C# 04162

COPY

In the Matter of Arbitration

between

UNITED STATES POSTAL SERVICE

and

Case No. H1N-NAC-C 3

NATIONAL ASSOCIATION OF LETTER CARRIERS

and

AMERICAN POSTAL WORKERS UNION

APPEARANCES: Harvey Rumeld, Esq. and Kevin B. Rachel, Esq., for the Postal Service; Cohen, Weiss and Simon, by Keith E. Secular, Esq., and Shala T. Stewart, Esq., for NALC; O'Donnell & Schwartz, by Arthur M. Luby, Esq., for APWU

DECISION

This grievance filed by NALC arose under and is governed by the 1981-1984 National Agreement (JX-1) between the above-named parties. The undersigned having been designated to serve as sole arbitrator, a hearing was held on 8 July 1983, in Washington, D. C. At that hearing APWU, pursuant to Article 15.4-A-(9) of the National Agreement, intervened and participated. The stipulated issue (Tr. 16-17) is as follows:

> Whether local or regional Postal Service offices may require employees who incur job-related injuries to submit to a medical examination prior to receiving treatment from their physician of choice?
>
> If not, what shall the remedy be?

A verbatim transcript was made of the arbitration proceeding. All three parties filed post-hearing briefs. The record was closed on 24 August 1983.

On the basis of the entire record, the arbitrator makes the following

AWARD

Local or regional Postal Service offices may not require employees who incur job-related injuries to submit to a medical examination prior to receiving treatment from their physician of choice.

All such local or regional requirements shall be rescinded immediately. Any further proposed changes in Subchapter 540 of the Employee & Labor Relations Manual shall comply with the procedural requirements of Article 19 of the National Agreement.

Benjamin Aaron
Arbitrator

Los Angeles, California

27 February 1984

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OPINION

I

Since 1974, the Federal Employees Compensation Act (FECA) has provided (§ 8103) that when federal employees (including postal workers) are injured on the job, they have the right to be treated at government expense by a physician of their own choosing (JX-11). U. S. Department of Labor (DOL) regulations implementing § 8103 of FECA were first published by the Office of Worker Compensation Programs (OWCP) on 14 February 1975 (JX-12). As provided in those regulations, when an employee incurs a job-related injury, he must report the injury to his supervisor on a standard form, CA-1. The supervisor must promptly issue to the employee another standard form, CA-16, which the employee presents to his chosen physician. The CA-16 authorizes the physician to examine and treat the

employee and to bill DOL for his services.

Two separate sets of procedures have been in effect in the Postal Service for many years: (1) procedures for providing injured employees with medical care and treatment by their chosen physicians, and (2) "fitness-for-duty" examinations by physicians or medical officers directly employed by the Postal Service, or under contract with it, to determine whether an employee may continue or return to work. Postal Service regulations relating to its Injury Compensation Program are set forth in Chapter 540 of its Employee & Labor Relations Manual (ELM) (JX-13). If an injured employee is unable to return to work, he is eligible for compensation benefits under FECA and DOL regulations. The Postal Service must monitor the employee's course of treatment to determine his likely return date and his capacity for limited duty. A standard form, CA-17, is periodically sent to the treating physician for reports of the employee's condition.

At least since 1969, the Postal Service and other federal agencies have used fitness-for-duty examinations to determine whether an injured employee is eligible for disability retirement, whether an employee currently working is physically capable of continuing to work, and whether an injured employee who is receiving compensation is capable of returning to full or limited duty. Until the local and regional Postal Service procedures for handling on-the-job injuries challenged in this case, were initiated, fitness-for-duty examinations were always

performed well after the injured employee had been examined by his chosen physician and a course of treatment established.

At various times in 1981, 1982, and 1983, a number of local and regional post offices initiated new procedures for handling on-the-job injuries (JX-16-JX-21). Although the procedures were by no means uniform, they all, with minimal exceptions, required injured employees to submit to a pretreatment examination by Postal Service physicians or medical officers before being treated by their own physicians. The principal reason for initiating these new procedures was to control the costs of the Injury Compensation Program. Thus, George K. Johnson, Director of Employee and Labor Relations at the Sectional Center in Reno, Nevada, was asked whether the predominant reason for instituting the policy was one of controlling costs, and answered (Tr. 81):

> From the field standpoint, that was the major consideration because we had no control over what was happening to us . . . . We felt that there were some additional benefits to the employee, as well, but, of course, that's been open to a lot of conjecture but there certainly were some cost benefits to the Postal Service as a result.

Dr. Irvin F. Hermann, the Postal Service's National Medical Director, was asked whether one of the purposes of a pre-treatment examination was to forestall exaggerated claims by the injured employee. He replied, "Well, that is one of the benefits of the examination relative to the employee as well." (Tr. 67) Hermann also testified that prior to the issuance of the challenged local and regional procedures,

fitness-for-duty examinations were conducted only after the injured employee had been released for duty by his personal physician.

Postal Service national policies relating to employee injuries are codified in Subchapter 540 of the Employee & Labor Relations Manual (ELM) (JX-13). The following provisions are relevant to this dispute:

> 543.1 Initial Medical Treatment
>
> .11 General. A medical officer may provide initial medical treatment if:
>
> a. Employees accept such treatment of their own free will; and
>
> b. Treatment complies with Handbook P-14, Health and Medical Service, and with OWCP regulations and directives.
>
> * * * *
>
> .13. Emergency Treatment. An employee needing emergency treatment in addition to first aid must be sent to the nearest available physician or hospital, of the employee's or employee's representative choice. . . .
>
> 543.2 Continuing Medical Treatment
>
> * * * *
>
> .22 General Procedures
>
> .221 If non-emergency treatment of an injury or illness is required, the injured or ill employee may be treated by a physician of the employee's choice.
>
> * * * *
>
> .23 Outside Treatment. If an employee does not elect to receive treatment at a USPS medical unit, that employee may select a physician or hospital within approximately 25 miles of home or work-site . . . .

543.3 Exclusive Medical Care

.31 Medical unit or other USPS personnel must not interfere with the medical care prescribed by the employee's attending physician. Contact with a physician or physician's staff should be limited to the medical condition of the employee or the employee's ability to return to full or limited duty.

.32 Form CA-17 is sent to the treating physician or hospital for completion only when it is necessary to determine the employee's medical condition or the employee's ability to return to full or limited duty.

* * * *

547 Return to Duty

* * * *

547.3 Fitness-For-Duty Determination

.31 Determining Fitness. The fact that an injured or ill employee is scheduled for a series of treatments or appointments with a physician or hospital does not, by itself, establish that the employee is not fit-for-duty in the interim. Control personnel will recommend, upon medical justification, to the installation head that any employee being treated by a physician or hospital be required to report to a USPS medical unit (or contract equivalent) for a fitness-for-duty examination. Only an installation head is authorized to approve a fitness-for-duty examination.

Before Subchapter 540 was promulgated, its provisions were discussed with the unions party to the National Agreement, pursuant to Article 19. NALC and APWU contend that the new procedures instituted by local and regional post offices violate, among other provisions of the National Agreement, not only Article 19, in that they were not made known to and discussed with unions party to the National Agreement prior to their promulgation, but also Article 5, which states:

"The Employer will not take any action affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law."

The Postal Service maintains that the challenged pre-treatment examination procedures do not violate any provisions of the National Agreement and that even if the requirement that injured employees submit to an initial examination by a Postal Service physician prior to obtaining treatment from a physician of their own choice is covered by Article 19, the policy is "fair, reasonable and equitable." (Article 19 provides in part: "Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions . . . shall contain nothing that conflicts with this Agreement . . . 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.")

The Postal Service argues that its position is supported by the United States Department of Labor, Office of Workers' Compensation Programs. In a letter dated 16 December 1982 (JX-4), John D. McLellan, Jr., Associate Director for Federal Employees' Compensation, responded to a letter from the Postal Service asking for a clarification of an earlier expression of his Office's views concerning the Postal Service's practice

of having an injured employee examined by its own physician prior to his receiving written authorization to be given treatment by his personal physician. His letter read in part:

> If the Postal Service is to require or provide a medical examination to an injured Postal Service employee prior to the issuance of the CA-16, the Postal Service medical examination must be done promptly following the injury. To be done promptly in most instances the examining physician would have to be located close to the site where the injury took place. However, the real test is not the geographic location of the examining physician, or whether the authorization (CA-16) for the employee to obtain his choice of treatment was provided promptly following the injury.
>
> By our letters we are making no attempt, nor do we intend to limit your practice of having employees examined by a Postal Service physician.

II

Both NALC and APWU have submitted lengthy briefs in support of their joint position, but I do not find it necessary to review their arguments in any greater detail than has previously been set forth. The issues in this case seem to me to be straightforward and uncomplicated. First, I think it so clear as not to require further discussion that procedures for the treatment of injured employees, which are set forth specifically in Subchapter 540 of the ELM and, in accordance with Article 19, are incorporated by reference into the National Agreement, are covered by the phrase, "other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act," in Article 5. It must also be remembered

that the challenged local and regional procedures deal not only with initial treatment of injuries, but also with fitness-for-duty examinations. As I said in Case No. H1C-NA-C 32, which involved a unilateral modification by the Postal Service of its disability retirement procedures, "[a]ny contract provision or administrative regulation that affects the manner in which an employee may be terminated from employment, or in which his employment status may be altered, is a 'condition of employment.'"

Second, I think it is equally clear that the local and regional departures from the procedures set forth in Subchapter 540 of the ELM are in conflict with those procedures and therefore with the National Agreement.

Third, Article 19 does not distinguish between national, local, and regional levels of management; therefore, any changes in handbooks and manuals must comply with the procedural requirements of Article 19. It is undisputed that there was no such compliance in this case.

Fourth, because the challenged local and regional procedures are inconsistent with the National Agreement, it is irrelevant either that they may be "fair, reasonable, and equitable," or that they do not violate the FECA or the regulations promulgated by the OWCP. It is the National Agreement that I am asked to construe, not external law; and, in any case, nothing prevents the Postal Service from agreeing to procedures, as it has done for a number of years, that may

go beyond the minimum required by the FECA and the OWCP. The latter obviously has no authority to relieve the Postal Service of its contractual obligations.

For the foregoing reasons, the grievance is sustained. The various local and regional procedures challenged in this case are invalid and must be rescinded. Any further proposed changes in Subchapter 540 of the ELM must comply with the procedural requirements of Article 19 of the National Agreement.

Benjamin Aaron
Arbitrator