ARBITRATION AWARD C#6462

September 19, 1986

UNITED STATES POSTAL SERVICE

-and-

NATIONAL ASSOCIATION OF LETTER CARRIERS

Case Nos.
H1N-NA-C-121
H1C-NA-C-122

-and-

AMERICAN POSTAL WORKERS UNION

Subject: Handbooks and Manuals - Fairness of Proposed Change in Medical Care Provisions of Injury Compensation Program - Alleged Inconsistency between Proposed Change and Pertinent Governmental Regulations

Statement of the Issues: Whether the Postal Service's proposed changes in medical care provisions, found in the Employee & Labor Relations Manual's injury compensation program, are "fair, reasonable, and equitable" or are "inconsistent with..." other terms of the National Agreement regarding injury compensation?

Contract Provisions Involved: Articles 3, 19 and 21 of the July 21, 1981 National Agreement and Subchapter 540 of the Employee & Labor Relations Manual.

Appearances: For the Postal Service, Kevin B. Rachel, Senior Attorney, Office of Labor Law; for NALC, Keith E. Secular and Shailah T. Stewart, Attorneys (Cohen Weiss & Simon); for APWU, Susan L. Catler, Attorney (O'Donnell Schwartz & Anderson)

Statement of the Award: The grievances are denied with respect to the proposed ELM 543.11, the proposed pre-treatment examination by a Postal Service physician. That procedure, as described by the Postal Service, does not constitute a violation of Article 19.

The grievances are granted with respect to the proposed ELM 543.13, the proposed "emergency situation" (and "nonemergency situation") definition. That definition is a violation of Article 19.

BACKGROUND

These grievances protest certain proposed changes in Section 543.1 of the Employee & Labor Relations Manual (ELM). One such change would allow Management to require an employee injured on the job to be examined by a Postal Service physician before being treated by a physician of his choice, provided this was a non-emergency situation and provided this examination would not delay prompt treatment by the employee's physician of choice. Another change would establish a new definition of emergencies, i.e., those situations in which pre-treatment examination by a Postal Service physician could not be required. The Unions contend that these changes do not satisfy Article 19 because they are neither "fair, reasonable, and equitable" nor "...consistent with this [National] Agreement." It asks that the Postal Service be prohibited from implementing these ELM revisions.

Postal employees who suffer a job-related injury receive workers' compensation pursuant to the Federal Employees' Compensation Act (FECA) which is administered by the Office of Workers' Compensation Programs (OWCP) of the Department of Labor (DOL). FECA provides such employees with the following benefits: continuation of regular pay for a maximum of 45 days; compensation for lost wages thereafter; and coverage for the cost of proper medical care. OWCP has adopted regulations which create general procedures for the filing and processing of compensation claims. The Postal Service has in turn promulgated detailed rules with respect to such claims.

Those rules are found in Subchapter 540 (Injury Compensation Program) of the ELM. An employee must report the injury to his supervisor on a Form CA-1.* He must then contact the control office or control point designated by the postal installation to handle injury claims. This control point will ordinarily be a Postal Service medical or health unit. But if the employee works at some outlying branch or station where there is no medical or health unit, then the control point will be a supervisor at that branch or station. At the control point, the employee is given a Form CA-16 which authorizes treatment by the employee's physician. Sometimes the authorization is given orally and the CA-16 is written later. In emergency situations, the employee may receive treatment without any authorization and the CA-16 is issued later.

* An occupational disease or illness (as opposed to an injury) is reported on a Form CA-2.

The ELM distinguishes between "initial medical treatment" (Section 543.1) and "continuing medical treatment" (Section 543.2). It permits the Postal Service physician (also known as a medical officer) to "provide initial medical treatment if...[e]mployees accept such treatment of their own free will." If no more than first aid is involved, employees "should be treated at the worksite, or at the USPS medical or health unit." But where emergency treatment is necessary, employees "must be sent to the nearest available physician or hospital..." Whoever provides such emergency treatment "is not considered the employee's initial choice of physician." Apart from a statement that "animal bites or eye injuries are considered medical emergencies", there was then no definition of an "emergency."

Anything beyond first aid or emergency treatment was apparently viewed as "continuing...treatment." The injured employee "may be treated by a physician of the employee's choice." Having made such a choice, the control office or control point was to "contact..." this physician "by telephone...to determine if the physician is available and will accept the employee for treatment." However, if the employee does not choose a physician, he "is referred to the USPS medical unit, if available, for diagnosis and initial treatment." Such a referral "cannot be made if it would cause harmful delay." And the medical officer who provides such treatment "is not considered the employee's initial choice of physician..."

When an injured employee is unable to return to work, the ELM calls upon the postal installation to monitor his course of treatment to determine his likely return date and his capacity for limited duty (Section 547). A Form CA-17 is sent to the treating physician for reports on the employee's condition. And Management may schedule "fitness-for-duty" examinations by a Postal Service physician to determine whether the employee receiving compensation is capable of returning to full or limited duty. These examinations have always been performed well after the employee had been examined by his physician of choice and a course of treatment had begun.

Sometime in 1982, several local post offices decided to require employees who suffered job-related injuries to submit to a medical examination, when feasible, by a Postal Service

physician prior to their receiving treatment from a physician of their choice.* The purpose of this requirement, according to the Postal Service, was to get immediate information for supervision on the condition of the injured employee and to get the employee seen by a doctor more quickly. When Postal Service headquarters learned of this local initiative, it wrote to DOL to make sure this requirement was in compliance with OWCP regulations. The DOL response essentially was that this pre-treatment examination by the Postal Service physician was "acceptable" provided, among other things, that it did not delay prompt treatment by the employee's physician of choice and that it did not interfere with immediate treatment in an emergency situation.

NALC objected to this pre-treatment examination by the Postal Service physician. It filed a national level grievance and the APWU intervened. Arbitrator Aaron sustained the grievance on procedural grounds in February 1984. He concluded that the disputed local and regional policies were "invalid and must be rescinded" for the following reasons:

> "...I think it is...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...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."

Pursuant to the Aaron award, the Postal Service directed local and regional facilities to discontinue any use of a compulsory pre-treatment examination by a Postal Service physician. It also requested detailed information as to their experience with such pre-treatment examinations. It sought, in other words, an appreciation of the pros and cons of this type of procedure.

* This policy apparently did not apply to emergencies in most, perhaps all, of these local post offices.

On the basis of this information and its own internal discussion, the Postal Service has proposed several changes in Subchapter 540 of the ELM. One such change would introduce a new 543.11 to the ELM, authorizing a pre-treatment examination by a Postal Service physician in any postal facility which chose to adopt this procedure. Another change would deal with emergency treatment under 543.13, eliminating the sentence which equated animal bites and eye injuries with emergencies and establishing in its place a new definition of emergency situations.*

Because these proposed revisions are critical to an understanding of this dispute, they should be quoted in full:

543.11

"General. Initial medical examination/treatment will be authorized in accordance with the FECA provisions and applicable OWCP regulations and policies governing medical care. The injured employee may, however, in nonemergency situations be required to be examined by a Postal Medical officer (PMO) or contract equivalent prior to obtaining initial medical treatment. In such instances,

a. The examination must be performed promptly following the report of injury.

b. The CA-16, Request for Examination and/or Treatment must be provided promptly following the report of injury.

c. The examination must in no way interfere with the employee's right to seek prompt examination/treatment from a physician of choice." (Emphasis added)

* Still another revision dealt with 543.223 but that is not involved in the present case.

543.13 (to be 543.14)

"Emergency Treatment...

a. Emergency situations are considered to be of a life threatening nature such as severe bleeding, loss of consciousness, severe chest pain suggesting possible heart attack, etc.

b. Nonemergency situations are generally those that are not considered an immediate threat to life, such as strains/sprains, minor cuts, minor burns, contusions, etc.

c. In the event that there is doubt as to the emergent nature of the injury, it should be handled as an emergency." (Emphasis added)

A point of clarification may be helpful. The precise nature of the pre-treatment examination was not really made clear. It apparently would involve a simple physical, an initial evaluation, for purposes of diagnosis. The ELM change would require the injured employee in a non-emergency situation to submit to this examination, at least in those postal installations which adopted this procedure. However, if he made an appointment to be treated by a physician of his choice and if the Postal Service's pre-treatment examination would cause a delay in his appointment, he could disregard the pre-treatment examination. Or if his was an emergency situation, he need not appear for the pre-treatment examination.

Both NALC and APWU believed the proposed changes were improper. They filed national level grievances. Their position is that such changes would be neither "...consistent with" Article 21, Section 4 nor "fair, reasonable, and equitable" and are therefore a violation of Article 19. They urge that Management "be prohibited from implementing the proposed revision."

Article 19 of the National Agreement reads in part:

"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..."

A hearing was held in Washington, D.C. on May 22, 1986. Post-hearing briefs were filed by the parties on August 1, 1986.

DISCUSSION AND FINDINGS

The Unions believe the proposed ELM changes do not meet the "fair, reasonable, and equitable" test of Article 19. Their main concern is that a compulsory pre-treatment examination by a Postal Service physician in non-emergency situations "pose[s] substantial medical risks." They allege that these "risks" would result from subjecting the injured employee to two diagnostic examinations, first by the Postal Service physician (i.e., the pre-treatment procedure) and then by the employee's treating physician. They claim such an arrangement would often cause the injured employee unnecessary pain, psychological stress, excessive travel, and delayed treatment by his physician of choice. They state too that such an arrangement would often cause added difficulties for the treating physician.

The Postal Service challenges some of these claims. It says the proposed ELM changes include specific protections for injured employees which answer many of the Unions' concerns. It asserts that "numerous benefits" from pre-treatment examination exist for the injured employee and Management and that these "benefits" outweigh any possible "risks." It insists the weight of expert medical evidence favors the pre-treatment examination. It maintains that past experience with the pre-treatment examination in postal installations between 1982 and 1984 demonstrates that the procedure benefitted both employees and Management. It notes finally that many private sector enterprises use a pre-treatment examination by an employer physician much like the one the Postal Service wishes to adopt.

The Delay Claim

It is true that most postal employees do not have ready access to a Postal Service physician during working hours. Only a very small percentage of NALC personnel work in the main post offices which may have medical officers. Many APWU clerks work in the same facilities as letter carriers. Those who serve in main post offices with medical officers generally are on afternoon and midnight shifts. Much of their work is done between 6:00 p.m. and 6:00 a.m. when no physician is on duty. The medical unit at such times is either unstaffed or staffed with a nurse alone. Under these circumstances, it is obvious that many employees injured on the job in a non-emergency situation would have to wait some hours, perhaps more than a shift, before they could see a medical officer for a pre-treatment examination.

This delay factor is emphasized by the Unions. However, one of the proposed ELM changes (543.11c) states that the pre-treatment examination "must in no way interfere with the employee's right to seek prompt examination/treatment from a physician of choice." These words reveal that the employee need not wait for a pre-treatment examination if he can see his physician of choice earlier. R. Bauer, the Postal Service's Manager of Injury Compensation, discussed 543.11c at length. His testimony revealed that the injured employee would have a right to make an appointment with his physician of choice at the time he is injured, that this appointment could not be delayed because of the pre-treatment procedure, that he could go to his physician without having to submit to a pre-treatment examination if his physician could see him before the medical officer could, that he can elect to use a hospital emergency room as the equivalent of his physician of choice, and that should he elect to do so he may go to the emergency room after reporting his injury without having to wait for a pre-treatment examination.

Given this broad reading of proposed 543.11c, it cannot be said that the pre-treatment procedure will cause delay in the injured employee being treated by his physician of choice. He cannot be required to delay an appointment with his physician of choice (or a visit to the hospital emergency room) because of the pre-treatment examination.

There is, however, a need for clarification. For the proposed 543.11c is ambiguous in one respect. It speaks of the pre-treatment procedure not interfering "with the employee's

right to seek prompt examination/treatment from a physician of choice." These words could possibly be construed by local supervision to protect only the employee's right "to seek..." an appointment, i.e., the telephone call to his physician, rather than the right to receive prompt treatment from his physician. To avoid such a misreading of the Postal Service's intent, it should be understood that "seek" encompasses both requesting and receiving the prompt treatment contemplated.

The Excessive Travel Claim

It is true that some injured employees may not promptly make an appointment with their physicians of choice. Or their appointment may not be until a day or more after the injury. In either event, the employee has time to undergo a pre-treatment examination without causing any delay in his appointment. He would be required, in these circumstances, to travel from his work site (or his home) to the Postal Service physician. That would ordinarily represent an extra trip, extra travel.

However, an extra trip for an injured employee in a non-emergency situation is not necessarily unreasonable. The fact is that the employee may actually benefit from the pre-treatment examination. The Postal Service physician may conclude he needs treatment immediately and make arrangements with the physician of choice to see the employee sooner than planned. Or the Postal Service physician may conclude he needs the services of a specialist and make arrangements with the physician of choice to put the employee in some specialist's hands. Earlier diagnosis may lead to earlier treatment which may in turn mean fewer complications or earlier recovery.

Dr. Welch, the Unions' expert witness, noted that some injuries (e.g., a torn medial meniscus) could be made worse by travelling. But this would depend on a number of variables - the distance travelled, the mode of transportation, the nature of the injury, and so on. I assume that the pre-treatment procedure could (and would) be waived if the employee could not be moved at all without aggravating the injury. Indeed, such a case would probably qualify as an emergency in which event the pre-treatment examination would not be required. On balance, the benefits from the pre-treatment procedure seem far more impressive than any problem which might arise from extra travel.

The Psychological Stress Claim

It is true that the pre-treatment examination by a Postal Service medical officer is, to use the Unions' words, "at least potentially...adversarial in nature." For the Postal Service physician could later challenge the employee's compensation claim on the basis of something he'd discovered in his examination. Also Dr. Welch noted that it would not be clear to the injured employee at the pre-treatment examination what was wrong with him or why he was being examined by someone other than his physician of choice. The Unions maintain that the employee's sense of vulnerability immediately after the injury plus the ambiguity of the relationship with the Postal Service physician could together produce unnecessary psychological stress.

This is a highly conjectural argument. A sense of vulnerablity after an injury, the anxiety produced by not knowing the precise nature and seriousness of the problem, would be present in any physical examination. That anxiety would be much the same, whether the examination was by a Postal Service physician or by the employee's physician of choice. To the extent to which the pre-treatment procedure offers a preliminary diagnosis or some kind of assurance, it is likely to quiet psychological stress. That means the hours (or days) between the pre-treatment procedure and the visit to the treating physician are likely to be much less stressful than they otherwise would be. In this way, the pre-treatment procedure would appear to reduce stress.

The ambiguity in the employee's relationship to the Postal Service physician is much the same as what occurs when he is given a "fitness-for-duty" examination. In the latter situation, he knows he is being evaluated for return to work, perhaps at an earlier date than his treating physician thought advisable. This would no doubt prompt some psychological stress. But the ELM has contemplated this kind of examination, this kind of stress, for years. If that is an acceptable stress, there is little reason why the pre-treatment procedure should not be regarded as an equally acceptable stress. The fact is that some potential adversarial stress exists in different facets of every employee-employer relationship.

The Unnecessary Pain (and Attendant Difficulty for Treating Physician) Claim

It is true that many postal employee injuries involve trauma to the back, shoulder, knee or ankle. The pre-treatment examination of some of these injuries by a Postal Service physician may well prompt pain and discomfort. Consider, for instance, a knee injury, a torn medial meniscus. A diagnostic examination requires duplication of the same maneuver which caused the injury and hence results in sharp knee pain. This procedure must be repeated again when the employee sees his treating physician. Thus, he is subjected to two (rather than one) painful examinations. And the treating physician may be placed at a disadvantage if the employee is less able to endure the second examination or if muscle spasm in the area surrounding the injury has increased on account of the initial examination.

None of this was really challenged by the Postal Service. But the pain associated with pre-treatment examination of a relatively few types of injuries would tend to be a momentary thing, ordinarily a matter of seconds. Perhaps the Postal Service physician would not even manipulate the damaged limb if he could tell from the employee's subjective complaints what the probable injury was. The pre-treatment procedure might pose a minor problem for the treating physician. However, it is difficult to believe that the earlier procedure would substantially interfere with the treating physician's ability to diagnose the injury.

The additional pain in some cases must, in any event, be measured against the benefits of the pre-treatment procedure. The examination by the Postal Service physician may result in the injured employee being treated sooner by his physician of choice and may result in his being sent first to the proper specialist rather than a general practitioner. The Postal Service physician would be in a position to help expedite the employee's treatment. And, as I explained before in this discussion, earlier diagnosis may lead to earlier treatment which may in turn mean earlier recovery. This is beneficial to both the injured employee and the Postal Service. The value of such benefits, it seems to me, plainly outweighs the small amount of extra pain which may be a consequence of pre-treatment examination of a few types of injuries.

The Benefits Claim

The benefits to the injured employee from the pre-treatment procedure have already been described. Once again, they are: an earlier diagnosis, a greater chance for earlier treatment and perhaps earlier intervention by the appropriate specialist, and hence a much larger possibility of earlier recovery. Employees thus have much to gain from the pre-treatment examination.

It should be obvious that quicker treatment and a quicker return to work will mean less lost time and hence less injury compensation costs for the Postal Service. The pre-treatment procedure would also give management an immediate idea of the severity of the employee's injury and approximately how long he is likely to be off work. That knowledge would help management better staff postal operations and would help management respond more realistically to injury compensation claims. It could more successfully distinguish the valid calim from the dubious one. The pre-treatment procedure also would enable the Postal Service physician to discuss the employee's status, including the ability to perform light duty, more knowledgeably with the treating physician. And employees who undergo the pre-treatment examination may be more likely to use the Postal Service physician as their treating physician, an arrangement which would be certain to give management closer understanding and control than it would otherwise possess. In short, the pre-treatment procedure seems to promise management lower costs and more effective monitoring of the injury compensation program.* These are perfectly legitimate objectives for management.

Summary

For these reasons, my conclusion is that the proposed 543.11c pre-treatment examination, as contemplated by the Postal Service, would be "fair, reasonable, and equitable." This proposed ELM change would not violate this Article 19 test.

* That actually appears to be what happened between 1982 and 1984 when various postal facilities adopted the pre-treatment examination.

There remain two other questions. The first is whether the proposed pre-treatment examination is "inconsistent with..." Article 21, Section 4 of the National Agreement. The second is whether the proposed changes in 543.13, i.e., the elimination of a sentence equating "animal bites" and "eye injuries" with "emergencies" and the creation of a new definition of "emergency situations", satisfy the "fair, reasonable, and equitable" test in Article 19.

The "Inconsistent with..." Claim

Article 21, Section 4 requires that the Postal Service "...promulgate appropriate regulations which comply with applicable regulations of the Office of Workers' Compensation Program [OWCP] and any amendments thereto..." The Unions point to OWCP regulations, specifically, 20 CFR 10.401(e), which reads in part, "...Any agency-required examination... shall not interfere...with the employee's initial free choice of physician..." They urge that the proposed ELM pre-treatment examination would permit "local supervisors to delay examination and treatment of injured workers by their chosen doctors...", that such delay would "interfere...with the employee's initial free choice of physician", that the proposed ELM change would thus not "comply" with this OWCP regulation, and that the Postal Service proposal is therefore "inconsistent with..." Article 21, Section 4 and invalid under Article 19.

This argument is not persuasive. The pre-treatment examination, according to proposed ELM 543.11c, "must in no way interfere with the employee's right to seek prompt examination/treatment from a physician of choice." Postal Service testimony as to the intent of this proposed change made clear that the injured employee would not be expected to delay an appointment with his physician of choice because of the pre-treatment procedure. The OWCP regulation prohibits any interference with the employee's right to prompt treatment by his physician of choice. The proposed 543.11c repeats this same prohibition in different words. The pre-treatment examination would not interfere with the injured employee's rights.* This reality prompted the DOL to suggest in correspondence with the Postal Service that the pre-treatment

* See, in this connection, the discussion earlier in this opinion with respect to "The Delay Claim."

examination would not conflict with OWCP regulations provided the employee was not expected to delay an appointment with his physician of choice. It follows that the proposed 543.11c would not be "inconsistent with..." Article 21, Section 4.

The "Emergency..." Definition Claim

ELM 543.13 has for some years stated that "animal bites or eye injuries are always considered medical emergencies." The Postal Service's proposed changes would excise this sentence and would define "emergency situations" as -

> "...[those] of a life threatening nature such as severe bleeding, loss of consciousness, severe chest pain suggesting possible heart attack, etc."

Its proposal further states that "in the event...there is doubt as to the emergent nature of the injury, it should be handled as an emergency." The Unions challenge the proposed changes as "too narrow" and "unreasonably restrictive."

There are several difficulties with the proposed definition. To begin with, emergencies should not be limited to "life threatening" situations. For example, eye injuries may not be life threatening but some of them could, if not treated on an emergency basis, result in permanent scarring. Burns may not be life threatening but some of them could, if not treated on an emergency basis, result in infection and more severe scarring.

Equally important, the proposal itself recognizes that one must look beyond the injury to what the symptoms of the injury might possibly mean. "Severe chest pain" may suggest nothing more than indigestion or a pulled muscle. But because it could potentially signify the onset of a heart attack, it is viewed as an emergency. By the same token, a dog bite may seem a matter of small moment. But if the dog were rabid, the injury could be serious indeed and the employee could understandably insist on emergency treatment. Considerations such as these no doubt account for the ELM's past treatment of "dog bites" and "eye injuries" as "emergencies."

Moreover, the proposal ignores the fear and anxiety which sometimes accompany a traumatic injury. These subjective factors may, in the employee's mind, transform an otherwise non-emergency situation into an emergency. Consider again an eye injury, an employee suddenly realizing

foreign matter has entered his eye. It may not be a serious problem but the uncertainty may cause the employee great concern for his own welfare. To say that he may not act as if he were confronted by an emergency in these circumstances would be unreasonable. According to Union testimony from a former Director of OWCP, the OWCP regulations do not define an "emergency" because those in charge of the regulations thought the matter should be "left wide open" on the "theory" that an "emergency" could be "best defined by the employee."

My conclusion is that the proposed definition is too narrow and hence is not "fair, reasonable, and equitable." It does not meet this Article 19 test.

AWARD

The grievances are denied with respect to the proposed ELM 543.11, the proposed pre-treatment examination by a Postal Service physician. That procedure, as described by the Postal Service, does not constitute a violation of Article 19.

The grievances are granted with respect to the proposed ELM 543.13, the proposed "emergency situation" (and "nonemergency situation") definition. That definition is a violation of Article 19.

Richard Mittenthal, Arbitrator