C# 01641

C8N-4F-C-13163
Cecilia Westmeyer
Toledo, OH

VOLUNTARY ARBITRATION PROCEEDINGS

CASE NO. C8N-4F-C 13163

UNITED STATES POSTAL SERVICE	:	
	:	
The Employer	:	
	:	
-and-	:	OPINION AND AWARD
	:	
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, BRANCH 100	:	
	:	
The Union	:	

APPEARANCES

For the Employer:

Rodney A. Stone, Labor Relations Executive
Hester Dawson, Accounting Manager
T. J. Lang, Labor Relations Manager

For the Union:

Jerry N. Street, Local President and Business Agent
Ron Coughenour, Local Vice President
Cecilia Cole (formerly Westmeyer), Letter Carrier

GEORGE E. BOWLES
ARBITRATOR
693 Maple
Plymouth, Michigan 48170

I. SUBMISSION

The hearing in this case was scheduled and conducted in a conference room at the facility of the U. S. Postal Service at 435 South St. Clair Avenue, Toledo, Ohio, on April 9, 1981, beginning at 10:00 a.m. The parties presented both evidence in the form of exhibits and testimony. Arguments were presented at the close of the taking of evidence, and post-hearing briefs were not filed.

The Employer at the outset of the hearing raised a question of arbitrability, which the parties addressed. However, evidence was received on the merits of the grievance.

II. STATEMENT OF FACTS

The grievance filed January 23, 1980, stated:

> "#1. On Wednesday, December 26, 1979, Part-time Flexible Carrier Cecilia Westmeyer called in and reported off work due to illness. At about 9:00 a.m. Supervisor Hester Foggy called the home of Carrier Westmeyer and spoke to the Carrier's mother (Mrs. Westmeyer) and told her that Cecilia would have to go to the doctor and get a statement from him, saying that "she was unable to work on December 26, 1979". She was to turn it in when she returned to work. Carrier Westmeyer did get a doctor's slip, complying with the order from Supervisor Hester Foggy. #2. Union Contentions: Carrier Westmeyer has been employed by the Postal Service since September, 1978, and has used very little sick leave. She had only used about 2 days of sick leave between August and December, therefore proving that she does abuse her sick leave. Management did give instructions to it's Station Supervisors that "anyone calling in sick on December 26, 1979 must have a doctor's slip for the absence". This was a blanket order. Ms. Westmeyer has never had a discussion with her Supervisor concerning her use of sick leave, nor has she been placed on restricted sick leave. It was unjust for Management to request a doctor's slip when Article X states "an employee's certification may be accepted for 3 days or less". #3. Violations: Management has violated Articles X, Section 5.E., XVI, and XXX. #4. CORRECTIVE ACTION REQUESTED: That the Toledo Post Office reimburse Carrier Cecilia Westmeyer the cost of her doctor's visit to Dr. H. R. Silverman, Jr. M.D., on December 26, 1979 of $23.00 and that Management refrain from ordering Carrier Westmeyer to get a doctor's statement on any absence of 3 days or less, also, that she be made whole."

The answer of Postmaster James F. Brzezinski, dated January 28, 1980:

> "....Management has a right to request medical certification for periods of absence of three days or less as stated in Article X of the 1978 National Agreement. In this instance concerning the grievance, I find that

due to the grievant being granted emergency annual leave for 12-24-79, and 12-25-79 was a holiday, management deemed documentation of her illness on 12-26-79 necessary for the protection of the interests of the Postal Service.

Article X is the contractual provision involved in this grievance.

I find that management has not violated Article X or any other provision of the 1978 National Agreement to which the union has made reference, therefore, the grievance must be denied."

Part-time Flexible Carrier Cecilia Westmeyer (Cole), at the time of the grieved incident, had been employed for one year and three months, had not been counselled for abuse of sick leave; her Supervisor, Hester Foggy(Dawson), had not discussed sick leave with her. Mrs. Cole testified that she tried to conserve sick leave so that she could use it when she really needed it. Six of her family are postal employees, including her retired father. She became sick Christmas Day, and on the morning of December 26, her mother called in at 6:15 a.m. to Hester Foggy, reporting the illness. Hester Foggy called back about 9:00 a.m. and told the Grievant's mother that she would have to bring in a doctor's slip. She went to the doctor before returning to work, got a shot, and was charged $23.00, which she paid. She produced the doctor's slip upon her return to work and was given sick leave allowance. She would not have gone to the doctor but for the Employer request.

When she came back to work, she was not told by supervision that she was taking too much sick leave. She was aware of the contractual requirement requiring a doctor's slip if one is absent for three days or more. She did not know anyone else absent December 26 who was required to get a doctor's slip. At the time, she had accumulated 104 hours of sick leave.

She missed December 24 because of her aunt's funeral; her Dad called in because he wanted to make sure that she would attend the funeral of her aunt who was a nun. The records show she was absent November 30th following Thanksgiving and also December 1st, the next day.

Supervisor Hester Foggy (Dawson) explained she did receive a call from the Grievant's mother, and didn't mention the doctor's statement at that time, but a superior, Lou Richards, instructed her to request a doctor's statement. He is in control of managers and carriers. She did not recall that he said that all absences must be documented. As to her practice, she said that "it depends", and that she would look at the record

when deciding whether or not to require a doctor's statement for a one-day absence. She did not consider the Grievant's four absences in one year and three months of sick leave as an abuse of sick leave. The record was not good, but it was not bad.

During a holiday period, the Post Office is busier than usual and as many part-time collectibles are put on as possible. For that reason, if there are absences for sick leave reasons around holidays or non-scheduled days, they are more likely to be questioned. Employees do not take vacations during the Christmas season, and normally, all Letter Carriers are available except those that are ill.

She further testified that since it was the day after the holiday, the call was a little unusual on December 26. She confirmed that the Grievant, upon her return to work, asked if the Employer would pay the $23.00, and she was told that it would not.

III. CITED CONTRACT PROVISIONS

ARTICLE XV
GRIEVANCE-ARBITRATION PROCEDURE
SECTION 4. ARBITRATION

> "A(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. Unless otherwise provided in this Article, all costs, fees, and expenses charged by an arbitrator will be shared equally by the parties."

ARTICLE III
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 X
LEAVE
SECTION 5. SICK LEAVE

"E. For periods of absence of three (3) days or less, a supervisor may accept an employee's certification as reason for an absence."

ARTICLE X
LEAVE
SECTION 2.

"The leave regulations in Subchapter 510 of the Employee and Labor Relations Manual, insofar as such regulations establish wages, hours, and working conditions of employees covered by this Agreement, shall remain in effect for the life of this Agreement."

ARTICLE XIX
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.

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least thirty (30) days prior to issuance. At the request of the Unions, the parties shall meet concerning such changes. If the Unions, after the meeting, believe the proposed changes violate the National Agreement (including this Article), they may then submit the issue to arbitration in accordance with the arbitration procedure within thirty (30) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Unions upon issuance."

EMPLOYEE & LABOR RELATIONS MANUAL
CHAPTER 5
EMPLOYEE BENEFITS

"513.1 Purpose. Sick leave insures employees against loss of pay if they are incapacitated for the performance of duties because of illness, injury, pregnancy and confinement, and medical (including dental or optical) examination or treatment."

".332 Unexpected Illness/Injury

.....As soon as possible after return to duty, employees must submit a request for sick leave on Form 3971. Employees may be required to submit acceptable evidence of incapacity to work as outlined in the provisions of 513.36, Documentation Requirements. The supervisor approves or disapproves the leave request. When the request is disapproved, the absence may be recorded as annual leave, if appropriate, as LWOP, or AWOL, at the discretion of the supervisor as outlined in 513.342."

".36 Documentation Requirements

.361 3 days or less. For periods of absence of 3 days or less, supervisors may accept the employee's statement explaining the absence. Medical documentation or other acceptable evidence of incapacity for work is required only when the employee is on restricted sick leave (see 513.36) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service."

".365 Failure to Furnish Required Documentation. If acceptable proof of incapacitation is not furnished, the absence may be charged to annual leave, LWOP, or AWOL."

CONTENTIONS OF THE PARTIES

The Employer takes the position that the Union is looking for corrective action beyond the power of the Arbitrator. The U.S. Postal Service does not agree to submit the matter of corrective action to the Arbitrator, and the remedy requested by the Union is outside the scope of the jurisdiction of the Arbitrator, citing Article XV, Section 4, page 47, at sub-paragraph 6.

Reliance is also placed on Article III, the Management's Rights clause. In Article III, Section 5.E, page 15, reference is made to the language on periods of absence and proof of the reasons for absence at the top of the page. Article X, Section 2, is noted; it incorporates all of the regulations promulgated by the U.S. Postal Service by reference into the Contract. Noted, too, is Article XIX, specifically referring to handbooks and manuals. There is provision that absent a protest from the National Union, any promulgated rules and regulations, handbooks and manuals are part of the Contract. Noted are 5.10, 5.11.3, 5.13.1, 5.13.332 with reference to unexpected illness or injury, and the provision that the employer may require an acceptable medical verification, 364 and 365 referable to medical documentation.

Contract language at XV limits the Arbitrator to the terms of the Contract. Joint Exhibit 3, referable to sick leave, is adopted by reference.

In effect, it is argued, the Union is asking the Arbitrator to set aside the Contract and create a new benefit, a benefit employees don't have now, that is, the payment by way of reimbursement of the doctor's fee for his medical certification. To grant the Union's request, the Arbitrator must create a benefit not provided by the Contract; sick leave is a contract benefit, and an employee must fullfill the requirements of the sick leave provisions or not get such benefits. One of the requirements is that the employee must furnish certification. The Union is asking the Arbitrator, by way of remedy, to (1) create a new benefit, reimbursement for the cost of medical certification, (2) create the criteria for establishment of such new benefit, and (3) determine if the facts meet the new criteria which have been created by the Arbitrator - all of which constitutes an alteration of existing regulations. New benefits must be created, if at all, in bargaining talks during contract negotiations.

The Arbitrator does have remedy power, the parties have agreed, on discipline and discharge cases, and the application of the pay provisions of the Contract.

The employer points out the provision for fitness-for-duty examinations, and the employer agrees, where there has been an illness for an extended period of time which puts in issue fitness-for-duty, to pay the cost of such an examination. There is no such provision in .361.

As to the blanket order with reference to December 26th, the Union notes 513.361 in Article X, Section 5.#, Article XVI, Section 4, and Article III. The Union argues that the employer went beyond Article III and Article X, Section 2, and did not comply with Chapter 510, and 513.361 of the manual. The medical documentation is required only when the employee is on restricted sick leave, which is not this case, or for protection of the interests of the Postal Service, which is not the case either.

It is reasoned that management cannot be arbitrary and capricious and must follow Article X, Section 2, and Section 5.2. The manuals have been violated, too. Request is made that the employee be made whole for the $23.00 bill.

DISCUSSION

Under .361, the supervisor can determine that a medical documentation is "desirable for the protection of the interests of the Postal Service." The phrase, "desirable for the protection of the interests of the Postal Service", is general language, indeed vague and indefinite. May a supervisor in his absolute and uncontrolled discretion determine what is desirable? May supervisors, at a given location, decide upon different standards or criteria of "desirable"? Can supervisors in different locations validly and fairly establish different criteria for determining "desirable"? What were the criteria used in this case?

The record is barren of what the supervisor considered when he concluded that it was "desirable" to seek documentation. The record is also spare on why this conclusion was reached. Had operational difficulties been experienced during the Thanksgiving Holiday or other holidays? Was there information coming to the supervisor or supervisors that a considerable number of employees were going to take off before or after December 25th? Were the operations of the facility threatened by many absences? Were operations, in fact, affected by absences? How many absences were there? How many employees were warned or called in for sick leave abuse as a consequence of an absence or absences during the period? The Arbitrator doesn't know.

The Arbitrator must find that the Employer failed to establish by an evidentiary record, not only what the standards or criteria were in the determination of the supervisor as "desirable", but also did not put in convincing proofs showing what actually occurred or what was anticipated as likely to occur. Both fair play and good contract administration would require as basic and fundamental that employees be put on notice as to what the criteria or standards were to be used by management in determining desirability for the requirement of medical documentation. By way of analogy, a statute cannot be upheld and administered unless those affected by it know what is required; there must be definiteness and clarity in order that people may conform their conduct to the requirements of the law. The same fundamental consideration applies here.

THE QUESTION OF REMEDY

The Employer has advanced an interesting and intriguing argument with respect to remedy. If the parties had intended to grant the Arbitrator power and jurisdiction to order reimbursement for the $23.00 doctor's fee, the Contract would have so provided

in express language, it is said; the parties under just cause principles have given the Arbitrator jurisdiction to provide remedies in discipline cases, including discharge. Further, in the area of fitness-for-duty examinations, the Employer has agreed, contractually, to pay for such examinations. Not having so provided as to reimbursement for the cost of an examination as hereinvolved, the Employer cannot be required by the Arbitrator to reimburse, as the Arbitrator cannot alter the contract, it is urged.

It is elementary in arbitral jurisprudence that the Arbitrator cannot change the contract; he is a creature of the parties, a private person selected by them, whose powers are limited and defined by the parties. He cannot add a new obligation, nor can he diminish an obligation. He takes the contract as it is.

On the other hand, much has been decided as to the power of the Arbitrator to provide remedies. The employer here does not argue that the Arbitrator is without power or jurisdiction to decide a dispute of this kind, or this specific dispute; the argument is that he cannot provide the remedy requested by the Union. In Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960), the U.S. Supreme Court ruled:

> "When an Arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of specific remedies which should be awarded to meet a particular contingency."

In Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957), it was held that courts should resolve the problem presented by "looking at the policy of the Legislature and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem".

Other cases standing for broad remedies include: Selb Manufacturing Co. v. Machinists, 305 Fed 2nd 177, 8th Ct. (1962), Machinists v. Cameron Ironworks, Inc., 292 Fed 2nd 112 (5th Ct.), where it was held that "great latitude must be allowed in fashioning the appropriate remedy constituted in the Arbitrator's decision".* These cases involve, for the most part, back pay awards. What did the parties intend? How did they show that intention, particularly in the specific language used? Many Arbitrators would

*Reviewed in Practice and Procedures in Labor Arbitration, Fairweather (1973) at the BNA, Inc.

rule that the appointment by the parties carries with it an implicit power to specify the appropriate remedy. See Practice and Procedure in Labor Arbitration, Owen Fairweather, BNA, 1973, Page 277, and How Arbitration Works, Elkouri & Elkouri, Pages 19-28, as well as Thirteenth Annual Meeting, National Academy of Arbitrators, 41 (1960), Discussion on Remedies in Arbitration, Labor Arbitration Prospectives and Problems Proceedings of the Seventh Annual Meeting, National Academy of Arbitrators, Page 201.

In final analysis, is there implied power to grant the remedy the Union has requested here?

In 48 Virginia Law Review, 1199, 1212, Arbitrator Robbin W. Fleming wrote:

> "The parties were not engaged in an academic exercise in seeking a ruling as to whether the contract had been violated and that the power to decide the contract violation must therefore carry with it the power to award a remedy."

In his presentation at the 17th Annual Meeting of the National Association of Arbitrators (1964), published by the Bureau of National Affairs, Page 177, commenting on the Fleming statement, Sidney A. Wolff said:

> "Recent court decisions, particularly since the Supreme Court trilogy, sustain this principle, and hold that:
>
> > To deny the Arbitrator power to fashion an appropriate remedy for breach of the collective agreement, we must find clearly restrictive language negating the Arbitrator's power to fashion a remedy."*

In support of its position, the Employer has cited three Opinions and Awards by Arbitrator Marvin J. Feldman, and one by Bernard Cushman. In case numbers C8C-4T-C 10884 and AC-5-LOU-1027 the Arbitrator noted that under Article XIX of the AGreement, Handbooks, Manuals and published Regulations of the Postal Service that relate directly to wages, hours and working conditions, and which contain nothing in conflict with the Contract may be promulgated by the Employer and that the Union, at the National level, may grieve the verbiage of the Handbooks, Manuals and published regulations prior to their publication and issue. He held that the Labor Relations Reporter did not rise to the dignity of a promulgated Manual, Regulation or Handbook. The employee requested to leave the premises before the end of the guaranteed period, and the issue was the application of the guarantee section. It was held that if the employee does not want to work, then the employer cannot be held to pay for a period which would otherwise be a guaranteed pay period. Procedurally, the Arbitrator held he was with-

*Article XV, Grievance-Arbitration Procedure, Section 1 defines "Grievance" in part: "...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.

out jurisdiction as to the requested ruling; an Award would modify the terms of the Agreement, in conflict with the Employee and Labor Relations Manual.

In case numbers C8C-4B-C 7591 and C8C-4B-C 7700, it was noted by the Arbitrator that under Article XIX of the National Agreement, the employer could notice changes to the Union at the National level and the Union could grieve and arbitrate; hence, the Employee and Labor Relations Manual and Shop Rules could not be changed by a local Union grievance procedure. The National Union had not sought to arbitrate the particular matter. The Arbitrator, then, was without jurisdiction. In case number C8C-4A-C 7474, the same ruling was made in that the National Union had not seen fit to arbitrate the particular regulation. The employer had published a handbook known as P-13. The local Union could not grieve. In a case arising as a local impasse issue in Raleigh, North Carolina, Arbitrator Bernard Cushman considered the issue of management requiring an employee to provide medical evidence of proof of illness of three working days or less. Here again, the Union had not invoked arbitration within ten days. The Arbitrator, assuming that there was jurisdiction, considered whether the provision involved was inconsistent or in conflict with the National Agreement. He held that a supplemental local sick leave benefit was inconsistent with the contractual benefit structure, and the intent of the parties in negotiating the National Agreement.

The four cases were properly decided. The Arbitrator did not have jurisdiction because the National Agreement controlled. In the instant case, the local Union is not challenging .361 in the substantive sense; it does not ask for a change in the language , "when the supervisor deems documentation desirable for the protection of the interests of the Postal Service". Rather, in issue is the application of this langauge to the individual case, specifically, whether as applied to the Grievant, the documentation was "desirable for the protection of the interests of the Postal Service".

The case finds resolution, as is often the way, in the evidence. The Employer did not establish that the documentation was "desirable for the protection of the interests of the Postal Service." The Grievant had not abused her sick leave; she was not on restricted sick leave (See 513.36). She was allowed sick leave for December 26, 1980. The Employer did not show that operational difficulties were experienced or anticipated for December 26, nor did the Employer show that any considerable number of employees

were absent. Lastly, there was no precise and complete showing as to how the cases of other absent employees were handled, except for the one employee, who because of Union intervention, did not have to supply documentation.

The Arbitrator finds no language which expressly or by implication precludes a reimbursement remedy. The very great weight of authority is that an Arbitrator has implied power to grant an appropriate remedy. Reimbursement is the only practical remedy. Therefore, the Arbitrator holds that the Grievant, Cecilia Westmeyer Cole, shall be reimbursed for the sum of $23.00, the cost of medical examination and treatment, which she paid her physician.

GEORGE E. BOWLES, ARBITRATOR

A W A R D

THE ISSUE:

Is the Grievant, Cecilia Westmeyer Cole, entitled to reimbursement in the amount of $23.00, the amount she spent for medical examination and treatment by her physician, documentation having been required by the Employer for her absence on December 26, 1980?

THE ANSWER:

Yes. The Grievant, Cecilia Westmeyer Cole, shall be reimbursed by the Employer in the amount of $23.00, the cost of medical examination and treatment by her physician, which she paid.

GEORGE E. BOWLES, ARBITRATOR

April 23, 1981
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