C#08199

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

GRIEVANT: Wanda Lyons

POST OFFICE: Tacoma, WA.

CASE NO: W4N-5R-C 46269

BEFORE: Thomas F. Levak, ARBITRATOR

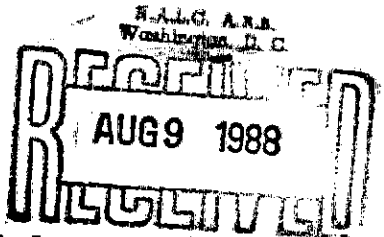
APPEARANCES:

For the U. S. Postal Service: Lynne Hill

For the Union: Jamie Lumm

Place of Hearing: Tacoma, WA.

Date of the Hearing: 7/12/88



AWARD: Service violated Article 19 of National Agreement as well as E&LRM Section 513.5 when Grievant's request for advanced sick leave was denied by letter of June 1, 1987. Grievance is sustained. Grievant to be reimbursed as if request for sick leave had been approved. Parties to determine amount due. Arbitrator retains jurisdiction to resolve any dispu concerning actual amount of ASL due the Grievant.

Date of Award:

7/30/88

Arbitrator

BEFORE THOMAS F. LEVAK, ARBITRATOR

In the Matter of the Grievance Arbitration Between:

U. S. POSTAL SERVICE
THE "SERVICE"

(Tacoma, WA.)

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO
THE "UNION"

(W. Lyons, Grievant)

W4N-5R-C 46269

DISPUTE AND GRIEVANCE CONCERNING DENIAL OF ADVANCED SICK LEAVE

ARBITRATOR'S OPINION AND AWARD

NALC GTS #2495

This matter came for hearing before the Arbitrator at 9:00 a.m., June 12, 1988 at the offices of the Service, Tacoma, Washington. The Service was represented by Lynne Hill and the Union was represented by Jamie Lumm. The Grievant, Wanda Lyons, testified and appeared throughout the proceedings. Testimony and evidence were received and the hearing was declared closed following oral closing argument. Based upon the evidence and the arguments of the parties, the Arbitrator decides and awards as follows.

OPINION

I. THE ISSUE.

This case concerns the propriety of a denial by the Tacoma Postmaster of the Grievant's request for advanced sick leave ("ASL"). At the commencement of the arbitration hearing, the parties stipulated that the following issue is to be resolved by the Arbitrator:

> Did the Service violate Article 19 of the National Agreement as well as Section 513.5 of the E&LRM when the Grievant's request for ASL was denied by letter of June 1, 1987? If so, to what remedy is the Grievant entitled?

The parties further stipulated: (1) That should the Arbitrator rule in favor of the Union and afford the Grievant a remedy, any sick leave she would have had advanced to her had her request for ASL been granted will be reimbursed to her as though she had received it. (2) That the Data Site is not to start subtracting earned sick leave from any awarded ASL for at least three pay periods from the date of the Arbitrator's decision. (3) That the parties shall mutually attempt to

determine the amount of ASL due the Grievant, and the Arbitrator is to retain jurisdiction of this case for the purpose of resolving any disagreement between them as to the actual amount due.

II. THE E&LRM.

513.5 Advance Sick Leave

.51 Policy

.511 May Not Exceed 30 Days. Sick leave not to exceed 30 days (2240 hours) may be advanced in cases of serious disability or ailments if there is reason to believe the employee will return to duty. Sick leave may be advanced whether or not employees have annual leave to their credit.

.512 Medical Document Required. Every application for advance sick leave must be supported by medical documentation as to illness.

.52 Administration

.521 Installation Heads Approve. Officials in charge of installations are authorized to approve these advances without reference to higher authority.

III. FINDINGS OF FACT.

This case concerns the Parkland Station of the Tacoma, Washington office of the Service. At all times relevant, George A. Boettger has been the MSC Manager/Postmaster of the Tacoma office. The Grievant first became employed by the Service on February 1, 1975 as a Clerk, and on March 7, 1981 she transferred to Tacoma, where she has been continuously employed as a City Letter Carrier at the Parkland Station.

The Grievant's Employment History.

The only evidence is that during her entire history of employment, the Grievant has served as a satisfactory employee. She has never been disciplined for any reason, nor have step increases ever been denied her for any reason. Except for the Grievant's below described use of sick leave ("SL"), there is no evidence that the Grievant has suffered any attendance-related problems such as unexcused absences or tardies, AWOL's or abuse of SL. Neither has the Grievant ever been disciplined for excessive absenteeism caused in whole or in part by what management might consider to be excessive use of SL.

The Grievant's Use of SL, Her ASL Request, and the Denial.

The Service presented no evidence concerning the Grievant's SL record. The Union's evidence consisted of the Grievant's 1987 Form 3972 and the Grievant's testimony.

Most of the Grievant's use of SL has been the result of two major surgeries. In 1984, the Grievant was off work on SL for approximately 3 months as the result of one of those surgeries and recuperation therefrom. Apparently, the Grievant suffered complications from that illness in late 1986, and for 3 weeks was off work because medications she was taking prevented her from driving a Service vehicle. Between 1984 and February 1987, the Grievant's use of SL was limited to three occasions where she lost 2 to 3 days of work due to contact with poison oak.

Commencing in March 1987, the Grievant began to suffer medical problems related to surgery that she ultimately had on May 27, 1987. Because of pain, other medical complications and doctors' appointments relating to that medical problem, the Grievant was excused from work on SL approximately ten times between March and May 27, 1987. In order to avoid as much SL as possible, the Grievant both traded days off with other employees and also scheduled doctor appointments for her days off.

Approximately one month prior to May 27, 1987, the Grievant submitted the following request for ASL to Postmaster Boettger:

> I have been an employee for the Postal Service for over 12 years. During this time I have had two major illnesses, the last 3 1/2 yrs. ago which I used 3 mos. sick leave. Since this time my S.L has never built back up because of the complications which have now led to the need of surgery. I have been schuled [sic] for major surgery on 5/28/87. I have 3 wks. AL schuled [sic] during the recovery time (Aprx. 8-10 wks.). At this time I am requesting to borrow S.L to cover the remaining time for the recovery period.
>
> (U2)

Accompanying the request was medical documentation which noted that the Grievant's prognosis was good and that she would be able to return to work some 6 to 8 weeks after the scheduled May 27, 1987 surgery. At the time the request was made, the Grievant's earned 1,248 hours of SL virtually had been exhausted. (It should also be noted that the only evidence is that at the time the Grievant made her request for ASL that management was aware that she was a single parent supporting two children.)

The Grievant's surgery was conducted as scheduled on May 27, 1987. On June 1, 1987, Boettger sent the following denial letter to the Grievant:

> This is a reply to your request for advanced sick leave. I have disapproved your request due to your past attendance record.

The Grievant required approximately 10 weeks rest and recuperation from her May 27, 1987 surgery. She used her 3 weeks AL for a portion of that period, and the remainder of the time was charged to LWOP.

Contentions Made At Steps 1 Through 3 of the Grievance Procedure.

At Steps 1 and 2 the Union argued: (1) The Grievant's 3972's showed that SL had only been used for medical difficulties, and that the majority of those were for less than 5 hours. (2) Because of Grievant's long seniority, the fact that she was the sole support of two children, and the fact that she had house and car payments, there was no reason to believe that she would not return to work. (3) The Grievant's doctor had advised that the Grievant's prognosis was good that she would return to work. (4) The only reason for denial was the Grievant's past SL attendance record, which is not a proper reason for denial. The E&LRM contemplates the use of ASL, and a catch-22 exists in that no reason exists for ASL if the employee has sufficient SL accrued. (5) Though requested, no explanation was ever given for the meaning of "past attendance record" in the June 1, 1987 denial letter.

The Service basically argued that: The installation head has sole discretion in determining whether he will approve ASL, and the Postmaster had the right to deny the request where all SL had been utilized.

It should finally be noted that although the Union requested that the term "past attendance record" be explained to it, the term was never explained.

IV. UNION CONTENTIONS.

The Union has established violations of Article 19 and the E&LRM. The basic reason is that the June, 1987 denial letter was never explained. Management agrees that if the Postmaster's decision was arbitrary or capricious, the Grievant should be reimbursed, and under the evidence, his decision must be so considered to be arbitrary and capricious.

Most of the Grievant's SL was for major illnesses or surgeries, or for absences or doctors' appointments related thereto. A portion was for poison oak. In order to keep SL usage as low as possible, the Grievant traded days off and changed doctors' appointments. The Grievant has never been disciplined for SL abuse.

The only administrative action ever taken against the Grievant was one-quarter of RSL in 1985. She has had no step increases deferred.

The Grievant's 1987 Form 3972 is marked "shows improvement" by her reviewing supervisor.

The Grievant's SL balance was low or exhausted at the time of her request, but SL has been used in the past only when necessary.

In this case, the Service has failed to give any reason for the denial. The record shows that the Grievant would have returned to work. She returned to work in 1984; she has children and bills; she has worked through her current illness while suffering embarrassing medical problems; she was never questioned by the Postmaster as to whether she would return; she offered to use AL for part of her absence and did so use it; and, she has 13 years of employment. Management did not even call the Postmaster to explain the reason for the denial.

The reason given is a catch-22. The Grievant would not be requesting ASL unless it was exhausted. ASL is contemplated by the E&LRM for exactly this type of situation. The Grievant wasn't asking for a loan, just an advance that she would earn back.

The Union's position is supported by arbitral precedent. See Case No. S1N-3U-C 10828, Arbitrator John F. Caraway, 11/19/84; S1N-3W-C 15296, Arbitrator Robert W. Foster, 12/21/84. See also, Arbitrator Snow's decision concerning hearsay evidence, Case No. W1N-5H-D 27023, 2/13/85.

V. SERVICE CONTENTIONS.

During her 12 years and 5 months of employment, the Grievant had earned 1,248 hours of sick leave by the time of her request in May 1987. Having spent $15,512 worth of SL, the Grievant asked for an interest-free loan of $2,983.

The E&LRM does not require that ASL "shall" or "must" be granted. Rather, the installation head is "authorized" and he "may" grant ASL. Only if the installation head exercise of his managerial prerogative is arbitrary, capricious or discriminatory, can his decision be reversed; and the Union must demonstrate and prove that the denial was arbitrary, capricious or discriminatory.

The Union's central argument was that the Grievant had the misfortune to have several illnesses and that none of us can control the physiological condition of our bodies. This all may be true but the fact remains that 13 days of SL for a regular City Carrier is the agreed-to accrual rate. The Grievant had

utilized all of her SL, and the installation head was not obligated to approve a loan for more SL.

The Service has called no witnesses and has submitted no evidence other than the Grievant's current Form 50 personnel action which supports the mathematical computations set forth above. This does not mean that the Service takes this issue lightly, but we cannot testify to change the clear language of the E&LRM Section 513.5, even though the Union testified we must change the language from "may" to "shall."

We do not perceive that an arbitrator will write into Section 513.5 language which would require the Service to always make everyone who asks interest-free loans. The E&LRM was not violated, and the grievance should be denied.

VI. ARBITRATOR'S CONCLUSION.

The Arbitrator concludes that the Union has established by preponderant evidence that the Service violated National Agreement Article 19 and E&LRM Section 513.5. Accordingly, the grievance must be sustained. The following is the reasoning of the Arbitrator.

The starting point in this case concerns the scope of E&LRM Section 513.5. Regarding that scope, the Arbitrator finds himself in basic agreement with the ruling of Regional Arbitrator Robert W. Foster in Case No. S1N-3W-C 15296, dated 12/21/84, and cited by the Union in its closing argument.

As Arbitrator Foster noted, Section 513.5 does not mandate the granting of ASL, but rather employs the permissive word "may" where there is "reason to believe the employee will return to duty." He further notes that the obvious purpose of that quoted condition is that there should exist a reasonable expectation that the employee will be able to return to duty and work at least long enough to repay the ASL. As he further comments, while there will frequently be some uncertainty as to whether an employee may be able to return to work at the time the request is made, the decision concerning whether there is reason to believe that the employee will so return is left to the exercise of sound managerial discretion that is not to be abused by an arbitrary or capricious denial unsupported by a factually-based good reason. In every case of denial, the critical question therefore becomes whether management has sufficient evidence at the time of the decision to reasonably believe that the employee will return to work and repay the ASL it is granted.

Various factors may come into play when the installation head makes his decision. Those factors include, but are not necessarily limited to: (1) medical prognostication indicating whether the employee will be able to return to work and work on a regular enough basis to repay the ASL; (2) evidence indicating whether the employee has good reason to return to work, such as

the need to support children; (3) evidence concerning any past abuse of SL and discipline therefor.

Because E&LRM Section 513 expressly vests installation heads with discretion, an arbitrator should find an installation head's decision to be arbitrary or capricious only where substantial evidence does not exist to support the installation head's decision. In reviewing the decision of the installation head, an arbitrator therefore does not act as some sort of "super personnel manager"; an arbitrator must affirm the decision of the installation head where a reasonable person could say that substantial evidence supports the installation head's decision.

As has been noted in numerous federal court and arbitration decisions:

> "The arbitrary or capricious standard is the least demanding form of *** review of administrative action. Any questions of judgment are left to the agency***. Before condemning a decision as arbitary or capricious [an arbitrator] must be very confident that thedecision-maker overlooked something important or seriously erred in appreciating the significance of the evidence." Pokratz v. Jones Dairy Farm, 771 F.2d 206 (1985).

Substantial evidence does not mean a preponderance of evidence but must be somewhat less than a preponderance. For example, in Laws v. Celebrezze, 368 F.2d 648 (4th Cir. 1966), it is stated:

> "Substantial evidence, it has been held, is evidence which a reasoning mind would accept as sufficient to support a particular conclusion. It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance."

Thus, where conflicting evidence exists - e.g., on the question of whether the employee is likely to return to work - the installation head is vested with discretion under Section 513.5 to choose the evidence that some other reasonable person might find to be the less convincing; and so long as there is some substantial evidence to support the installation head's decision, an arbitrator must find that the decision is not arbitrary or capricious. On the other hand, some substantial evidence must exist to support the installation head's decision. In the absence of any such evidence, his decision must be deemed to be arbitrary and capricious, and should be overturned by the arbitrator.

In the instant case, there is no substantial evidence to support the decision of the installation head. The Grievant

never has abused sick leave in the past, and the only prognosis at th time of her request was that she reasonably was expected to return to work and pay back the ASL. That prognosis was in the form of the medical certification, the Grievant's prior record and her need to support her family.

The reason advanced for the denial of the request was not within the scope of, and is not contemplated by, E&LRM Section 513.5. The fact that the Grievant had utilized all of her accumulated SL at the time of her request was not a bona fide basis for denial. Accordingly, the grievance must be sustained.

AWARD

The Service violated Article 19 of the National Agreement as well as E&LRM Section 513.5 when the Grievant's request for advanced sick leave was denied by letter of June 1, 1987. The grievance is sustained.

The Grievant shall be reimbursed as if her request for advanced sick leave had been approved. The parties shall attempt to determine the amount due, and the Arbitrator retains jurisdiction of this case to resolve any dispute between the parties concerning the actual amount of ASL due the Grievant.

The Data Site shall not start subtracting earned sick leave from the advanced sick leave awarded for at least three (3) pay periods from the date of this Opinion and Award.

DATED this 30th day of July, 1988,

Thomas F. Levak, Arbitrator.