C# 12424

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration between	GRIEVANT: Class, Branch 67, Elizabeth, New Jersey
UNITED STATES POSTAL SERVICE	CASE NO. H7N-1P-C 23321
-and-	
NATIONAL ASSOCIATION OF LETTER CARRIERS	

BEFORE: Richard Mittenthal, Arbitrator

APPEARANCES:

For the Postal Service:	Brian M. Reimer Attorney, Office of Labor Law
For NALC:	Michelle Dunham Guerra and Keith E. Secular (on the brief) Attorneys (Cohen Weiss & Simon)
Place of Hearing:	Washington, D.C.
Date of Hearing:	July 8, 1992
Date of Post-Hearing Briefs:	September 11 and 18, 1992

AWARD: With respect to employees returning from an extended absence due to non-occupational illness or injury, the Newark District "policy" requirement was not contrary to the ELM, specifically 864.41, and was not a violation of the Agreement. To the extent to which this "policy" is applied to those returning from an extended absence due to occupational illness or injury, it would be in conflict with the ELM, specifically 864.42, and would thus be a violation of the Agreement.

Date of Award: October 5, 1992.

Richard Mittenthal
Arbitrator

BACKGROUND

This grievance protests a policy statement issued by the Newark, New Jersey Division of the Postal Service in February 1989. The policy concerned employees wishing to return to work after 21 or more days of absence due to injury or illness. It required them to arrange to be seen and examined by a Postal Service doctor prior to their return. NALC insists that this requirement was not consistent with the terms of Subchapter 864.4 of the Employee & Labor Relations Manual (ELM) and was therefore a violation of Article 19 of the National Agreement. The Postal Service disagrees. It also urges that this dispute is not arbitrable at the national level.

The Postal Service has a substantial need for medical services which can be provided only by doctors. Part of this need is satisfied through its employment of full-time doctors, referred to in the ELM as "medical officers." Part of this need is satisfied through contracts with private physicians or clinics. The larger postal facilities usually have one or more "medical officers." The smaller facilities are ordinarily handled by contract physicians.

These doctors are responsible for a variety of medical examinations and evaluations. They give pre-employment physicals to job applicants. They do periodic physicals for certain categories of employees. They make fitness-for-duty examinations when supervision suspects an employee is unable to perform the duties of his or her job on account of medical reasons. They review medical evidence presented by the employee who wishes to return to work after an extended absence due to illness or injury. This return-to-duty review is covered by Subchapter 864.4 of the ELM and read as follows at the time this dispute arose:

> 864.41 Employees returning to duty after 21 days or more of absence due to illness or serious injury require medical certification. Employees must submit medical evidence of their ability to return to work, with or without limitations. A medical officer or contract physician evaluates the medical report and makes a medical assessment to assist management in employee placement to jobs where they can perform effectively and safely.[1]

[1] Provisions similar to 864.41 of the ELM are found in Subchapter 342 of the Personnel Operations (P-11) Handbook.

> 864.42 In cases of occupational illness or injury, the employee will be returned to work upon certification from the treating physician, and the medical report will be reviewed by a medical officer or contract physician as soon as possible thereafter.

The present case appears to involve employees seeking to return to duty from an extended absence attributable to non-occupational illness or injury. Such employees are governed by 864.41. They must produce "medical certification...of their ability to return to work..." The "medical officer" or contract physician "evaluates" the "medical certification", presumably to determine whether the employee is in fact able to return. And, in a number of larger postal facilities, such employees have been required to see and be subject to examination by a "medical officer" or contract physician before being allowed to return. That appears to be the policy in Boston, Brockton, Brooklyn-Queens, Jersey City (International & Bulk Mail), Newark, Southern Maryland, Chicago, Louisville, Omaha, Dallas, Oakland, San Francisco, and Los Angeles.

This latter requirement has been in effect in the Newark Division since 1974 although it is not clear whether every office within the division has insisted that the returning employee be seen by a Postal Service doctor before actually returning. That Newark policy was reduced to writing on April 22, 1987, February 22, 1988, and February 14, 1989. The last of these policy statements provided in part:

> Employees returning to duty under these circumstances [after 21 or more days of absence due to illness or injury] must contact the Medical Unit prior to the date and time they are expected to return to work to arrange for a Return to Duty Evaluation by the Medical Officer. Employees can contact the medical units between the hours of 8:00 a.m. and 4:30 p.m. Monday through Friday to make an appointment to see the Medical Officer. Such assessments will be conducted off-the-clock and must take place prior to returning to duty.

In short, before Newark employees are permitted to return to duty from this kind of extended absence, they (1) must present a "medical certification" from their own physician to the effect that they are able to resume work and (2) must arrange to be seen and evaluated by a Postal Service doctor.

NALC Branch 67 from Elizabeth, New Jersey, part of the Newark Division, became aware of this February 14, 1989 policy

statement. It believed that the policy was contrary to past practice in Elizabeth and that the policy was in any event a violation of Article 19. That article 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, 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...
>
> 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 sixty (60) 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...

NALC asserts that 864.41 contemplates that employees seeking to return to work after an extended absence need only provide Management with a "medical certification" from their treating physician. It contends that the Newark policy, by requiring such employees to submit to an examination by a Postal Service doctor before being allowed to return, has added another requirement. It insists that this local policy requirement is in conflict with 864.41 and is hence a violation of Article 19. It asks that the arbitrator order the Newark policy to be rescinded.

The Postal Service urges that the 864.41 procedure is simply a "baseline" or "minimum standard", that Management is free in any local facility to require something more of employees wishing to return from an extended absence, and that such a requirement is nowhere prohibited by 864.41. It stresses that the Newark policy requirement in question had been in effect a long time and that NALC's branch, although it must have been aware of the policy, made no protest from 1974 to 1989. It notes that essentially the same policy has existed in other facilities around the country without any objection from NALC. It emphasizes too that the very issue posed in this case was decided against NALC in a regional arbitration and that the then NALC Director of City Delivery acknowledged in a Step 4 settlement in April 1985 that sometimes "local policy

dictates...the employee must be seen and cleared by the postal medical officer..."

DISCUSSION AND FINDINGS

At the outset, the Postal Service says this dispute is not arbitrable at the national level. It cites Article 15, Section 4D1: "Only cases involving interpretive issues under this Agreement or supplements thereto of general application will be arbitrated at the National level." It asserts that NALC's complaint does not involve such an "interpretive issue...of general application..."

This argument is not persuasive. The parties differ on the significance of an ELM provision, 864.41, which has been incorporated in the National Agreement through Article 19. NALC views this provision as a fixed standard subject to change only through Management's use of Article 19 procedures. It says Newark Management could only demand of the returning employee that which is expressly set forth in 864.41. The Postal Service claims Newark Management can demand more because 864.41 is merely a "baseline" or "minimum standard" as to what should be required of returning employees before they actually return. NALC says that the additional Newark requirement goes beyond 864.41 and must therefore be regarded, pursuant to Article 19, as a "change...inconsistent with this Agreement..." The Postal Service claims that because the Newark requirement is not precluded by 864.41, it cannot be "inconsistent with.." 864.41. Its position is that this requirement should be held to be permissible given the limited purpose of 864.41.

These contentions reveal basic differences with respect to not only the meaning of 864.41 but also the flexibility of this ELM provision and the meaning of certain language in Article 19. The grievance plainly raises "interpretive issues...of general application..." and is thus arbitrable at the national level.[2]

* * *

As for the merits of the case, I turn to Newark's history. Before the policy in question was initiated, employees had to

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[2] The fact that the Postal Service and APWU agreed in another case at the pre-arbitration step that this Newark requirement was not arbitrable at the national level is not binding on NALC.

submit a "medical certification" from their treating physician to the effect they were physically capable of resuming work. Nothing more was required of them. The new policy, however, added another requirement. They now also have to see and be subject to examination by a Postal Service doctor before they are allowed to return. The "medical certification" alone is no longer enough.

This additional Newark requirement must be measured against 864.4. Two distinct situations are contemplated by this ELM provision. One, 864.42, covers employees who seek to return from an "occupational illness or injury." They "will be returned to work upon certification from the treating physician..." Management appears to have little, if any, discretion in the matter. If the employee produces the necessary "certification", he is to be "returned to work" and the "certification" is to be "reviewed" by a Postal Service doctor "as soon as possible thereafter." Should Management choose to require that the "review" precede the employee's return, or that the employee be seen by the Postal Service doctor before returning, its action would be contrary to the express terms of 864.42.

The other provision, 864.41, nowhere mentions the terms "occupational" or "non-occupational". But a close reading of 864.4 shows that 864.41 must have been intended to apply to those seeking to return from non-occupational illness or injury. It states that employees wishing to return from such an absence must produce a "medical certification...of their ability to return..." It states further that the Postal Service doctor "evaluates the medical report" and "makes a medical assessment..." to assist in determining what jobs such employees can perform. Nothing in these words prohibits Management from insisting on something more than the "medical certification." Had such a prohibition been intended, 864.41 would surely have been written in much the same words as 864.42. The fact is, however, that 864.41 does not provide that employees "will be returned to work upon certification..." or that the Postal Service doctor will "review" the certification "as soon as possible thereafter..."

The Newark policy requires employees to see a Postal Service doctor before returning to work.[3] Such a requirement

[3] I assume this policy refers only to those wishing to return from non-occupational illness or injury. Should this requirement be applied to those returning from occupational illness or injury, it would be contrary to the express terms of 864.42.

is not set forth in 864.41. But it is not prohibited either. The silence of the ELM on this point does not establish, at least not on the facts of this case, that the Newark requirement is "inconsistent with..." 864.41. Nothing in 864.4 suggests that the Postal Service meant to exclude any procedure beyond the "medical certification" provided by the treating physician and the "evaluation" of this certification and other medical papers by the Postal Service doctor.

Much the same question was presented to Arbitrator Garrett in Case Nos. NB-N-3908 and -5125. There, NALC argued that because the M-41 Handbook authorized the use of the "third bundle delivery method" only on motorized routes with curbside delivery, Management could not require the use of this "...method" on a dismount stop. Garrett, in rejecting this argument, observed:

> ...This kind of argument appears to equate the USPS Handbooks with carefully drawn, highly technical legal documents, such as a trust indenture. It would seem, however, that this kind of an interpretive theory at best could only have limited value as an aid to sound interpretation of typical collective bargaining agreements. Moreover, its application here would overlook the fact that the Handbook provisions were not drafted to represent the results of collective bargaining, but rather essentially to set forth policies and procedures to guide USPS employees in the performance of their numerous and varied duties. While it is entirely clear that such policies and procedures may embody provisions which on their face (or by reasonable implication) constitute conditions of employment, it must be recognized that some operating conditions or problems are not of sufficiently great importance to warrant specific treatment in a Manual, Handbook, or Regulation. Thus it seems unsound at best to attempt to read such a document as if it were designed to cover expressly every possible situation which might arise in the course of operations.

Garrett went on to find that NALC "d[id] not point to any specific...[M-41] provision which clearly (or by reasonable implication) could have been violated..." and that Management's assignment of the "third bundle delivery method" on a dismount stop "constituted a reasonable exercise of Management authority under Article III."

A similar conclusion seems appropriate in the present case. Management had good reason not to draft 864.41 in greater detail. It sought, at the very least, to ensure that any employee wishing to return have a "medical certification" from the treating physician and that the Postal Service doctor have an opportunity to review the "certification." It recognized, however, that postal facilities vary greatly in size, numbers, availability of physicians, and so on. Many postal facilities have no "medical officer" and must rely on contract physicians. Even when there is a "medical officer", he and the returning employee may be so far apart geographically that a physical examination may not be feasible. Contract physicians are not always familiar with postal operations and postal work. Hence, there may be no real benefit in having a contract physician see the returning employee. Considerations such as these no doubt prompted Management to couch 864.41 in such a way as to allow postal facilities some discretion in determining what degree of medical review best fits their circumstances.

None of this should come as a surprise to NALC. In Framingham, Massachusetts, employees seeking to return from an extended absence due to illness or injury were required to go to Boston to be seen by a Postal Service doctor. NALC filed a class action grievance in March 1984 protesting that the employees were not paid for their time and expenses in keeping such doctor's appointments. NALC did not assert that this required physical was itself a violation of the ELM. The dispute was settled in Step 4, Case No. H1N-1E-C 31854, by a Postal Service Labor Relations Representative and the then NALC City Delivery Director, a national officer. They agreed that employees would not be paid for their time but would be reimbursed for their travel expenses. The settlement letter stated in part:

> ...<u>If local policy dictates that the employee must be seen and cleared by the postal medical officer</u>, the employee shall be reimbursed for travel expenses incurred to attend the examination... (Underscoring added)

It is true that this settlement concerned the money impact of the "local policy" on returning employees. Nevertheless, the underscored words plainly acknowledge that Management may require through "local policy" that returning employees be "seen and cleared" by a Postal Service doctor prior to their return. NALC expressed no objection to such "local policy" at that time. Indeed, as I noted earlier in this opinion, much the same "local policy" has existed in numerous large metropolitan areas. These "local policies" have rarely been

challenged. On the one occasion where NALC mounted a challenge and urged that the "policy" violated the ELM, specifically 864.4, a regional arbitrator rejected its claim. Moreover, it is worth stressing that the Newark District introduced its "local policy" in 1974. Perhaps the Elizabeth office did not follow the District "policy" until 1989; perhaps it did. But the fact is that large numbers of returning employees elsewhere in the District were required to arrange to be "seen and cleared" by a Postal Service doctor before returning to work. During these years, a great many Carriers must have gone through this kind of medical clearance.[4] Yet the instant grievance was not filed until February 1989.

For all of these reasons, my conclusion must be that the Newark "policy" requirement in dispute was not "inconsistent with..." the ELM and hence was not a violation of the National Agreement.

AWARD

With respect to employees returning from an extended absence due to non-occupational illness or injury, the Newark District "policy" requirement was not contrary to the ELM, specifically 864.41, and was not a violation of the Agreement. To the extent to which this "policy" is applied to those returning from an extended absence due to occupational illness or injury, it would be in conflict with the ELM, specifically 864.42, and would thus be a violation of the Agreement.

Richard Mittenthal, Arbitrator

[4] Newark "policy" statements on this very subject were written in April 1987 and February 1988 and were distributed to, among others, "all employees."