C-19250

In the Matter of the Arbitration	GRIEVANT: A. Powers
between	POST OFFICE: Melbourne, FL
UNITED STATES POSTAL SERVICE	CASE NOS: H94N-4H-C 96033490
and	GTS NO. 027804
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, BRANCH 2689	

BEFORE: Hutton S. Brandon, Arbitrator

APPEARANCES:

For the U. S. Postal Service: William G. Roberts, Jr.
Labor Relations Specialist

For the Union: John W. Bourlon
Union Advocate, NALC

Place of Hearing: Melbourne, FL

Date of Hearing: February 2, 1999

AWARD: The Postal Service violated the National Agreement, Article 19, and its handbooks and manuals by unreasonably requiring the grievant, A. Powers, to provide medical certification of incapacity for work on December 29, 1995. Accordingly, the grievance is sustained. The appropriate remedy is to reimburse the grievant for the cost of his visit to a doctor for such medical certification on that date, to include the cost of all medical tests ordered by the doctor on that date for use in determining the extent of the grievant's ailment and its effect on his capacity for work.

Date of Award: February 16, 1999

Hutton S. Brandon
Arbitrator

Matthew Rose, NALC
National Business Agent

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I. The Issue

The parties stipulated to the following issues: "Did the Postal Service violate the Agreement [Article 19] and its associated manuals and handbooks, and specifically Section 513.361 of the ELM [Employee and Labor Relations Manual] when it required the grievant to provide medical documentation to support an absence for December 29, 1995, and, if so, what would the appropriate remedy be?"

II. Pertinent Provisions of the Agreements Between the Parties and Background

The National Agreement, herein referred to as the Agreement, provides in pertinent part at Article 19 that:

> Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working condition, 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.
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> * * * *

That portion of the ELM pertinent to this case is Section 513.361 relating to documentation requirements of employee absences of three days or less. It states:

> 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 is required only when the employee is on restricted sick leave (see 5213.37) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service.

And Section 513.364 provides in relevant part:

> When employees are required to submit medical documentation pursuant to these regulations, such documentation should be furnished by the employee's attending physician or other attending practitioner. The documentation should provide an explanation of the nature of the employee's illness or injury sufficient to indicate to management that the employee was (or will be) unable to perform his or her normal duties for the period of absence. Normally, medical statements such as "under my care" or "received treatment" are not acceptable evidence of incapacitation to perform duties.
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> * * * *

In addition, the locality involved in this proceeding utilizes in connection with the administration of the foregoing ELM provisions the following "sick leave challenge" which may be read or verbally related to employees calling in for unscheduled sick leave:

> Produce upon your return to duty medical certification that you were unable to perform the duties to which you were assigned for the period of your absence or you will be considered AWOL [Absent Without Leave]. Medical certification must be provided by the attending practitioner. It must provide sufficient information to show you were incapacitated for the period of absence. It must be signed by the medical practitioner. Do you understand these instructions?

III. Material Facts

The facts in this case are not in significant dispute. Albert Powers, herein called the grievant, was at all material times a carrier in the Service's Satellite Beach, Florida facility. The grievant, a 24 year old at the time of the events herein, first achieved seniority status in May, 1995. On December 29, 1995 he awoke suffering from back pain and decided he would remain at home and undergo bed rest rather than report for work as previously scheduled. Accordingly, he timely telephoned his supervisor, Christy Philo, to report that he was ill and would not be reporting for work. Although it was clear that the grievant was not on sick leave restriction and did not otherwise have an attendance problem, Supervisor Philo at the time of the grievant's telephone call either read or otherwise communicated to the grievant the Service's "sick leave challenge."

As a result of the challenge of his illness, the grievant who had no personal physician and no medical insurance, and apparently little past experience with physicians, removed himself from bed on December 29 and went to a family medical care center. There he advised the doctor who examined him that he needed a medical certification that he was incapacitated for work. The doctor completed a form addressed "To Whom It May Concern" containing the recommendation that the grievant remain home from work, and requesting that the grievant be excused from work beginning on 12/29/95 and adding that the employee would be released to resume work "to be determined at office reevaluation on 1/2/96." This form was duly delivered by the grievant's friend and fellow employee to the grievant's supervisor the following day.

In the meantime, on December 29 the grievant's doctor referred the grievant to another medical center to undergo X-ray and MRI examinations. On January 2, 1996 the grievant

returned to the doctor who executed another form reflecting that the grievant should still be excused for work and would be "released to return to work on 1-5-95[6] after office follow-up." On January 5, 1996 the grievant returned to the doctor who apparently at this time had the results of the x-rays and MRIs. This time the doctor completed the form stating the grievant was released to work on January 5 and explained the grievant's medical problem as, "Back pain, etiology undetermined. Probable viral syndrome. Mr. Powers had a thorough work-up to include cat scan. He is now recovered and may return to work."

The grievant's medical bills including his doctor bills resulting from his initial visit to the doctor totaled $2334. Through the grievance in this case the grievant seeks reimbursement for these bills which, in his view and that of the Union, resulted from the unnecessary and unreasonable challenge of his sick leave.

IV. Arguments of the Parties

The parties argued orally. The Union argued that the grievant acted in complete good faith at all times appropriately notifying his supervisor as far in advance as he could that he was ill and would not be in. That medical certification was to show that the grievant was incapacitated for work. The grievant was not on sick leave restriction, and the record shows he had only used approximately thirteen hours of sick leave in the preceding several months. Therefore, there was no reason under ELM Section 513.361 to require medical documentation from him at that time. The supervisor did not inquire of the grievant the nature of his illness and made no attempt to evaluate the grievant's claim and the necessity for a medical evaluation. There was no evidence which would show that the supervisor had a reasonable basis for suspecting that the grievant was not physically incapacitated and was instead malingering. Accordingly, the supervisor was not sincere and acted unreasonably in requiring documentation and causing the grievant to incur a great expense. In acting unreasonably the Service breached the ELM and the Agreement. The grievance should be sustained. The grievant should be reimbursed for his doctor's bill to include the charges for X-rays and MRIs which the doctor obviously deemed necessary for his diagnosis of the grievant's condition and to provide the certification of the grievant's incapacity for work as required by the "sick leave challenge."

In support of its argument the Union submitted four citations of prior postal arbitral awards, Case No. W1N-5B-C 9854 (Arbitrator James Suskind, 1982), Case No. C1C-4B-C 2960, (Arbitrator Neil H. Bernstein, 1982), Case No. NIN-IJ-C 12917 (Arbitrator Robert L. Stutz, 1986), and Case No. C4N-4B-C 15559 (Arbitrator J. J. Mikrut, Jr. 1986).

The Service argued that the relevant ELM sections allow the supervisor to require documentation where it is in the best interests of the Postal Service. Here the supervisor in requiring medical certification was acting to protect the interests of the Service by insuring against malingering employees. She also had a real concern about the health of the employee. With these reasons in mind she did not act arbitrarily.

In requiring documentation or medical certification, the Service does not require the employee undergo treatment. That "is up to the doctor." All the Service needs is a statement saying the employee was incapacitated for duty. The doctor in this case fulfilled his obligation by filling out the first medical certification which was based essentially on the patient's description of his back pain. That first documentation (12/29/95) was adequate and acceptable for the Postal Service's purposes. The further medical documentation or certification and the subsequent tests, in the Service's view were unnecessary for compliance with the sick leave challenge, because the Service does not require a medical diagnosis or prognosis. The Service concedes that it was prudent of grievant's doctor to order the examinations conducted in this case, but insofar as the Service is concerned they were unnecessary. The Service should not be held responsible for the expense of the examinations.

The Service argued that even if it was not reasonable for the supervisor to require medical certification of the grievant in this case, the arbitrator can only provide a remedy which is limited to the cost of the visit to the doctor's office and his examination, not to include the expensive tests undertaken in this case. In this regard, the Service pointed to the same arbitration cases cited by the Union showing this limitation on remedies. While the Service cares about the health of its employees, medical treatment can not be at the expense of the Service. That is the responsibility of the grievant even if, as was the case here, the employee does not have appropriate medical insurance.

The Service accordingly maintained that the grievance should be denied.

V. Conclusions

It is undisputed that under Section 513.36 the Service retains to itself the right to require medical documentation of incapacitation for those employees claiming illness. The purpose of such documentation is clearly to make more difficult if not preclude employees making false claims of injuries or illness to excuse absences for which they receive paid sick leave. The retention and exercise of the right to require documentation is obviously in the best interests of the Service to prevent to the extent possible fraudulent absences which not only are an expense on its budget but also an interference with efficient operations.

The right to require medical documentation, while broad, is not without its limitations. Those limitations are stated in Section 513.361. For absences of three days or less a supervisor may exercise some discretion in requiring medical documentation, but documentation may only be required: (1) when the absent employee is on restricted sick leave, or (2) when the supervisor deems documentation desirable for the protection of the interests of the Postal Service. The first limitation is clear. The last one is less so. But the first limitation gives meaning to the second.

Obviously, it is within the Service's best interests to prevent all absences based upon fraudulent claims of illness or injury. Thus, carried to its logical extension the full effectuation of this policy would require medical documentation for all absences of whatever duration and particularly where the illness or injury is not manifested by a measurable or observable symptom. But medical documentation in every instance is neither reasonable nor practical, and Section 513.361 implicitly recognizes this by setting the limitations already noted. Accordingly, in context, limiting the requirement of medical documentation to employees on restricted sick leave, clearly suggests that the second limitation is intended to apply to circumstances where there is a reasonable basis for suspicion on the part of the supervisor or management personnel that an absence is not based upon a bona fide illness or injury. This view is in keeping with the award of Arbitrator Mikrut, supra, and an award of Arbitrator Dobranski, Case No. C1C-4B-C 1655, cited therein.

It is undisputed that the grievant was not on restricted sick leave. He therefore did not meet the first condition for requirement of documentation under Section 513.361. The record contains allusions by the grievant's supervisor to the heavy work load experienced at the time of the grievant's absence and to the fact that December 29 was a Friday before a Monday holiday.

Reference to these considerations provides no defense, however. The existence of a heavy work load without more has no bearing on the validity of a claimed illness which the medical documentation would address. (See the award of Arbitrator Bernstein, supra) The same may be said of an absence before a scheduled holiday, unless there is some history or prior experience with the absent employee indicating a prior absence or absences before a scheduled holiday. That was not shown to be the case here.

The grievant's supervisor testified that she could not recall whether she specifically inquired of the grievant the nature of his illness. Nor could she specifically describe any factor or consideration not already mentioned above which caused her to suspect that the grievant's claim of illness was not genuine. Under these circumstances, it is difficult to understand what reasonable purpose the requirement of medical documentation served.

The reasonableness of the Service's actions in this case constitutes an affirmative defense. No reasonable, logical, much less compelling, reason has been shown by the Service reflecting how its interests were served by forcing the grievant to provide medical documentation establishing his incapacitation for work on December 29, 1995. Accordingly, the Service's actions in requiring medical documentation of the grievant was unreasonable and unwarranted. Such actions must be considered as inconsistent with the provisions of Section 513.361, and the grievance must be sustained.

Having sustained the grievance, the issue of the remedy must be addressed. In three of the cases cited by the Union, supra, where an arbitrary and unreasonable request for medical documentation was found, the Postal Service was required to pay the employee for the cost of doctor examination. In the fourth case cited, Case No. C1C-4B-C 2960, it appeared that the arbitrator would have required the Service to pay for the doctor's examination but for the admission of the employee in that case, unlike the grievant in the instant case, that she would have gone to the doctor even absent the Service's request for medical documentation, because she needed treatment anyway. Only the expense of the $4.00 fee for the completion of the medical certification itself was granted there.

The results reached in the cited cases are reasonable, equitable, and, in my view, appropriate. As Arbitrator Stutz stated in his award, supra, "While the [Service] is not ordinarily expected to bear the expense of the medical documentation referred to in 513.361, where, as here,

an employee experiences unnecessary expense to satisfy an unreasonable requirement, it is only fair to reimburse the employee." It is accordingly concluded that the grievant is entitled to have his grievance sustained and to receive reimbursement for the cost of his doctor examination of December 29, 1995. The greater difficulty in this case is deciding whether he is entitled to reimbursement for all the testing that flowed from the doctor's examination.

It is ironic that the Service relies upon Arbitrator Stutz's award cited by the Union to argue that it was not responsible for the expensive tests ordered by the grievant's doctor. Arbitrator Stutz ruled without further explanation that "[A]ll the supervisor required was certification of incapacity to work, not a series of expensive testing procedures, which may or may not have been related to DeNicola's illness . . . ." The absence of explanation is unfortunate, for logic suggests that if the Service is financially responsible for the doctor' examination in such a case, it would also be responsible for any expense incidental to the examination that did not constitute treatment. It would appear only fair to reimburse the employee for any expense he would not have incurred except in satisfying the unreasonable requirement of the Service.

The Service here has claimed it needed nothing more than a brief certification of the grievant's incapacity. The Service further claimed, and as the supervisor testified, that the first medical certification submitted to it for the grievant's December 29 absence was adequate for its purposes, since it contained the doctor's recommendation that the grievant remain home from work. No further testing was required.

I find these claims troubling, because they appear to be in clear conflict with the Service's own regulations. Specifically, ELM Section 513.364 states that "The documentation should provide an explanation of the nature of the employee's illness or injury sufficient to indicate to management that the employee" is unable to perform his normal duties. Further, "[M]edical statements such as "under my care" or "received treatment" are not acceptable evidence of incapacitation . . . ." Moreover, the wording of the "sick leave challenge" related to the grievant, and presumably communicated to the grievant's doctor by the grievant, states that the medical certification "must provide sufficient information to show [the employee was] incapacitated for the period of absence." Obviously, these regulations mandate not only a medical examination but a specific medical explanation and judgment of incapacity. Yet the "acceptable" documentation submitted for the grievant's December 29 contained neither a diagnosis or a statement of

incapacity. It simply recommended he stay at home and deferred a determination of the grievant's status pending reevaluation after the results of the ordered tests were known.

The record contains little to explain the doctor's actions. The Union did not call the grievant's doctor to testify in this case regarding the basis of his determination to order the expensive X-rays and MRIs. And the Postal Service called no medical professional to testify regarding standard medical examinations for the existence of back pain and the determination of incapacity to work as a result of such back pain. MRIs and X-rays are normally regarded as diagnostic tools rather than treatment tools, although each might have certain usage in treatment.

There was no evidence that any portion of the charges related to the grievant's treatment, and, in fact there is no evidence that any particular treatment was undertaken as a result of the examination. Absent a job related injury not claimed in this case, the Service clearly would not be responsible for any expenses for treatment of the grievant's ailment. Any such treatment would inure to the sole benefit of the grievant. On the state of the record before me, however, I must conclude that the grievant's physician was relying upon the ordered tests to help him diagnose the extent of the grievant's work incapacity. Indeed, it was not until he had reviewed the results of these tests that the doctor submitted his January 5 conclusion concerning the etiology of the grievant's back problem and released him for return to work.

One may quarrel with the judgment of the grievant's physician in ordering expensive tests for a young uninsured patient complaining of back pain but without specific claim of back injury. One suspects that simpler and less expensive office tests and examinations could have been conducted and would have been sufficient. Indeed, one further suspects that had the grievant as an uninsured patient walked into the doctor's office with his back pain complaint, but without seeking a medical certification for work incapacity, the expensive tests would not have been ordered. However, in considering the doctor's actions, one must recall that he had never before seen the grievant, was not aware of his medical history, and was unsure of the grievant's background and reliability. He was being asked to certify job incapacity due to back pain, a malady which has been the notorious excuse of malingering employees in numerous industries. Caution may have been the doctor's concern.

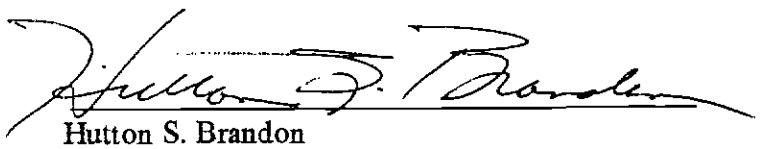
To find under these circumstances that the doctor ordered unnecessary tests would require me to reach a medical conclusion without the benefit on this record of competent medical opinion

or medical evidence. It was the Postal Service which unreasonably required the grievant to undergo the medical examination. It was its contention that the expensive tests utilized were not necessary, and that it was therefore not responsible for them. It was therefore the burden of the Service to show that the expenses attendant to that examination were unnecessary. This burden was never met.

Considering all the above, I am unable to conclude on this record that the tests ordered by the grievant's doctor were not reasonably related to the determination of the grievant's incapacity for work on December 29, 1995. I have already noted above my concurrence in the principle that the Service must reimburse an employee for expenses incurred in satisfying an unreasonable requirement inconsistent with its regulations. There is no logical reason for not extending that principle to all the grievant's expenses related to his doctor's diagnostic examination, for there was no evidence that the grievant would have incurred these expenses but for the Service's unreasonable request for medicial certification. An appropriate award reflecting this result is entered below.

VI. The Award

The Postal Service violated the National Agreement, Article 19, and its handbooks and manuals by unreasonably requiring the grievant, A. Powers, to provide medical certification of incapacity for work on December 29, 1995. Accordingly, the grievance is sustained. The appropriate remedy is to reimburse the grievant for the cost of his visit to a doctor for such medical certification on that date, to include the cost of all medical tests ordered by the doctor on that date for use in determining the extent of the grievant's ailment and its effect on his capacity for work.



Hutton S. Brandon
Arbitrator

Dated: February 16, 1999