

REGIONAL ARBITRATION PANEL

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 In the Matter of Arbitration )  
 )  
 Between )  
 )  
 United States Postal Service )  
 )  
 And )  
 )  
 National Association of Letter Carriers, )  
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Grievant: Morris  
 Post Office: Toledo, OH 43601  
 USPS No.: C16N-4C-C 18125740  
 Union No.: 163C18

BEFORE: Glenda M. August, Arbitrator

APPEARANCES:

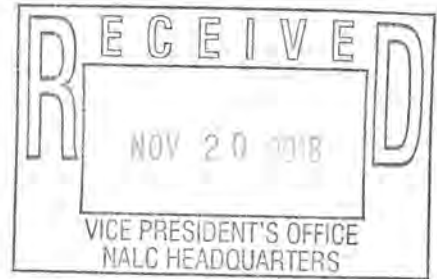
For the U.S. Postal Service

Barbara Cook

For the National Association of Letter Carriers

Andy Adkinson

Place of Hearing: 435 S. St. Clair St. Toledo, OH 43601  
 Date of Hearing: September 5, 2018  
 Briefs Received: October 9, 2018  
 Date of Award: November 6, 2018  
 Relevant Contract Provision: Articles 3, 15, & 19  
 Contract Year: 2016 - 2019  
 Type of Grievance: Contract



AWARD: The grievance is sustained. Management violated the National Agreement when they failed to comply with prior DRT decisions. Management shall cease and desist failing to comply with DRT resolutions for the Toledo Installation.

**RECEIVED**  
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**DANIEL E. TOTH**

*Glenda M. August*  
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 Glenda M. August  
 Arbitrator

## **I. ISSUE (s)**

Did the Postal Service violate the National Agreement including, but not limited to, Articles 3, 15, and 19, when it failed to comply with past decisions and placed the grievant on the "Deems Desirable" list? If so, what is the proper remedy?

## **II. RELEVANT CONTRACT PROVISIONS**

### **ARTICLE 3 MANAGEMENT RIGHTS**

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

- A. To direct employees of the Employer in the performance of official duties;
- B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;
- C. To maintain the efficiency of the operations entrusted to it;
- D. To determine the methods, means, and personnel by which such operations are to be conducted;
- E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and
- F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

(The preceding Article, Article 3, shall apply to City Carrier Assistant Employees.)

### **ARTICLE 15 GRIEVANCE-ARBITRATION PROCEDURE**

#### **Section 1. Definition**

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A

grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

## **ARTICLE 19 HANDBOOKS AND MANUALS**

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. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

### **III. FACTS**

Management formally notified the Grievant in a letter dated January 10, 2018, that he was being placed on the Deems Desirable list effective immediately. The letter stated that the Grievant would be required to submit acceptable documentation for any unscheduled absence or tardy. On January 19, 2018, the Grievant notified Management that he needed to leave work prior to the end of his shift and then called in sick the following day. The Union filed the instant grievance contending that the Service violated the National Agreement and prior DRT decisions for the Toledo Installation when they improperly placed the Grievant on the Deems Desirable list on January 10, 2018.

### **IV. UNION'S CONTENTIONS**

The Union contended that the instant case is a Contractual Case and the Union is seeking a remedy for the contractual violation. According to the Union, the Service has violated at least one or more citable precedent setting grievance resolutions. They noted that this case centers on the Grievant being placed on the "deems desirable" list effective January 10, 2018 until March 31, 2018 (JX-2 Page 15). The Union argued that this was not done in conjunction with an absence or at the time of a call in. It was a "blanket" covering all future unscheduled absences for a long period of time.

The Union asserted that the grievance is about non-compliance. They contended that the

issue of how “deems desirable” is to be used and its’ purpose has already been settled by prior agreements between the parties (JX-2 Pages 17-19). It was argued by the Union that the parties jointly agreed in the DRT grievance resolution for case number C11N-4C-C 13318335, as to the difference between “deems desirable” and “restricted sick leave”. The Union further argued that the DRT Decision in that case (Page 17 of the Joint Exhibit 2) states that “*Management shall no longer use the “Deems Desirable” option in eRMS as a blanket policy*”.

It was the position of the Union that the DRT Decision in the aforementioned case provided an overview for the Use of Restricted Sick Leave versus “Deems Desirable”. According to the Union, ELM Section 513.39 details the Restricted Sick Leave process which is based on a review of the employee’s attendance record and then placed on the restricted list for a quarter; if the employee’s attendance record substantially corrects he/she will be removed after the quarter.” However, according to the Union, “*Deems Desirable*” is used for one, single, **current absence**, of three days or less where the Service needs documentation to protect their interest. Supervisors must have reasonable fact based belief the leave is not being taken because the employee is sick. **It is to be used for one absence, not for a week, month, or quarter**”. The Union noted that the DRT explained that “*The case file provides that management has improperly placed carriers on “Deems Desirable”*”. The Union contended that the exact thing occurred in the instant case.

The Union asserted that the DRT decision (JX-2 Pages 17-19) was not complied with. In that case, the Union argued that Management was putting individual employees under the “deems desirable” blanket for long periods of time. The Union noted that in the DRT Decision, the parties provided an explanation regarding the difference between Restricted Sick Leave and “Deems Desirable” that was provided by Headquarters Manager Strategic Complement Reassignment Labor Relations, where he provided clarification between the two options. The Union argued that local Management at Toledo, OH disagreed with Headquarters Management and instead chose to accept their own interpretation regarding the provisions.

In support of their position, the Union further cited the DRT Decision in case number C11N-4C-C 17326170, in which the DRT decided “*Management violated the National Agreement when they placed the grievant on “Deems Desirable” for a period of 30 days after she informed management she was unavailable to work her regular scheduled day off on a*

*holiday schedule.*” In that same decision, the DRT provided information for “educational purposes” to Management and listed the award from Arbitrator Holden which cited a Management exhibit that stated:

In order to ensure that the “Deems Desirable” option in ERMS is appropriately utilized by Management the following agreed upon provisions shall apply:

The “Deems Desirable” option should not be activated for any extended period of time, but should normally remain active for each specific absence...”

Activation of the “Deems Desirable” Option in ERMS should not be made in lieu of placement on the Restricted Sick Leave List.

Deems Desirable does not allow a policy to request documentation for all instances of intermittent leave; Deems desirable is for specific absences on a case-by-case basis.

(The above **guidelines** (bold) can be found in “Guidance and Instruction” issued by the Postal Service in July 2010, a copy of which was introduced as Management Exhibit #1 at the hearing.)

The Union cited yet another DRT Decision on the same issue where in case number C11N-4C-C 17340610, the DRT decided that “*Management had improperly placed the grievant in a “Deems Desirable” status. Management is highly recommended to review the JCAM and the ELM prior to requesting medical certification and placing employees on Deems Desirable*”. The Union contended that all the aforementioned DRT Decisions are consistent in instructing management of the distinction between “Deems Desirable” and “Restricted Sick Leave”, and are in line with Postal Service Headquarters’ position as well as the USPS July 2010 “Guidance and Instruction”. However, the Union contended that new local management at Toledo is arguing against the USPS Headquarters position on the matter.

It was the position of the Union that “Deems Desirable” has been decided by the parties and is not the issue before the Arbitrator. According to the Union, the issue is whether or not Management complied with these previous DRT decisions; and they contend that answer is NO. The Union argued that the DRT decisions cited are binding and precedent setting, yet Management ignored the decisions and continued to violate the National Agreement. They further argued that Management is attempting to make this grievance about the ELM and

whether they can place an employee on deems desirable as a blanket for long periods of time rather than for a single current absence; the Union noted again that this is not the issue in this case.

Finally, the Union contended that the letter the grievant received from Management (JX-2 Page 15), placing him under a “blanket” instruction to provide acceptable documentation between January 10, 2018 and March 31, 2018 is clearly in violation of the prior DRT instructions and precedent setting educational DRT decisions. The Union requested that this Arbitrator sustain the grievance, find the Service in violation of non-compliance with previous DRT resolutions and Order Management to “cease and desist” failing to comply with grievance resolutions.

#### IV. MANAGEMENT’S CONTENTIONS

Management in the instant case contended that they did not violate the National Agreement when they placed the Grievant on the “Deems Desirable” list. According to Management the Grievant in his extremely short career with the Postal Service has shown that he did not show any care or consideration to come to work on a regular basis, therefore his Supervisor informed him in writing that he was being placed on Deems Desirable (JX-2 Page 15). The Service disputed the Union’s claim that Management violated past decisions and argued that none of the DRT decisions cited by the Union have anything to do with the instant case. Management asserted that the Union bears the burden of proof in this Contract case.

It was Management’s position that the JCAM at page 10-14 provided the requirements for Medical Certification and states:

**Medical certification. ELM Section 513.361 and .362 establish three rules:**

- a. For absences of more than three days, an employee must submit “medical documentation or other acceptable evidence” in support of an application for sick leave (“three days” means three scheduled workdays; Step 4, H1N-5B-C 3428, November 3, 1983, M-00489); and
- b. For absences of three days or less a supervisor may accept an employee’s application for sick leave without requiring verification of the employee’s illness (unless the employee has been placed in restricted sick leave status, in which case verification is required for every absence related to illness regardless of the number of days involved); however,

- c. For absences of three days or less a supervisor may require an employee to submit documentation of the employee's illness "when the supervisor deems documentation desirable for the protection of the interests of the Postal Service."

Numerous disputes have arisen over situations in which a supervisor has required an employee not in restricted sick leave status to provide medical documentation for an illness of three days or less. Generally, to challenge such a decision successfully the union should demonstrate that the supervisor acted arbitrarily, capriciously or unreasonably in requiring the employee to obtain medical documentation. The union should be prepared to show that the grievant has a good overall sick leave record and no record of abuse.

Consistent with the Rehabilitation Act, the parties agree that the ELM Sections 513.362 and 513.364 do not require the employee to provide a diagnosis (USPS correspondence, August 3, 2007, M-01629). Employees who are on extended periods of sick leave must submit at regular intervals, but not more frequently than once every 30 days, satisfactory evidence of their continued inability to perform their regular duties, unless "a responsible supervisor has knowledge of the employee's continuing incapacity for work" (ELM Section 513.363).

Management also provided the requirements for Sick Leave Documentation from the ELM Section 513.36 which states the requirements for employees who are absent 3 days or less or over 3 days. The Service offered the opinion of Arbitrator Tobie Braverman in Case Number 14092440 out of Buffalo, New York, where she opined:

The burden of proof to demonstrate that management has been arbitrary, capricious or unreasonable in identifying letter carriers as "deems desirable" for purposes of sick leave verification is on the Union. That burden was not met where the evidence established that the manager made decisions based upon legitimate considerations, and the attendance records of the affected employees appeared to justify the action. One employee for whom the action appears to have been unreasonable was not actually required to submit documentation, and there is therefore no basis for a remedy."

Management argued that likewise in the instant case, they did not act arbitrarily, capriciously or unreasonably in notifying the Grievant that he was placed on Deems Desirable.

It was Management's position that in the case at bar, the key word is "may place the employee, not must or shall place the employee" on the Restricted Sick Leave List. They argued that there is no mandate in the ELM stating this must be done; but rather it is an option to

Management as is notifying an employee that they are being placed on Deems Desirable then placing them on “Deems Desirable” in ERMS. According to Management, the Grievant’s Supervisor reviewed both Restricted Sick Leave in the ELM and Deems Desirable and decided that based on the specific leave used by the Grievant, Restricted Sick Leave was not the proper path.

Management asserted that the Grievant had no sick leave and Restricted Sick Leave only covers the use of sick leave and leave without pay. In fact, according to hearing testimony by Management, the average hours worked by an employee annually is 2080 but the Grievant over the past year had only worked 862.45 hours. Management also testified that over the past 90 days, the Grievant had 38 incidents of unscheduled leave, 71 over the past 180 days and 151 in the past year. Management further asserted that Deems Desirable was the best option in this particular case.

Regarding the opinion of Headquarters Strategic Complement Reassignment Labor Relations Manager in the DRT case number C11N-4C-C 13318335 cited by the Union, Management argued that this employee is now retired from the Postal Service so the Service could not obtain clarification on his statement and the Step B Management Representative stated that he received the comment via email and he no longer has the email available to him. Management argued that in regards to the Statement from Headquarters, if an employee does not have sick leave, and used annual leave or is AWOL, how does Management correct their leave usage? Additionally, according to Management, the case cited was in regards to multiple carriers at Wernerts Station where there was a blanket policy at that specific station if employees exceeded 3 unscheduled absences. Management asserted that the instant case in no way reflects that issue.

Finally, Management argued that the Grievant’s Supervisor did not act arbitrarily, as she testified that she just wanted the Grievant to correct his behavior, and she carefully reviewed which path she should take to do so; and even spoke with the Union Steward. Management further argued that the Union seeks non-compliance to vague settlements which are not precedent setting when the reality is the Grievant did not come to work. The Service contended that after the Supervisor exhausted all attempts to correct the Grievant’s behavior, she placed him on Deems Desirable because the specific stipulations attached to Restricted Sick Leave would not have worked for this specific employee. The Service used the only recourse available



to them, stated Management and in this Contract case, where the Union bears the burden of proof, they have failed to prove that Management was non-compliant to the decisions in the case file. Therefore, Management requested this Arbitrator to deny the instant grievance in its entirety.

## **VI. DISCUSSION AND OPINION**

### **NALC-USPS** **JOINT CONTRACT ADMINISTRATION MANUAL**

**Medical certification. ELM Section 513.361 and .362 establish three rules:**

- a. For absences of more than three days, an employee must submit “medical documentation or other acceptable evidence” in support of an application for sick leave (“three days” means three scheduled workdays; Step 4, H1N-5B-C 3428, November 3, 1983, M-00489); and
- b. For absences of three days or less a supervisor may accept an employee’s application for sick leave without requiring verification of the employee’s illness (unless the employee has been placed in restricted sick leave status, in which case verification is required for every absence related to illness regardless of the number of days involved); however,
- c. For absences of three days or less a supervisor may require an employee to submit documentation of the employee’s illness “when the supervisor deems documentation desirable for the protection of the interests of the Postal Service.”

The instant case involves the alleged non-compliance by Management with prior Dispute Resolution Team (DRT) resolutions regarding Deems Desirable notations in eRMS. According to the Union, there have been several grievances filed and resolved by the DRT regarding the appropriate use of Deems Desirable, and Management at Toledo refuses to abide by those decisions which are precedent setting for the Toledo Installation. Management on the other hand disputes that they failed to comply with any decisions and contend that the use of “deems desirable” is appropriate in the instant case and in compliance with the National Agreement and the ELM.

In case number C11N-4C-C 13318335, which was cited by the Union, the Issue Statement read:

Did the Postal Service violate the National Agreement, including Articles 3, 10 and 19 when they implemented a blanket policy placing employees on the “deems desirable” list, requiring employees to submit medical documentation for absences and if so, what is the appropriate remedy?

The DRT agreed to resolve the grievance and ordered that Management shall **no longer use the “Deems Desirable” option in eRMS as a blanket policy.** The parties advised that Management should provide the reasonable fact that lead to the individual being placed on “deems desirable” upon request.

In the second case cited by the Union, C11N-4C-C 17326170, the Issue Statement read:

Did management violate the National Agreement, including but not limited to, Articles 3, 10, 15, and 19, when it placed the grievant on the “deems desirable” list? If so, what is the appropriate remedy?

The DRT resolved that grievance as well and found that ***“Management violated the national Agreement when they placed the grievant on “Deems Desirable” for a period of 30 days after she informed management she was unavailable to work her regularly scheduled day off on a holiday schedule.”*** In that case, the DRT cited Arbitrator Sarah Cannon Holden in case # B10C-1B-C 15197604 where she opined:

In order to ensure the “Deems Desirable” option in ERMS is appropriately utilized by Management the following agreed upon provisions shall apply:

Implementation Cannot conflict with leave regulations contained in ELM 510

Governs management of a present, single absence 3 days or less  
Must be on a case-by-case basis

May not be arbitrary and capricious Supervisor must have a reasonable, fact-specific basis for the request

The “Deems Desirable” option should not be activated for any extended period of time, but should normally remain active only for each specific absence for which we can fulfill our burden that the Interests of the Service need to be protected. It should be deactivated immediately thereafter. Activation of the “Deems Desirable Option” in ERMS should not be made in lieu of placement on the Restricted Sick Leave List.

Deems Desirable does not allow a policy to request documentation for all instances of intermittent leave; Deems Desirable is for specific absences on a case-by-case basis.

The above guidelines (bold) can be found in "Guidance and Instruction" issued by the Postal Service in July 2010, a copy of which was introduced as Management Exhibit # 1 at the hearing.

Arbitrator Holden cited a Management Exhibit which was produced by the Postal Service in 2010. In that Exhibit the Postal Service reviewed the proper and appropriate use of the Deems Desirable option in ERMS. Those guidelines were no doubt developed from the ELM in association with the National Agreement and JCAM.

A review of the ELM at Section 513.36 provides the following information regarding documentation requirements for postal employees:

**513.36 Sick Leave Documentation Requirements**

**513.361 Three Days or Less**

For periods of absence of 3 days or less, supervisors may accept the employee's statement explaining the absence. Medical documentation or other acceptable evidence of incapacity for work or need to care for a family member is required only when the employee is on restricted sick leave (see 513.39) or **when the supervisor deems documentation desirable for the protection of the interests of the Postal Service**. Substantiation of the family relationship must be provided if requested.

The Joint Contract Administration Manual provides the following regarding Medical Certification for absences:

**Medical certification. ELM Section 513.361 and .362 establish three rules:**

- a. For absences of more than three days, an employee must submit "medical documentation or other acceptable evidence" in support of an application for sick leave ("three days" means three scheduled workdays; Step 4, H1N-5B-C 3428, November 3, 1983, M-00489); and
- b. For absences of three days or less a supervisor may accept an employee's application for sick leave without requiring verification of the employee's illness (unless the employee has been placed in restricted sick leave status, in which case verification is required for every absence related to illness regardless of the number of days involved); however,
- d. **For absences of three days or less a supervisor may require an employee to submit documentation of the employee's illness "when the supervisor deems documentation desirable for the protection of the interests of the Postal Service."**

Both the ELM and the JCAM describe those situations where documentation may be required for absences of three days or less and that is when, based on that particular absence, the Supervisor

*deems documentation desirable for the protection of the interests of the Postal Service.* The language used by both the JCAM and the ELM describe a “deems desirable” situation based on a particular absence...; neither the ELM or the JCAM describes a “Deems Desirable” list or “Deems Desirable” Option to identify a particular employee and then require them to submit documentation for every absence during a particular period. The language speaks more to identifying a particular absence which might prompt a Supervisor to request documentation based on their belief that Postal Service interests may need to be protected.

The language of the ELM and JCAM would be in line with the interpretation of the Postal Headquarters Representative who provided clarification to the DRT in case number C11N-4C-C 13318335, cited in the instant case, as well as in line with the “Guidance and Instruction” issued by the Postal Service in the July 2010 document cited by Management in Arbitrator Holden’s aforementioned case. As a result of the clarification by Postal Service Headquarters, and Arbitrator Holden’s inclusion of the “Guidance and Instruction from the Postal Service, the DRT concluded that Management at the Toledo Post Office was inappropriately using the “Deems Desirable” option in ERMs to place a blanket restriction on employees, including the Grievant, for extended periods of time. The DRT found this was a violation of the National Agreement and ordered Management to cease the use of the “Deems Desirable” option in eRMS as a blanket policy.

Management argued that the DRT resolutions had little to do with the issue in the instant case and was based on issues at Wernerts Station. Regarding DRT decisions, the JCAM provides that:

**JCAM**

**ARTICLE 15 GRIEVANCE-ARBITRATION PROCEDURE**

**Step B Decision.** The Dispute Resolution Team must make a decision within fourteen calendar days after receipt of the appeal from Formal Step A, unless this time limit is mutually extended. The written Step B decision must state the reasons for the decision in detail and include a statement of any additional facts or contentions not set forth in the grievance as appealed from Formal Step A. The Step B team must attach to the decision a list of all documents included in the file.

A Step B decision establishes precedent only in the installation from which the grievance arose. For this purpose, precedent means that the decision is relied upon in dealing with subsequent similar cases to avoid the repetition of disputes on

similar issues that have been previously decided in that installation.

Although the grievance in the cited case was initiated at the Wernerts Station, the decision of the DRT establishes precedent on the Installation at Toledo. Thus, Management in this case had a responsibility to comply with the DRT's decision in the aforementioned grievances.

While it is certainly Management's right, specifically the employee's supervisor, to request documentation for absences of less than 3 days, Management must assign that "deems desirable" on a case by case basis, based on a specific absence and not use the Deems Desirable option in ERMS to place a blanket restriction on an employee for an extended period.

Based on the evidence of record and the arguments and contentions of the parties, the grievance is sustained. Management violated the National Agreement when they failed to comply with prior DRT decisions. Management shall cease and desist failing to comply with DRT resolutions for the Toledo Installation.

**AWARD**

The grievance is sustained. Management violated the National Agreement when they failed to comply with prior DRT decisions. Management shall cease and desist failing to comply with DRT resolutions for the Toledo Installation.

*Glenda M. August*

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GLENDAM. AUGUST  
Arbitrator

November 6, 2018

New Iberia, LA