copies of (1) the standard grievance form, (2) the Employer's written Step 2 decision, and, if filed, (3) the Union corrections or additions to the Step 2 decision.

"Step 3:

"(a) Any appeal from an adverse decision in Step 2 shall be in writing to the Regional Director for Human Resources, with a copy to the Employer's Step 2 representative, and shall specify the reasons for the appeal.

"(b) The grievant shall be represented at the Employer's Regional Level by a Union's Regional representative, or designee. The Step 3 meeting of the parties' representatives to discuss the grievance shall be held within fifteen (15) days after it has been appealed to Step 3. Each party's representative shall be responsible for making certain that all relevant facts and contentions have been developed and considered. The Union representative shall have authority to settle or withdraw the grievance in whole or in part. The Employer's representative likewise shall have authority to grant the grievance in whole

or in part. In any case where the parties' representatives mutually conclude that relevant facts or contentions were not developed adequately in step 2, they shall have authority to return the grievance to the Step 2 level for full development of all facts and further consideration at that level. In such event, the parties' representatives at Step 2 shall meet within seven (7) days after the grievance is returned to Step 2. Thereafter, the time limits and procedures applicable to Step 2 grievances shall apply.

"(c) The Employer's written Step 3 decision on the grievance shall be provided to the Union's Step 3 representative within fifteen (15) days after the parties have met in Step 3, unless the parties agree to extend the fifteen (15) day period. Such decision shall state the reasons for the decision in detail and shall include a statement of any additional facts and contentions not previously set forth in the record of the grievance as appealed from Step 2. Such decision also shall state whether the Employer's Step 3 representative believes that no interpretive issue under the National Agreement or some supplement thereto which may be of general application is involved in the case.

"(d) The Union may appeal an adverse decision directly to arbitration at the Regional level within twenty-one (21) days after the receipt of the Employer's Step 3 decision in accordance with the procedure hereinafter set forth; provided the Employer's Step 3 decision states that no interpretive issue under the National Agreement or some supplement thereto which may be of general application is involved in the case.

...

"Section 3. Grievance Procedure - General

"A. The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end.

"B. The failure of the Employee or the Union in Step 1, or the Union thereafter to meet the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance. However, if the Employer fails to raise the issue of timeliness at Step 2, or at the step at which the employee or Union failed to meet the prescribed time limits, whichever is later, such objection to the processing of the grievance is waived.

"C. Failure by the Employer to schedule a meeting or render a decision in any of the Steps of this procedure within the time herein provided (including mutually agreed to extension periods) shall be deemed to move the grievance to the next Step of the grievance-arbitration procedure.

... .

"Section 4. Arbitration

"A. General Provisions

... .

"5. Arbitration hearings normally will be held during working hours where practical. Employees whose attendance as witnesses is required at hearings during their regular working hours shall be on Employer time when appearing at the hearing, provided the time spent as a witness is part of the employee's regular working hours.

"6. 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. . . .

... .

"9. In any arbitration proceeding in which a Union feels that its interests may be affected, it shall be entitled to intervene and participate in such arbitration proceeding, but it shall be required to share the cost of such arbitration equally with any

or all other Union parties to such proceeding. Any dispute as to arbitrability may be submitted to the arbitrator and be determined by such arbitrator. The arbitrator's determination shall be final and binding.

. . ."

ARTICLE 19

HANDBOOKS AND MANUALS

"Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

. . ."

ANALYSIS AND CONCLUSION

Postal Service management has, and retains, the right to direct its work force, to provide for efficient operations, and to determine the methods, means, and personnel through which its mission will be accomplished. (Jt. Exhibit 1 at Article 3.) The Service's rights are limited and regulated by provisions of the National Agreement, Memoranda of Understanding that are contained in the National Agreement, and by local Memoranda of Understanding that have been negotiated pursuant to Article 30. Various Postal Service Handbooks, Operating Manuals, and Regulations also contain limitations and restrictions on the exercise of management's rights that are integrated with the National Agreement by operation of Article 19.

The Service has the right to place an employee on administrative leave. Administrative leave is an authorized absence from duty while the employee remains on regular pay status.

"[I]t is a leave granted by Management to further the interests of the Postal Service. . . . Administrative leave is not intended to convey a privileged status, where the employee

can do what he wants; rather it is a status for Postal Service efficiency or convenience . . ." (Arbitrator Fogel, Case No. W7N-5E-C 20079, 1990.)

Arbitrator Fogel further stated that the Service has the authority and discretion to dictate reasonable requirements that constrain an employee's freedom of action during the time that the employee is on administrative leave.

As a part of the administrative leave, the Service required that the Grievant be available by phone or personal contact, required that he request appropriate leave if he wished not to be available, and informed him that he would be considered AWOL if he failed to comply with the stated requirements. Employer Exhibit 1 by its terms retained the Service's right to make an individual determination on each request to be not available. There was no challenge to the reasonableness of the requirements, nor in the Arbitrator's opinion, would such a challenge have been sustained.

The record indicates that the Grievant honestly, and perhaps correctly, believed that there was some amount of latitude in his personal activities while he was on administrative leave, just as long as he called the Post Office and informed the Service of his intended whereabouts. At a minimum, that latitude would allow him to be absent from home and/or out of telephone contact in order to visit his Doctor and to take walks. The walks were apparently accepted by the Service as part of the Grievant's prescribed treatment for his depression.

Since the Service has the right to determine the terms under which an employee is placed on administrative leave, arbitral review is limited to the question of whether the Service's implementation of the terms meets a basic test of reasonableness. An Arbitrator is required to review the Service's actions within a relatively proscribed set of well-accepted guidelines. In matters such as this, arbitral intervention is justified only in limited circumstances:

"[T]he Union must surmount the presumption that the Employer's decision was made in good faith and was based upon a reasonable foundation. Of course, exercises of managerial prerogatives are open to challenge on questions of unreasonableness, discrimination, arbitrariness, and capriciousness. . . . [U]nless the Union can establish that the Employer abused its discretion, arbitral intervention is unwarranted." (Arbitrator Dworkin, Case No. C8N-4B-C 31531, 1983.)

The determination of how to assess the 52 minutes in question belongs to the Service. It had at least two other options besides the AWOL determination. First, the time could have been maintained in regular administrative leave status. The Service could have considered playing golf to be equal to taking walks - an admittedly acceptable on-the-clock activity. However, the Service had the right to consider the detrimental effect of the public's (including other employees') perception that it would sanction an employee playing golf during his regular workday. Second, the time could have been charged to leave without pay (LWOP) status. The net effect would have been the same as the AWOL status, without the pejorative connotation, as the Grievant would not be on the clock while on the golf course. The Service's determination to assess the time as AWOL instead of LWOP was influenced by the perception that the Grievant's call was an attempt to mask the true reason for being out of personal contact. While the Arbitrator does not accept the Service's reasoning, the real issue is not who is to be believed as to the substance of the Grievant's call to the Post Office but the substance of the call itself. It is clear that the Grievant did not say that he was going golfing. His reference to "1500," the phone number at the golf course, is not specific enough to guarantee that the person who took the message understood the message. When an employee in this situation wants to remain in paid status for a full eight hours and wants to avoid the imposition of an AWOL determination, it is the employee who is required to make certain that there is no misunderstanding.

While the Arbitrator's analysis of the situation might lead to the conclusion that circumstances could justify an extension of the administrative leave in the instant circumstances or, in the alternative, charging the 52 minutes to LWOP status, there is no compelling evidence in the record upon which to base a finding that the Service's AWOL determination was arbitrary, capricious, or based on an unreasonable motive. If the Arbitrator is unable to make such a finding, then his judgement as to what is proper or preferable may not be substituted for the Service's determination.

AWARD

The Service did not violate the terms of the National Agreement when it charged the Grievant with 52 minutes of AWOL for August 31, 1989. The grievance is denied.

Respectfully submitted,

CARL B.A. DANGE III