C# 10901

REGULAR ARBITRATION PANEL

In the Matter of Arbitration:	GRIEVANT: Wayne Jackson
UNITED STATES POSTAL SERVICE	POST OFFICE: Columbia, S.C.
and	CASE NO: S4N-3P-C 28517
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	NALC CASE NO: CTS #000036

ARBITRATOR: Bernard Cushman, Esq.

APPEARANCES:

For the Postal Service
Jack A. Mabe, Manager, Labor Relations

For the Union:
Don Southern, Regional Administrative Assistant

Place of Hearing: Columbia, South Carolina

Dates of Hearing: April 23, 1991

AWARD

The grievance is sustained. The Grievant is entitled to eight hours of administrative leave independent of any annual leave balance to be taken at the Grievant's convenience.

Dated: June 13, 1991

Bernard Cushman
Bernard Cushman, Arbitrator

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OPINION AND AWARD

ARBITRATOR: Bernard Cushman, Esq.

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For the Postal Service
Jack A. Mabe, Manager, Labor Relations

For the Union:
Don Southern, Regional Administrative Assistant

This case arose under the 1984 National Agreement. A hearing was held at Columbia, South Carolina, on April 23, 1991. Both parties were afforded full opportunity to present evidence and to examine and to cross examine witnesses. The parties timely filed briefs dated May 24, 1991. The entire record, including the briefs, has been carefully considered by the Arbitrator.

THE ISSUE

Was the annual leave requested by the Grievant, Wayne Jackson, for March 21, 1986, improperly denied? If so, what is the proper remedy?

BACKGROUND

This case involves the denial of a request for annual leave made on March 18, 1986, by Wayne Jackson, the Grievant, a Carrier employed by the Columbia, South Carolina Post Office, and submitted on Form 3971 requesting annual leave for eight hours for Friday, March 21, 1986. The supervisor immediately denied the request and handed the 3971 back to the Grievant with the reason stated on the Form as "Needs of Service."

The relevant contractual provisions directly involved here are contained in the Local Memorandum, the Memorandum Of Understanding of March 1986. Article X of that Memorandum contains provisions relating to leave. The choice leave period is established in Section 1 of the Memorandum as May 1 through September 30.

Section 10A(1) provides for supervisory ascertainment of individual choices by seniority. Section 10A(3) provides that an employee may request in a second round the remainder or a part of his leave as a second choice. Section 10A(5) establishes a 12 percent quota (of the total number of carriers in each delivery unit) who shall be authorized annual leave during the choice period.

Section 11 of Article X provides:

> Request for annual leave other than choice will be submitted on Form 3971 no earlier than 30 days or later than the Tuesday prior to the service week in which the annual leave is desired except as provided in Sections 10.B., 12.A., and 12.B. Approval or denial of request for annual leave will be given no later than Wednesday prior to the service week in which annual leave is desired.

Section 12 provides the procedure for granting leave other than during the choice period. The Arbitrator for purposes of this discussion will describe that period as the non-choice period.

Section 12.A provides:

> Applications for leave beginning on after the first day of the new leave year and through the beginning of the choice period shall be submitted prior to December 1 for advanced approval. The supervisor shall gather all requests for leave during this period submitted by December 1 and shall approve such requests up to quota in Article X, Section 12-F, on a seniority basis and enter on the leave chart as approved leave. Applications received for leave after December 1 will be approved by priority of receipt up to the authorized quota as stated in Section 12-F and entered on the leave chart as approved leave. Leave in excess of the normal quota may be granted as service needs permit.

Section 12.B provides:

> Applications for leave beginning in the Fall immediately following the end of the choice vacation period through the remainder of the leave year are to be submitted by April 15 of each year for advanced approval. The supervisor shall gather all request for leave in the Fall submitted by April 15 and shall approve such requests up to the authorized quota stated in Article X, Section 12-F, on a seniority basis and enter on the leave chart as approved leave. Applications received for leave in the Fall after April 15 shall be approved by priority of receipt up to the authorized quota and entered on the leave charged as approved leave. Leave in excess of quota may be granted as service needs permit.

Section 12.F provides:

> Ten percent of the total number of carriers at each delivery unit shall be authorized annual leave at times other than choice vacation period, excluding December.

The Union contends that the Postal Service was in error in denying the Grievant's request of March 18 for leave of eight hours on March 21. The Union points out that Section 11 contains exceptions to the requirement that requests for annual leave during the non-choice period be made no later than the Tuesday prior to the service week in which annual leave is desired. One of these exceptions is Section 12.A which provides that applications for approved leave after December 1 will be approved by priority receipt up to the authorized quota of ten percent. The Union argues that since the Grievant's request was made after December 1 and the ten percent quota for March 21, the day for which leave was requested, had not been filled, the Postal Service was obligated to honor the Grievant's request. The Union cites two awards by Arbitrator Foster concerning leave at this very facility which held under substantially similar facts that where the ten percent quota was not filled, the leave request must be honored. The Union further cites awards by Arbitrator Rentfro and Mittenthal as supporting the Union's position. The Union further points out that the request on the 3971 was denied immediately upon receipt with no evaluation of the factual situation by the supervisor who denied the request.

The Postal Service contends that the purpose of Section 11 in granting exceptions to applications for leave in Sections 12.A and 12.B, as well as 10.B, was to treat the case of an employee who applies for leave after December 1 by permitting him to make that request not just by December 1 as stated in 12.A where the request

might be for leave several months later, but by 30 days prior to the requested date in such a situation or by the Tuesday of the week preceding the service week in which the leave is to be taken. This 30 day exception, according to the Postal Service, is thus a clarification permitting the filing of a request after December 1 provided that the filing is made within 30 days before the requested date of leave or by the Tuesday prior to the service week in which the annual leave is desired. If the request for leave is not made in accordance with that time schedule, the granting of leave is entirely, according to the Postal Service, within the discretion of management, and if the fact is that the ten percent quota has not been met, that fact places no obligation upon management since the request was untimely. Any other interpretation, says the Postal Service renders Section 11 meaningless.

The Service further states that otherwise an employee could on any day on which the ten percent quota had not been filled for that day demand leave for that same day whether or not the supervisor was able to cover his absence.

The Postal Service contends further that Arbitrator Foster did not understand the issue and in his second award conceded he had erred in the first award but "felt compelled to continue his error." The Service says that since there was clear error on the part of Arbitrator Foster, this Arbitrator in the instant case should not follow his awards.

DISCUSSION, FINDINGS AND CONCLUSIONS

There have been two arbitration awards by Arbitrator Robert Foster between the Postal Service at this Columbia, South Carolina facility and the Union on the very issue before the Arbitrator in the instant case. In the first of these awards involving Grievant Dabbs, Case No. E4N-2H-C 37778, on November 19, 1986, the Grievant requested annual leave for November 24. The request was denied by the Postal Service based on the needs of the Service. The ten percent quota for the non-choice period had not been filled. Arbitrator Foster sustained the grievance and awarded as a remedy a day of annual leave of the Grievant's choice. He stated at pages 5 and 6 of his Opinion:

> The common element to the three listed exceptions is that they call for the grant of leave in situations where it is not possible to comply with the time constraints of Section 11 for submitting the leave request. The referenced exception applicable to the instant circumstance is the latter part of Section 12 B which addresses a leave request submitted after April 15 for leave in the Fall which "shall be approved up to the authorized quota." The mandator word "shall" is distinguished from the permissive word "may" applicable to granting leave in excess of quota. Thus, given the specific reference to this mandate in Section 11 as an exception, the arbitrator is duty bound to enforce the clear and unambiguous agreed upon language that excludes application of Section 11 from the Grievant's request for leave which would not exceed the quota.

The same issue was presented again to Arbitrator Foster in the case of Grievant Burton, Case No. 8W686 233. In that case the Grievant submitted a request for five hours of annual leave on March

17, 1986, for leave for that day. The supervisor denied the request the same day based on needs of the Service. Less than ten percent of the Carriers was off on leave on March 17. The parties took the same positions as they did in the Dabbs case referred to above. Arbitrator Foster again sustained the grievance. Arbitrator Foster stated:

> There still remains considerable justification for the Union's reading of this language as meaning what the words seem to say: when the 10 percent quota came back into the LMU with Arbitrator Mittenthal's national award in January of 1986 holding that the LMU clauses were not inconsistent or in conflict, employees were granted the right to incidental leave "up to the authorized quota." What the Postal Service continues to find as a limitation on this right by the Tuesday before Section 11 requirement may well reflect management's subjective intent as to what is meant when all of the provisions are read together, but such a meaning is far from obvious when read through the eyes of the Union or an objective observer.
>
> It must be said in all candor, however, that the more thorough analysis and detailed arguments posed by the Postal Service advocate this time around does cause some second thoughts, at least with respect to the earlier characterization of the language enforced as being "clear and unambiguous' in excluding application of Section 11. But, as stated in Article 15, Section 4.A.6 of the National Agreement, "All decisions of an arbitrator shall be final and binding," conditioned, of course, on the arbitrator acting within his jurisdictional limits as an interpreter of unclear contract language as was the case here. Thus, the precedential effect of the prior decision on the same issue raised in this later case should have put the matter to rest and preclude relitigation. That is to say, the relief from same day leave request sought by the Postal Service should now come from future negotiations and not relitigation in arbitration. As stated by Arbitrator Mittenthal in referring to the inefficiencies that may arise from a LMU clause that permits employees

> to take leave on too short notice, "such matters can presumably be corrected through local negotiations or, if necessary, through arbitration of local impasses." Case No. H1C-NA-C 59, 61 at page 13. That opportunity will come soon with the expiration of the existing agreement.

The Postal Service says that Arbitrator Foster conceded error. I do not read his opinion as conceding error in view of the sentence on page 6 which states: "What the Postal Service continues to find as a limitation on this right by the Tuesday before Section 11 requirement may well reflect management's subjective intent as to what is meant when all of the provisions are read together, but such a meaning is far from obvious when read through the eyes of the Union or an objective observer." The most that can be said is that he had second thoughts as to the language being "clear and unambiguous." In any event, I do not find Arbitrator Foster's award to fall within the standard of "clearly erroneous" which justifies me in not following his awards. Perhaps my discussion should end there. However, in the Arbitrator's view the parties are entitled to a statement from this Arbitrator as to why he finds that the Foster awards are not "clearly erroneous."

On the basis of my own independent study and analysis of the Local Memorandum, Arbitrator Foster reached a correct result, although my reasoning treads a somewhat different route.

Analysis begins with the text of the Local Memorandum set forth above. Section 11 by its terms deals with requests for leave in the <u>non-choice period</u>. Just what the reference to Section 10.B is doing

in Section 11 is puzzling. Section 10.B is included in the choice period provisions of Section 10. Section 11 provides affirmatively that requests for non-choice period leave will be submitted no earlier than 30 days or later than the Tuesday prior to the service week in which leave is desired but then sets forth exceptions to that requirement as to Sections 10.B, 12.A and 12.B. As the Service itself points out 10.B deals only with the choice period. And the Service's contention that the reference to 10.B relates to the no earlier than 30 days provision to be applied to choice leave applications has no apparent foundation, either in the language of Section 10 or in what appears to be the purpose or objective of the provisions of Section 10. The choice vacation period requires and lends itself to long-range planning. By April 1 employees may fairly be expected to have planned vacations to be taken during the period from May 1 to September 30 when the quota for vacations is 12 percent. Planning on the management's side presumably requires some time to analyze the requests and prepare manpower schedules accordingly. Advance approval is compatible with the needs of the somewhat compressed choice vacation period. Advanced approval for the non-choice period leave is a somewhat less acute need. Section 12.A recognizes such a distinction for the non-choice period. Thus, there is a provision for leave applications <u>after</u> December 1. Section 10 contains no such provisions for requests made after April 1 referring only to a May 1 cut-off date for second round applications. Section 12.A expressly contemplates leave

applications after December 1 up to quota and provides for mandatory approval by order of receipt up to the 10 percent quota. Section 12.A. then states that leave in excess of quota may be granted as Service needs permit. As a matter of normal contract construction when one section states that application after December 1 must be granted up to quota and then states leave in excess of quota is dependent upon Service needs, the appropriate conclusion to be drawn would appear to be that employer discretion applies only to above quota leave requests. And the above quota requests is the area in which Section 11 by the words it uses does apply. Contrary to the Postal Service contentions, Section 11 is not rendered meaningless by such a reading. Thus, the Grievant's application falls within the express exception to Section 11 residing in Section 12.A. Here, the Grievant asked for a within quota leave. It should have been granted.

The Arbitrator notes that Arbitrators Rentfro and Sobel reached the same result on substantially similar facts.

The Arbitrator recognizes that the contractual rights and obligations found in Section 12.A when read in conjunction with Section 11 may cause some inefficiencies in administration of same day within quota requests.[1/] As Arbitrator Mittenthal stated in

[1/] It is noted that Arbitrator Cohen in Case No. 5NIN 331/AC-C-17649 held that where the Local Memorandum did not so provide the Arbitrator could not require some particular amount of advance notice.

his national award in H1C-NA-C-59 and 61:

> It may be that a particular LMU clause will, due to the poor judgment of the negotiators, permit too many employees to be on leave at one time or permit employees to take leave on too short a notice. It may be that these arrangements will cause inefficiencies. But such matters can presumably be corrected through local negotiations or, if necessary, through arbitration of local impasses.* It cannot be said, on the present state of the record, that all (or most) LMU clauses on leave during non-choice periods (or incidental leave) must necessarily cause inefficiency. The fact that some clauses have such an effect is no basis for invalidating all clauses.

As Article 15, Section 4 of the National Agreement provides the Arbitrator is limited to the terms of the provisions of the Agreement and he may not alter, amend or modify the Agreement.

We turn then to the remedy. I find in accordance with the decisions of Arbitrator Sobel, Rentfro and Foster that the appropriate remedy under the circumstances of this case is to grant to the Grievant eight hours of administrative leave to be taken independent of any annual leave balance and to be taken at the Grievant's convenience.

AWARD

The grievance is sustained. The Grievant is entitled to eight hours of administrative leave independent of any annual leave balance to be taken at the Grievant's convenience.

Dated: June 13, 1991

Bernard Cushman

Bernard Cushman, Arbitrator