

Article X

2/9/78  
GAMSER

C# 727

Re: Case No. AC-N-14034  
John R. Napurano, Grievant

In the Matter of the Arbitration between  
AMERICAN POSTAL WORKERS UNION, AFL-CIO  
(New Jersey Eastern Area Local)

*LOCAL ARBITRATION*

-and-

OPINION AND AWARD

UNITED STATES POSTAL SERVICE  
(Newark, New Jersey Post Office)

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FEB 14 1978

INDUSTRIAL  
RELATIONS

BEFORE:

Howard G. Gamsler, Impartial Arbitrator

APPEARANCES:

For the Union - Schneider, Cohen & Solomon  
by: Edward A. Cohen, Esq.

For the USPS - Mason D. Harrell, Jr., Esq.  
Office of Labor Law

BACKGROUND:

In December of 1976, in Step 2 of the grievance procedure provided for in Article XV of the collective bargaining agreement between the above-captioned parties, a charge was advanced by John R. Napurano, 1st Vice-President of the North Jersey Area Local, wherein he alleged that the Postal Service at the Newark Post Office was violating Article 10, Section 3d of the Local Memorandum of Understanding. Mr. Napurano contended that local management was violating that provision of the Local Memorandum by charging certain employees with "Irregularity of Attendance" despite the fact that the terms of that sub-section of the Local Agreement do not permit disciplinary action as a result of an employee taking

"...any leave that has been documented and approved."

Mr. Napurano stated that there were twenty five or more cases which would be scheduled for arbitration in which this was the issue in contention.

Although the Postal Service contended that the grievance advanced by Mr. Napurano was filed untimely, under the provisions of Article XV of the Master Agreement, the Postal Service did agree that the letter submitting the case to arbitration was filed within the contemplated time limits. The Postal Service also agreed at the arbitration hearing, to address the merits of the case and to seek a determination of the issue raised by the Union.

This case is unique in that it was not brought to arbitration for the purpose of securing a determination of whether, in a specific case, and based upon a specific set of facts, the USPS had just cause to discipline or take any action adverse to the tenure of employment of any individual employee. The Parties apparently agreed that, because of the nature of the issue raised and the controlling agreements involved, an Award in the nature of the declaratory judgment would be sought. Without indicating in any manner that such a procedure takes any color of right from the grievance provisions of the Master Agreement, or that entertaining a case brought before the arbitrator under these circumstances should have any precedential value as to the appropriateness of proceeding in this fashion, the undersigned agreed to hear and decide the case as presented.

The hearing was held at the General Post Office in Newark, New Jersey on July 19, 1977. At that hearing, both Parties were given full opportunity to present testimony, other evidence and argument in

support of their respective contentions. By agreement, post-hearing briefs were filed. These were received in timely fashion and the contents of same were duly considered in the Opinion below.

THE ISSUE:

The Parties did not agree upon a definition of the matter placed in issue before the Arbitrator. However, from the contentions raised and the arguments advanced, during the course of the hearing, it was apparent that two questions were posed by this grievance. The first of these is whether the Local Union and Local Management, in their Memorandum of Understanding, were granted jurisdiction to limit the action which management could take where an employee's attendance was regarded as "irregular" although that employee's absences were all covered by documented and approved sick leave. The second question is whether, assuming managerial action were not limited by the terms of the Local Memorandum, the USPS could establish just cause to discipline an employee, up to discharging such an employee, under the principles enunciated in Article XVI of the Master Agreement for irregular and erratic attendance covered by documented and approved sick leave.

CONTENTIONS OF THE PARTIES:

In a very well reasoned and lengthy brief, which supplemented the testimony which it had adduced during the course of the hearing, the Union argued that in negotiating the 1973 and 1975 Local Memoranda of Understanding, the Parties to that Memoranda had agreed that employees who receive documented and approved leave of any kind, and more specifically sick leave, would not have absences so covered used as the basis for disciplinary action.

The Union claimed that the testimony of the witnesses at the hearing, who were active participants in the negotiation of the Local Agreements, clearly established that the Parties had agreed that sick leave which was approved, either earned or projected, could not be the basis for taking disciplinary action. The Union also claimed that there was never any question that the words "any leave" as used in Subsection 3d of Article 10 of the Local Agreement referred to sick leave as well as other forms of leave customarily afforded to Postal employees. The Union called attention to the entire wording of Section 3, Subsections a through i, inclusive, as well as the testimony of the negotiators regarding the positions taken by the parties and proposals exchanged on this provision to substantiate this claim.

The Union also argued that management could not now equitably argue that the local negotiators did not have authority to negotiate such a restriction on managerial rights in 1973 and 1975 as well. The Union contended that management was estopped from taking such a position when the contents of the Local Agreement were known to higher management in 1973 and 1975, and no action was taken to disown or to remove from the Local Agreement this language after the Union had successfully resisted efforts made during negotiations to modify the language ostensibly for the purpose of conforming to the requirements of the Master Agreement. The Union asserted that management could have challenged the Union's right to secure such a provision in the Local Agreement in the impasse procedures provided to resolve local issues, but that the Postal negotiators failed to do so. Thus, the right to contest the validity and viability of such a provision could not be raised in the instant proceeding which was not designed to

resolve local bargaining impasses which were not raised in a timely fashion.

The Union also argued that, in any event, the restrictions placed upon management's right to discipline contained in Section 3d of Article 10 of the Local Supplementary Agreement did not conflict with the provisions of the Master Agreement. The Union pointed to the fact that Article XVI of the Master Agreement requires that discipline be corrective in nature rather than punitive. The Union contended that the most creditable arbitral opinion has held that absences due to physical incapacity have nothing to do with discipline and should not be the basis for disciplinary action. In addition, the Union made reference to several arbitration awards in which it was also held that where there was an approved sick leave program, and the employee's absences were covered by leave provisions under such a program, there could be no disciplinary action taken against such an employee. In other words, just cause for discipline could not be found under such circumstances since management agreed under the terms of the sick leave program to excuse absences approved under that program.

Management argued that Article XIX of the 1975 Agreement, which is the Agreement under which this grievance was raised, provides, as did previous agreements, , . . . inter alia that provisions of Postal Manuals not inconsistent with the terms of the National Agreement shall remain in full force and effect. By virtue of that provision, Section 442.181 of the Postal Service Manual, which provides, "Employees are required to be regular in attendance.", was incorporated as a provision of the 1975 Agreement.

The Postal Service pointed out that Article XXX of the Master Agreement specifically provides that in local negotiations no agreements could be made that were inconsistent with or in conflict with the terms of the Master Agreement. These provisions, the USPS pointed out also appeared in exactly the same language in the 1973 Agreement. For these reasons, the Postal Service argued that the Local Union and Local Management in Newark could not have agreed upon and put into effect a provision in the Local Memorandum which restricted management's right to require employees attend to their duties with regularity, and the approval of sick leave could not inhibit management from enforcing this requirement incorporated by reference into the Master Agreement.

The Postal Service also argued that excessive absenteeism due to illness is proper grounds for disciplinary action. The USPS cited several arbitration awards which so held and argued that this was the prevailing arbitral opinion. The Postal Service also contended that the existence of a sick leave program and accrued sick leave days could not protect an employee from being counseled, warned, suspended and even discharged for a failure to maintain regular attendance although the absences were excused and possibly paid for under the existing sick leave program.

OPINION OF THE ARBITRATOR:

The threshold issue which confronts the Arbitrator in this case is whether there was a clear and enforceable agreement between the parties to the Local Memorandum in Newark which would prevent Local Management from taking disciplinary action against

an employee with an irregular attendance record when the cause of that employee's absences has been sickness covered by documented and approved sick leave.

The undersigned believes that the Union did present credible evidence to substantiate its contention that Section 3d of Article 10, as it appeared in both the 1973 and 1975 Local Agreements, referred to sick leave as well as annual leave and other leaves of absence for which management could excuse and pay an employee who did not appear for work. Having said that, it is necessary to add, however, that neither local management or the local union negotiators had authority and the power, under the terms of the provisions of Article XXX of the Master Agreement, as those provisions appeared in the 1973 and 1975 Agreements, to restrict management's right to discipline in this fashion. Article XXX clearly provided that local memoranda provisions inconsistent with the terms of the 1973 or 1975 Master Agreements cannot be negotiated on a local level. Paragraph B of Article XXX provided in pertinent part that, "...no local memorandum of understanding may be inconsistent with or vary the terms of the 1975 National Agreement." That same provision appeared in the 1973 Master Agreement.

Article XXX also most specifically limits local negotiations to twenty two enumerated items. A careful reading of these items does not reveal that the subjects of discipline and sick leave as well were left to be negotiated out at the local post office or area level. A principle which must be followed when the parties do enumerate and limit subjects with such particularity is to conclude that they meant to include no other subjects for local implementation.

This list of twenty-two specific items on which local negotiations can be had was hammered out laboriously by the negotiators of the Master Agreement. They understood that the basic provisions concerning wages, hours and other terms and conditions of employment would have to be uniform throughout the postal system for all employees concerned and uniformly administered as well. That is why they repeated in 1975 that terms of any earlier local memoranda not inconsistent with the provisions of the 1975 Master Agreement could remain in effect, and new provisions negotiated on the twenty-two items in 1975 would also have to be consistent with the terms of the Master Agreement made in 1975 and could not vary the terms of that Agreement.

Clearly the local postal representatives and union representatives had no authority to negotiate a provision which the Union alleges restricts management's rights to discipline an employee for a failure to maintain regular attendance, as provided for in Section 442.181 of the Postal Manual, as incorporated by reference into the Master Agreement pursuant to the provisions of Article XIX discussed above. Nor can management be required to apply such a provision at the Newark Post Office because it failed to protest its existence and challenge its validity in an impasse proceeding. Neither party to the local negotiations had the authority to negotiate the provision that the Union urges, in this proceeding, be given validity. Management cannot be estopped from asserting its invalidity at this time. To so provide would expose the Parties to the Master Agreement to the chaotic situation under which the terms concerning discipline and its relation to approved sick leave, as in this instance, and other terms covered by the Master Agreement, in other instances, would not be uni-



applied and administered because of the existence of a provision in a local memorandum inconsistent with or in conflict with the provisions of the Master Agreement.

Having concluded, for the reasons set forth above, that Subsection 3d of Article 10 of the Local Memorandum at the Newark, New Jersey Post Office could not be so implemented, the subsequent question posed in this proceeding is whether, under the provisions of Article XVI of the Master Agreement, irregular attendance can provide just cause for discipline. More particularly, the question is whether irregular attendance, even when absences are covered by documented and approved sick leave under a negotiated sick leave program, can provide just cause for actions taken by management against the absentee.

The undersigned has carefully considered the well reasoned arbitration awards submitted by both sides in support of their respective contentions regarding this latter issue. After due deliberation, and for the reasons set forth below, the undersigned is of the opinion that irregular attendance and unreliable attendance, regardless of the legitimacy of the reasons for the absences, may provide management with just cause for taking disciplinary action.

As Arbitrator Cushman held in Case No. AC-S-9, 936-D, decided on June 6, 1977:

"This Arbitrator agrees with Arbitrator Warns and many other arbitrators that an employer has a right to expect acceptable levels of attendance from its employees and that when such attendance is not had, discharge is appropriate despite the fact that the absence may be for valid and legitimate medical reasons. Vera D. Bugg, AB-S-6, 102-D....

"This Arbitrator is sympathetic to employees

"whose absenteeism is due to illness, and, therefore, to no fault of their own. Where, however, absenteeism due to illness results over a period of time in unacceptable levels of work attendance, an employer, under generally accepted principles recognized by many arbitrators, has a right to remove such an employee from employment. (USPS, (Vera D. Bugg) AB-S-6-102-D). The realities of economic survival and the demands of efficiency require that an employer be able to depend upon reasonable regularity of employee attendance in order to plan and perform his work schedule. Where reasonable standards of attendance cannot be met due to physical inability of the employee to meet such standards, termination by the employer is warranted. In such a case the employee is not being 'punished' because he is ill. He is simply being terminated for irregularity and undependability of attendance. Such situations are really not disciplinary in nature..."

This same line of reasoning was advanced in several other cases which arose in the Postal Service and which were cited by Management in this proceeding. Those cases were decided in the same manner in face of the existence of the Postal Service negotiated sick leave plan with which those Postal Service Arbitrators were certainly familiar. None of the cases relied upon by the Union to contest this view arose in the Postal Service. Although recognizing the limitations upon the application of the principle of stare decisis in an arbitration proceeding, the undersigned must give some persuasive weight to awards rendered interpreting the same language of Article XVI of this Agreement.

In addition, the undersigned is constrained to add the following comments. Of course properly documented and approved sick leave should not be used, in and of itself, in a manner adverse to an employee's interest. However, neither can excused sick leave be

considered as a grant of immunity to an employee against the employer's right to receive regular and dependable attendance and to take steps necessary to insure the existence of a reliable workforce to do the work at hand.

When management states that an employee's attendance record provides just cause for disciplinary action, management must be prepared to substantiate the fact that this employee's attendance record supports the conclusion that the employee is incapable of providing regular and dependable attendance without corrective action being taken. Management cannot inhibit an employee in the exercise of his contractual right to employ sick leave in the manner contemplated to cover legitimate periods of absence due to illness or other physical incapacity. Management must give every consideration to the fact that there is a sick leave program and that an employee's absence has been covered by accrued and earned sick leave or projected sick leave. Having given this consideration appropriate weight, the employer may still decide that an attendance record so erratic and undependable due to physical incapacity to do the assigned work requires that action be taken to insure that the work is covered in an efficient and reliable manner. An employer cannot be required to employ two people to do the work of one because the one cannot be relied upon to report for work regularly and meet an assigned work schedule. An employer likewise cannot be required to cover with costly overtime work assignments because an employee does not have the physical ability to get to work regularly and meet his schedule.

As stated above, local management and local union negotiators did not have any right to modify, amend or alter management's right to

discipline for just cause. Just cause is provided where, as stated above, irregular and unreliable attendance requires that steps be taken to provide for a reliable and dependable work force. The local parties to the Newark Post Office Local Memorandum attempted to place restrictions on what constitutes just cause for disciplinary action in such cases. This they lacked authority to accomplish through local negotiations, and this grievance must therefore be dismissed.

A W A R D

The grievance filed by Local Vice-President John R. Napurano is hereby denied.



HOWARD G. GANSER, IMPARTIAL ARBITRATOR

Washington, DC  
February 9, 1978