

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration
between
UNITED STATES POSTAL SERVICE
and
NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO

C# 10455
A-B

GRIEVANT: G REYNOLDS
POST OFFICE: SPOKANE, WA
CASE NO: W7N-5R-C 21649
W7N-5R-C 24750

BEFORE: Gary L. Axon, ARBITRATOR

APPEARANCES:

For the U. S. Postal Service:

Dolores J. Huff
Labor Relations Representative
United States Postal Service
E. 703 Trent
Spokane, WA 99202-9402

For the Union:

Jim Williams
Regional Administrative Assistant
NALC
P.O. Box 84386
Vancouver, WA 98684-0386

Place of Hearing:

Spokane, Washington

Date of Hearing:

November 29, 1990

AWARD: The Service violated Article 19 of the National Agreement and Section 513.5 of the Employee and Labor Relations Manual when it denied the two requests for advance sick leave at issue in this case. The grievances are sustained. Service is ordered to make Grievant whole for the losses due to the denial of the advance sick leave requests. The parties shall attempt to determine the amount due and the form of payment. The Arbitrator will retain jurisdiction to resolve any disputes concerning computation and payment of the relief ordered in the event the parties are unable to agree.

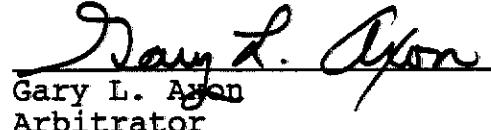
Date of Award: December 15, 1990

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DEC 17 1990

JIM EDGEMON, NBA

National Association Letter Carriers


Gary L. Axon
Arbitrator

I. STATEMENT OF ISSUE

The two grievances involved identical issues that occurred on two separate dates. The issues were framed by the parties to read:

Case No. W7N-5R-C 21649

Did the Postal Service violate Article 19 of the National Agreement and/or Employee and Labor Relations Manual, Section 513.5, when the grievant was denied a request for advance sick leave on September 22, 1989?

If so, what is the appropriate remedy?

Case No. W7N-5R-C 24750

Did the Postal Service violate Article 19 of the National Agreement and/or Employee and Labor Relations Manual, Section 513.5, when the grievant was denied a request for advance sick leave on May 22, 1990?

If so, what is the appropriate remedy?

II. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 15

GRIEVANCE-ARBITRATION PROCEDURE

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Section 2. Grievance Procedure-Steps
Step 1

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(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.

. . .

Employee & Labor Relations Manual

513.5 Advance Sick Leave

51 Policy

.511 **May Not Exceed 30 Days.** Sick leave not to exceed 30 days (240 hours) may be advanced in cases of serious disability or ailments if there is reason to believe the employee will return to duty. Sick leave may be advanced whether or not employees have annual leave to their credit.

.512 **Medical Document Required.** Every application for advance sick leave must be supported by medical documentation as to illness.

III. STATEMENT OF FACTS

Grievant Reynolds made two requests for advance sick leave dated September 16, 1989 and May 11, 1990. (Jt. Ex. 2(I) and Jt. Ex. 3(I)). Both requests were generated because of medical conditions which prevented Grievant from working. As a consequence of his being absent from work for medical reasons he had exhausted all of his accrued sick leave.

Bill R. Fetterhoff, MSC Manager/Postmaster, denied both requests for advance sick leave. In denying the September 16, 1989 request Fetterhoff wrote:

Your request for advance sick leave is denied. This decision is based upon a review of your attendance record for the past year. You have the option of charging your absence to Leave Without Pay.

Fetterhoff responded to the May 11, 1990 request for advance sick leave by stating as follows:

I am in receipt of your letter dated May 11, 1990, in which you have requested Advanced Sick Leave in accordance with the provisions of the Employee and Labor Relations Manual.

I have reviewed your Official Personnel Folder, and have taken into consideration that you have over eighteen (18) years of service, and have borrowed Advanced Sick Leave on three (3) occasions in the amount of 240 hours each time.

I have reviewed your PS Forms 3972 for the past several years. You have progressively used more Sick Leave each year. Your Sick Leave usage in 1990 appears to have been used in conjunction with Annual Leave, and non-scheduled days. In addition, I find that you were on Restricted Sick Leave in February of 1983, removed in September of 1983, and then placed back on Restricted Sick Leave in November of 1983, being removed in April of 1984.

Sick leave insures employees against loss of pay if they are incapacitated for the performance of duties because of illness, injury,... as outlined in the Employee and Labor Relations Manual. In your eighteen (18) plus years of service, you have earned approximately 1900 hours of Sick Leave. You have requested Advanced Sick Leave on three (3) occasions which amounted to 720 hours, yet you still do not have a Sick Leave or an Annual Leave balance. I believe that prudent use of Sick Leave would have left you with some type of hours to your credit. Therefore, I am denying your request for Advanced Sick Leave at this time, as I do not believe your record indicates you have the capability of accruing enough Sick Leave hours to repay an advance.

Union filed two grievances protesting both of the denials of the requests for advance sick leave. (Jt. Ex. 2(G) and Jt. Ex. 3(G)). Both grievances alleged Reynolds met all of the requirements of ELRM, Section 513.5. In addition, Union asserted Fetterhoff's decision was "arbitrary, capricious, and outside of the intent of the provisions of the ELRM." It was also the claim of Union the Service violated Article 15.2 Step 1(b) because management's Step 1 representative did not have authority to settle the grievance. By way of remedy Union requested Grievant be granted the advance sick leave to cover the LWOP. Grievant was forced to utilize to cover his absences.

Dolores Huff, Labor Relations Representative, denied the grievance on the September, 1989, request stating in pertinent part:

Mr. Fetterhoff reviewed Mr. Reynolds' attendance record for the past year and determined that advance sick leave would not be appropriate. As you know, that procedure is handled solely by the Postmaster, in accordance with the Employee and Labor Relations Manual. Therefore, this Grievance is denied.

(Jt. Ex. 2(F))

Responding to the second grievance, Huff wrote in relevant part as follows:

. . .

You quoted Section 513.5 of the Employee and Labor Relations Manual which states that he could be advanced thirty (30) days of sick leave if there was reason to believe he will return to duty. You stated that he has returned to duty and is now in therapy with a

new doctor and is feeling much better. I am very glad to hear that Mr. Reynolds' health is improving, and that he is feeling better. However, because of his usage of sick leave in the past, and because of the fact that he has asked for advance sick leave on five (5) occasions, I cannot advance him sick leave again. In Mr. Fetterhoff's letter to Mr. Reynolds dated May 22, 1990, he stated, "...I do not believe your record indicates that you have the capability of accruing enough sick leave hours to repay an advance." In my opinion, Mr. Fetterhoff was correct in his statement. Based on Mr. Reynolds' past history of sick leave usage, requesting advances, etc., I do not believe he would accrue enough sick leave hours to repay an advance either. You indicated that Mr. Fetterhoff's statement, "I believe that prudent use of sick leave would have left you some type of hours to your credit," was not relevant. It is absolutely relevant.

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(Jt. Ex. 3(F))

Union appealed the grievances to Step 3 where Richard Snider denied the two appeals. In denying the May 11, 1990, request for advance sick leave Snider wrote:

• • •
It is management's position that the decision to deny advanced sick leave to the grievant was proper. The granting of advanced sick leave is discretionary rather than mandatory. This grievant is now coming in for the fifth time requesting advanced sick leave. He has been employed by the Postal Service since January of 1973 giving him approximately seventeen (17) years of Postal Service and he has earned approximately 1,768 hours of sick leave, yet he has no sick leave credited to his account. This record certainly does not support that the grievant has been prudent in the use of sick leave.

• • •
(Jt. Ex. 3(C))

The Union elevated the two grievances to arbitration. Both cases were consolidated for hearing before this Arbitrator. A hearing was held at which time both parties had the full opportunity to present witnesses, written evidence and to argue the case.

Grievant Reynolds has nearly twenty years of service with the Postal Service. He testified that during this twenty years of employment he received advance sick leave on three occasions. In each situation he repaid the Service for all sick leave borrowed to cover his advances. Grievant described that in May he injured his back in an off-the-job injury. For several months he experienced pain and was unable to work. Due for the most part to the back problem, Grievant used up all of his sick leave.

Grievant testified that since he was unable to work because of medical problems, and had used up all of his sick leave he made the request for up to thirty days of advance sick leave on September 16, 1989. He returned to work in November, 1989. After the first of the year in January 1990, Grievant described how the problems with his back began to trouble him once again. He testified about the treatment he received to alleviate the pain. In April, 1990, Grievant was forced to leave work because of the back problem. He used his annual leave to cover his absence after running out of sick leave. When he was still unable to return to work, Grievant made the May 11, 1990, request of advance sick leave to protect his income for April, May and June, 1990. Since his

request for advance sick leave was denied Grievant was placed in LWOP status until returning to work on June 13, 1990.

Postmaster Fetterhoff testified that on receiving each request for advance sick leave he considered Grievant's potential to payback the advance and what Grievant had done to save sick leave so it could be used when needed. Fetterhoff concluded that the potential for payback was jeopardized because Grievant was using sick leave more quickly than he was earning sick leave. In addition, Fetterhoff reasoned that if Grievant had been more prudent in the use of his sick leave he would have had accrued sick leave available for use in 1990.

On cross-examination Fetterhoff testified he was aware Grievant had been placed on restricted sick leave in the early 1980s, but Fetterhoff also knew Grievant was not on restricted sick leave in 1989. Further, the witness stated he knew Grievant had never been disciplined for attendance related problems. Fetterhoff was also aware Grievant had repaid his previous sick leave advances at the time he made the decision to deny the requests at issue in this arbitration.

Shop steward Tony Madrigal testified he represented Grievant at the Step 1 meeting with supervisor Jerry Cossette. According to Madrigal, he asked Cossette if he had authority to settle the first grievance to which Cossette replied "No." With respect to the Step 1 meeting on the second grievance, Madrigal once again asked Cossette if he had authority to settle the dispute. Madrigal testified Cossette replied that he did not know

if he had authority to settle the case. Cossette then called his supervisor for direction. After the telephone call Madrigal stated Cossette informed him the grievance would be denied.

In reply to Madrigal's testimony Fetterhoff testified his supervisors had authority to settle grievances. Further, Fetterhoff had implemented a policy which required supervisors to meet with him within forty-eight hours after denying a grievance. Cossette did not testify at the arbitration hearing.

The issues are now properly before the Arbitrator for decision.

IV. POSITION OF PARTIES

A. The Union

Union first argues Service violated Article 15, Step 1(b) of the contract because the first line supervisor did not have authority to settle the grievances. The steward's testimony is unrebutted that Cossette told him no authority existed to settle the grievance. Thus, Union concludes the Service's case is procedurally flawed and the grievance should be sustained.

Turning to the merits, Union recognizes that an employee has no absolute contract right to advance sick leave. However, when the Service denies a request for advance sick leave it must not be done in an arbitrary and capricious manner. Management is also required to base its denials on reasons that are authorized by Section 513.511 of the ELRM. A refusal of a request for advance

sick leave on grounds outside the ELRM is an arbitrary decision which cannot be sustained in arbitration.

Section 513.511 authorizes advance sick leave in cases of serious disability where there is reason to believe the employee will return to duty and repay the advance. In the present case the sole reason stated in Fetterhoff's letter of denial was a review of Grievant's attendance record. (Jt. Ex. 2(H)). There is no mention in the letter about the specific concern Fetterhoff had about Grievant's attendance. At the hearing Fetterhoff related his major concerns were Grievant's lack of a sick leave balance and a pattern of imprudent use of sick leave which had exhausted all accrued sick leave. Union submits Grievant's sick leave use, of and by itself, is not a proper reason to reject a request for advance sick leave.

Moreover, Union argues the reason employees must solicit advance sick leave is that they have used all of their accrued sick leave. Adoption of Service's reasoning would in effect mean no employee who had a zero sick leave balance could ever receive advance sick leave. This result Union submits is contrary to the intent of Section 513.511.

The focus of a decision to grant or deny a request for advance sick leave is the medical condition of the employee and the reasonable expectation the employee will payback the advance. Neither of the two denials for advance sick leave made by Fetterhoff relied on these two factors. The amount of use of sick leave is not a proper factor to reject an application for advance

sick leave. Thus, Fetterhoff's decision was "not within the scope of denial" created by the contact.

Union next argues Service never disputed that Grievant's medical condition made him eligible for advance sick leave. Further, Union asserts Grievant's reliability has been established by the fact he used advance sick leave on three previous occasions and repaid all of the sick leave he borrowed to cover his medical absences. Grievant has never been disciplined for absence related problems. In other words, the record evidence confirms Grievant is a good credit risk.

Lastly, Union points out there is no medical evidence in the record Grievant would have been unable to return to work because of his medical problems. With respect to the May 11 request, the medical evidence established Grievant would be returning to work shortly. Statements from Grievant's doctors released him to return to work after a temporary period of disability and treatment. (Mgt. Ex. 2 and 3).

Union submitted its position is supported by arbitral precedent. (See S4N-3F-D 29534; W7N-5R-D 6601; S1N-3U-C 10828; W4N-5R-C 46269; S1C-3A-C 28150; H8N-5B-C 17682).

For all of the above reasons the Arbitrator should sustain the grievance and order the relief requested.

B. The U. S. Postal Service

Service takes the position advance sick leave is a privilege not a right. Section 513.511 expressly states advance sick leave "may be advanced." Since advance sick leave is

permissive, it is with the discretion of management to grant or deny based on the circumstances of each request. However, management is under no obligation to grant advance sick leave simply because an employee makes a request.

Service is concerned that Grievant as a long term employee has accrued approximately 1944 hours of sick leave and utilized all of it to cover his medical absences. Grievant has made a total of five requests for advance sick leave. The first three were granted by Service. From Service's viewpoint, the granting of advance sick leave on three prior occasions reveals it has not treated this employee in an arbitrary and capricious manner.

Service characterized Grievant's requests for advance sick leave as going to the bank for a loan. His first three requests for a loan were granted, but at some point the "bank" must be considered closed. Service reasons Grievant has been on restricted sick leave in the past, he was off work at the time he made his second request and his lack of sick leave balance are all factors which indicate Grievant is not a good credit risk.

Service next argues Grievant has not exercised good judgment in his sick leave use. Citing the testimony of Fetterhoff that if Grievant had been prudent in the use of his sick leave, Service submits there would have been no need to ask for advance sick leave. By using sick leave more quickly than he was earning it Grievant created a reasonable belief on the part of management he would be unable to repay the advance.

Service relied on several arbitration cases which it claimed supported the denial of the request for advance sick leave. (See N1N-1E-C 24810; S8N-3W-C 2531; C1N-4C-C 11177; N1C-1E-C 33988; N4M-1E-C 21065).

Therefore, Service concludes the Arbitrator should find management acted in an objective and reasonable manner when it rejected Grievant's request for advance sick leave and denied the grievances.

V. DISCUSSION AND FINDINGS

This Arbitrator reviewed all of the cases cited by the parties. Arbitrator Robert Foster best summarized the principles applicable in cases involving requests for advance sick leave in Case No. S1N-3W-C 15296. Foster wrote:

Part 513.511 of the Employee and Labor Relations Manual does not mandate the granting of advance sick leave, but rather employs the permissive word "may" where there is "reason to believe the employee will return to duty." The obvious purpose of this quoted condition is that there should exist a reasonable expectation that the employee will be able to return to duty and work at least long enough to repay the advanced sick leave. While there will frequently be some uncertainty as to whether that is the case at the time of the request, the decision is left to the exercise of sound managerial discretion that may not be abused by an arbitrary denial unsupported by a factually based good reason. Accordingly, the critical question in this case is whether management had sufficient evidence at the time of the decision to reasonably believe that the Grievant would return to duty and repay the advance sick leave if it was granted.

(Foster Award, p 5, emphasis added)

In applying those principles to the present case five undisputed facts must be recognized. First, Service does not dispute Grievant was medically disabled and therefore eligible for consideration for advance sick leave. Second, there was no claim by Service at the time of denial that Grievant had submitted insufficient medical evidence to support his claim. Third, absent from this record is any medical evidence Grievant would be unable to return to work because of his back problem. Fourth, at the time Grievant made each request for advance sick leave he had paid back all of the advance sick leave previously borrowed. Fifth, Grievant had never been disciplined for attendance related problems. Although he had been on restricted sick leave, he was not on restricted sick leave in the year prior to his request for advance sick leave.

The most telling documents in this case are Fetterhoff's letters of denial. (Jt. Ex. 2(H) and Jt. Ex. 3(H)). In each denial Fetterhoff zeroed in on the fact Grievant had no sick leave balance because of absences resulting from medical conditions. Fetterhoff in his May 22, 1990 letter concluded:

. . . I believe that prudent use of Sick Leave would have left you with some type of hours to your credit. Therefore, I am denying your request for Advanced Sick Leave at this time, as I do not believe your record indicates you have the capability of accruing enough Sick Leave hours to repay an advance.
(Jt. Ex. 3(H), emphasis added)

Absent from Fetterhoff's analysis was any statement of concern Grievant would be unable to return to work in order to

repay the advance sick leave. The medical evidence was to the contrary that Grievant would be returning to work. Section 513.511 and the arbitral authority cited by both parties instruct that a reasonable belief that the employee would return to duty and repay the advance sick leave is a primary factor the decision maker must consider.

Grievant had established himself as a "credit worthy" person by repaying all of his advance sick leave previously granted. His credit record when coupled with the medical prognosis offers strong evidence that he would return to duty and repay any advance that might be granted.

Additionally, this record supports a finding Grievant had not abused his sick leave privileges. While Grievant had been placed on restricted sick leave in the early 1980s, he had never been disciplined for sick leave abuse or misuse. Since being removed from restricted sick leave Grievant received two commendations with respect to his sick leave use. The 1986 and 1988 letters of appreciation from then postmaster Costello complimented Grievant on his "prudent use of sick leave during the past year shows your concern for being regular in attendance and your commitment as a postal employee." (Un. Ex. 6 and 7).

The essence of the denial of Grievant's request for advance sick leave was that he had no sick leave balance. Fetterhoff elaborated on his written conclusion at the arbitration hearing where he stated that if Grievant had been more prudent in the use of his sick leave he would not have needed to request

advance sick leave. Snider in his Step 3 answer also faulted Grievant for not being "prudent in the use of sick leave." In the judgment of this Arbitrator the Service representatives employed the wrong test for evaluating requests for advance sick leave.

Section 513.311 expressly provides "sick leave may be advanced whether or not employees have annual leave to their credit." This is a reasonable statement as there would be little or no reason for an employee to request advance sick leave if they had a sick leave balance. As arbitrator Caraway stated in Case No. S1N-3U-C 10828:

There is no principle in Section 513.5 which conditions the granting of sick leave upon the attendance record of the particular individual.

The Arbitrator concurs with Union that adoption of the reasoning advanced by Service would have the effect of negating the advance sick leave benefit authorized by the Employee and Labor Relations Manual.

Arbitral authority instructs that the advance of sick leave is discretionary rather than mandatory. However, the Service when exercising its discretion, must act rationally and not arbitrary or capriciously. At the time Fetterhoff made his decision to deny the two requests there was no evidentiary indication Grievant would be unable to return to work. To the contrary, the medical evidence revealed Grievant would be returning to work. Nor did the record evidence reveal Grievant abused his sick leave privileges. Sick leave was used by Grievant to address

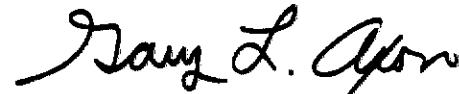
a serious medical problem with his back which had caused him to miss work.

The purpose of advance sick leave is designed to help a deserving employee continue in pay status who has legitimately used all available sick leave and thereby is forced to request an advance in order to address the medical problem that had been causing the employee to miss work. Accordingly, Service's denial of Grievant's requests for advance sick leave was an abuse of managerial discretion in the application and implementation of Section 513.511 of the Employee and Labor Relations Manual.

AWARD

The Service violated Article 19 of the National Agreement and Section 513.5 of the Employee and Labor Relations Manual when it denied the two requests for advance sick leave at issue in this case. The grievances are sustained. Service is ordered to make Grievant whole for the losses due to the denial of the advance sick leave requests. The parties shall attempt to determine the amount due and the form of payment. The Arbitrator will retain jurisdiction to resolve any disputes concerning the computation and payment of the relief ordered in the event the parties are unable to agree.

Respectfully submitted,



Gary L. Axon
Arbitrator

Dated: December 15, 1990