C-33427

REGULAR ARBITRATION PANEL

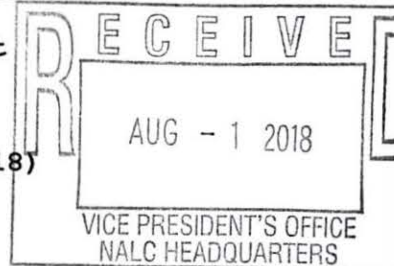
IN THE MATTER OF THE ARBITRATION	) GRIEVANT: Class Action
BETWEEN	) POST OFFICE: C16N-4C-C 17625198
UNITED STATES POSTAL SERVCE	) UNION NO.: DB75717
and	) DRT No.: 11-416823
NATIONAL ASSOCIATION OF LETTER CARRIERS)	

BEFORE: DONALD J. BARRETT, ARBITRATOR

APPEARANCES:

For the U.S. Postal Service: Mr. Jeffrey Wilson, LR Specialist

For the Union: Ms. Michelle McQuality, Local Business Agent



Place of Hearing: Dayton Ohio Post Office

Date of Hearing: June 1, 2018 (Briefs received June 22, 2018)

AWARD: This grievance is sustained.

Date of Award: July 5, 2018

<u>Award Summary</u>

The Union provided persuasive evidence that Management violated Articles 19 and 28 of the Agreement.

The Service failed to provide the nature, and/or an articulate reason for the issued letter of demand pursuant to Article 28, and the ELM.

The Service failed to provide requested information to the Union during the grievance procedure, providing a relevant document only at hearing, and the Service did "acquiescence" by failing to timely issue the subject letter of demand.

Management had the means, and knowledge regarding the grievant's injury claim being denied in their possession for two plus years before issuing the demand notice, an unreasonable period of time with no good cause for such provided.

Arbitrator

STATEMENT OF PROCEEDINGS:

This matter was presented before me at a regular arbitration hearing on June 1, 2018 at the Dayton Ohio Post Office pursuant to the 2016-2019 National Agreement, also known as the Agreement, or Contract between the National Association of Letter Carriers, also known as the Union, and the U.P. Postal Service, also known as the Service, or Management.

The parties to this hearing were fully prepared, professional, and were afforded a full, fair, and objective opportunity to be heard, to present argument, evidence, and witness testimony on behalf of their respective positions.

Counsel for the parties requested that each witness be duly sworn an oath prior to being examined, and this was done.

The Union was ably assisted at hearing by Mr. Dave Ditchey, Arbitration Advocate.

The Service was ably assisted at hearing by Ms. Amber Wells, (A) Labor Relations Specialist.

The parties counsel requested at the close of this hearing to provide the arbitrator with **Post-Hearing Briefs**. It was agreed that each brief would be post-marked no later than June 20, 2018, and a copy sent simultaneous to each other. I received each brief timely (June 22nd) with accompanying previously issued National and Regular Panel arbitration decisions.

I have read thoroughly each decision, and thank counsel for their submissions. Where I have found compelling positions/language taken relative to the issue(s) before me, I shall note such within the discussion/opinion of my award.

The Union presented the following witnesses:

Mr. Robbie Absher, Regular City Letter Carrier (The grievant)

Mr. Jason Jones, Union Steward/Informal Step A Representative

Mr. Chuck Leverich, Union Steward/Formal Step A Representative

The Service presented the following witnesses:

Mr. Rick Shelton, Management Formal Step A Representative

Mr. Clifford H. Logan III, Manager, Health and Resource Management

Counsel for each party provided written & oral **Opening Statements**

JOINT EXHIBITS:

Joint 1, The National Agreement, inclusive of the parties Joint Contract Administration Manual (J-CAM)

Joint 2, Moving Papers, Pages 1-11, and Pages 1-73

MANAGEMENT EXHIBIT:

M-1, Notice of Decision, Robbie D. Absher, Office of Workers Comp Programs,(OWCP) U.S. Department of Labor dated February 9, 2015[1]

STIPULATED FACTS NOT IN DISPUTE:

There were none offered at hearing.

ISSUE TO BE DECIDED:

The parties at hearing asked that the arbitrator to decide the issue offered by their Step B Team.

"Did Management violate Articles 19 and 28 of the National Agreement when they issued a Letter of Demand on 9/11/2017 to the Grievant claiming he is indebted to the USPS for the amount of $932.35? If so, what is the appropriate remedy?

BACKGROUND OF THE MATTER AT HEARING:

The grievant, Mr. Absher claimed an on-the-job injury on January 2, 2015, and filed a claim with the OWCP on January 5, 2015. In the subject notice, M-1 the grievant was informed his claim was denied.

[1] The Union passionately objected to the introduction as "new evidence" that was not provided to the Union during the grievance procedure, or upon their request for information. I accepted this document with the proviso that the weight given to it may be limited, and the value to the full understanding of this matter may be better determined. Normally the Union's objection would have been sustained but this document, for various reasons plays a pivotal role in the matter before me as articulated later in this award.

The grievant offers that he did not receive this denial of claim, and provided his supervisor with medical documentation associated with his claim.

In a Letter of Demand (LOD) dated September 8, 2017 the grievant was notified of his indebtedness for the sum of $932.35 by the Postal Service Station Manager Aaron Back.

This LOD states that the "…debt is based on PAYROLL RELATED DEBT" pursuant to Article 28 of the National Agreement, and the Employee and labor Relations Manual, Section 460.[2]

The grievant then filed a grievance with the Union declaring that the Service is violating Article's 19 and 28 of the Agreement in their attempt to demand payment, and also claiming Management misappropriated eleven hours of annual leave.

The parties met timely at the various steps of their grievance procedure but were unable to resolve their differences, and the Union then appealed the matter to arbitration where it has appeared before me for a decision on the merits, and within the boundaries of the parties Agreement.[3]

CONTRACT PROVISIONS CITED IN THIS MATTER:

Article 19, Handbooks & 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."

Employee & Labor Relations Manual

Section 452.322

"The notice required by 452.321 must notify the employee of the following:

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[2] See J-2, Page 21

[3] See J-2, Page 2

a. The name, work address, and telephone number of the postmaster of installation head issuing the notice.

b. The Postal Service's determination of the existence and amount of the debt.

c. The nature of the debt.

d. The Postal Service's intention to collect the amount due by offsetting 15 percent of the employee's 'disposable pay' (or the alternative amount determined for a bargaining unit employee as provided in 462.42) each pay period.

e. The estimated amount, starting date, frequency, and duration of the intended deductions.

f. The procedural rights available to the employee, as well as the appropriate method for requesting them. These rights include an opportunity to: (1) Obtain copies of Postal Service records relating to the debt. (2) Avoid the need for involuntary offsets by paying the debt in full.

Article 28, Employer Claims

"The parties agree that continued public confidence in the Postal Service requires the proper care and handling of the USPS property, postal funds and the mails. In advance of any money demand upon an employee for any reason, the employee must be informed in writing and the demand must include the reasons therefor."

POSITION OF THE PARTIES IN THIS MATTER:

The Union:

The Union maintains that the Service has failed to abide by the provisions of the parties Agreement, and supplemented by Management's own handbooks and manuals related to the proper procedure for seeking recoupment of monies owed the Service.

That the Service lacks evidence that the grievant ever received the original OWCP notice informing that his claim was denied in February 2015, and the first notice of an irregularity was when his acting manager, Mr. Back presented him with a Letter of Demand (LOD) on September 11, 2017.

That he requested information related to the issued LOD from Mr. Back but Back failed to provide any information.

That the Union requested information related to the reasons for the subject LOD on more than one occasion, including during the informal and formal steps of the grievance procedure but were not provided any information, or acceptable response, only a denial of the grievance.

That the Union, on behalf of the grievant submitted a PS Form 3074, Request for a Waiver to the postmaster, through his secretary yet again failed to receive any Management response.

That the OWCP notice received by the Dayton office of Health and Resources Management is dated February, 2015 yet the Postal Service failed to issue the LOD until 2017.

That the Service has failed to appropriately inform the grievant, until the day of the arbitration hearing of the specific reasons related to the subject letter of demand, and that this is in violation of the Agreement, and related postal handbooks, manuals, and the parties Joint Contract Administration Manual.

Counsel for the Union requests that this grievance be sustained in favor of the grievant, that the Service rescind the subject LOD in the amount of $932.35, that the Service reinstate 11 hours of annual leave to the grievant that was inappropriately taken by Management, and that the arbitrator retain jurisdiction over the implementation of an award in its favor.

The Service:

The Service maintains that the grievant, who allegedly sustained an injury on duty on January 2, 2015, submitted a claim with OWCP, and chose Continuation of Pay (COP) as his form of compensation during the period of his submitted claim.

That the grievant's claim was denied by the Department of Labor (OWCP) in a notice/letter to the grievant, sent to his known home address dated February 9, 2015.

That the grievant was given, through this notice a right to appeal, and/or provide additional information to support his claim yet failed to do so - failing to do anything at all until such time as the Service has attempted to recoup monies owed.

That the Service employing due diligence did discover the overpayments to the grievant, and appropriately employed the process allowed by the Agreement, and postal handbooks to recoup the debt.

That the Service informed the grievant of the origin of this subject debt based on a "Payroll Related Debt", and Article 28 of the Agreement does not mandate the Service to provide a detailed explanation, or a prescribed timeframe by which an incurred debt is absolved.

That the grievant has no recollection of the events surrounding his OWCP claim, and the continuation of pay he received from the Postal Service must be met with disbelieve as he can recall all other details surrounding his supposed injury.

The grievant acknowledges receipt of the subject letter of demand, and has further acknowledged his responsibility to repay such debt by his offer to repay a lessor amount each pay period.

That the burden to fully demonstrate a violation of the Agreement, or parts thereof rests entirely with the Union, and that the Union has failed throughout the grievance procedure, and at hearing to demonstrate any such violation, and therefore the Service requests that this grievance be denied in its entirety.

FINDING & OPINION OF THE ARBITRATOR:

The matter before me presents some elements of suspense, intrigue, and mystery.

A long time employee claims an injury in 2015, and without dispute files a claim with the Department of Labor's Office of Workmen's Compensation (OWCP) that is denied in a letter dated February 9, 2015.[4]

The grievant claims that the first time he has seen this letter is at the arbitration hearing, and the Union concurs.

Adding to this mystery is the statement in the subject letter that offers, "On 01/07/2015 this office advised you of the deficiencies in your claim and provided you the opportunity to submit additional evidence."

In reading this letter, it appears that the grievant did receive such a notice to supplement his claim, and responded to it by providing, "VA work restrictions report, USPS offer of modified assignment, (and a) statement from you to change election of pay to COP instead of annual/sick leave."

[4] See M-1

The grievant claims that he continued to provide medical documentation to his supervisor, Mr. Patrick Dickey, who assured him that the CA-1, and medical documentation would be filed with OWCP.[5]

(The record does not provide a statement from Mr. Dickey, and he did not offer hearing testimony)

The Service maintains, (and the grievant acknowledges) that the address noted on the February 9, 2015 OWCP letter is his home address still, and there is every reason to believe that the subject mail piece was delivered to this address.

This arbitrator, likely more than many believes in the efficiency of our U.S. Postal Service, however in matters such as that before me my faith alone cannot suffice.

Much of the Service's argument in support of their position starts with this February 9, 2015 notice to the grievant. It was allowed at hearing in their effort to impeach the grievant's testimony. (More on the introduction of M-1 later)

However, the grievant states, under oath that he did not receive this notice in 2015, and only became aware of it at hearing.

This letter bears no irrefutable evidence of delivery. It appears not to have been sent certified mail where a signature is required, or proof of delivery requested. The only markings on this letter is the "date stamp" of receipt by the "HRH Cincinnati District", and one other unrecognizable office's date stamp dated February 18, 2015.

While it seems likely that this method of governmental delivery is normal - this arbitrator does not seek proof of delivery of his awards, if it remains, even remotely possible that this important letter dated February 9, 2015 from the OWCP was not delivered to the grievant, and as stated, there is no proof of delivery than one cannot attribute to the grievant his failure to respond to it, and also to be completely aware of the stated reasons for his denial of claim.

I am left with sworn testimony from the grievant that he did not receive this letter, no irrefutable evidence that it was delivered, and no offer of contradictory testimony by the Service that the grievant continued to provide medical information to his supervisor, believing that his claim was being addressed timely, and appropriately.

And timely is an operative word as it relates to this grievance.

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[5] See J-2, Page 9

As stated above, the Service greatly relies upon the February 9, 2015 OWCP letter to support their position that the grievant was aware of his failure to provide acceptable documentation to the Department of Labor in support of his claim, elected to take continuation of pay, and through this letter was fully aware of the reasons for the issuance of the subject letter of demand because his claim had been denied.

However, as I have stated my faith in the delivery of the mails, while nearly absolute must, in matters such of these be supported by evidence of actual proof of delivery, and that is lacking. The only evidence before me of receipt of this February 9, 2015 letter is by the "HRM" office, and this fact leads to another arbitral concern.

The grievant, and Union both offered at hearing that this letter, M-1 was viewed by them for the first time at arbitration. That the Union had sought all information related to the reason(s) for the subject September 11, 2017 letter of demand, and that Management had failed to provide any response, including providing the Union with a copy of M-1. The record is replete with such requests.[6]

In response to the Formal Step A management representative's request for "something in writing", the manager of the HRM office stated that he could, "only give you a statement that we have documentation from the DOL that the claim is denied."[7]

At hearing the manager, Mr. Logan stated that there is a process by which information such as this can be released, that "Privacy Act Laws" prevent providing such information to "labor organizations."

However, this refusal to provide the Union, and his own Management representative with a copy of the February 9, 2015 OWCP letter that does fully explain the grievant's denial of claim, and gives reason for the subject letter of demand completely ignores the Union's right (and the grievant's) to such information. While one can appreciate the manager's reliance upon "FICA", and "Privacy" statutes, such statutes do not conflict with the Union's right to all relevant information which they deem necessary to pursue a grievance, or better understand if a grievance may exist.[8]

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[6] See J-2, Pages 5, 6, 7, M-6, Management Representative request for "something in writing to show his case was denied by OWCP.

[7] See J-2, Page M-6

[8] See Article 17.3 of the Agreement – Step 4, H4N-3W-C 27743, May 1, 1987 – Article 31.3, Information – NLRB v. Acme Indus. Co., 87 S.Ct. 565,569,64 LRRM 2069 (1967) – North Am. Coal., 84 LA 150 (Duda, 1985)

Further, to deny this document during the grievance procedure, and then produce it at hearing, even if in an attempt to impeach a witness completely dilutes the manager's assertion that it is protected information deserving of a particular process to acquire it.

This document was not medical information in the same sense as that held by an Occupational Health Nurse, where there is a recognized procedure for acquiring such privileged, and protected information.

To deny the Union this information upon their request, pursuant to their contractual right to information is to deny the grievant his right to due process, and the Union's right to fully represent him.

By denying this information throughout the grievance procedure, we are left with only with the August 21, 2017 "Statement", and the September 8, 2017 Letter of Demand, in our determination as to whether it meets the demands of Article 28, and the ELM 452.[9]

The "Statement" offers only that the grievant owes $932.35, and the September 8, 2017 LOD states that the sum is, "…based on PAYROLL RELATED DEBT."

The "Invoice" dated August 9, 2017 does state, in relevant part that it is, "…to collect CONT of PAY; 7:52 HRS from WK 1 and 25.45 HRS from WK 2, PP 04/2015." "Also, 11.00 HRS COP was changed to ANNUAL LEAVE."

This invoice directs questions concerning it to, "Your Supervisor." However, as offered in the record before me, the supervisor stated that the invoice, "…explains why his claim was denied & money owed."[10]

While one may conclude that by listing the relevant pay periods on the August 9, 2017 invoice the grievant should have reasonably been expected to know it had something to do with his 2015 claim for injury that alone does not satisfy the requirements of Article 28, or the ELM.

As previously stated by numerous arbitrators,[11] Article 28 states in relevant part, "In advance of any money demand upon an employee for any reason, the employee must be informed in writing *and the demand must include the reasons thereof."*[12]

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[9] See J-2, Pages 20, 21, 24-26

[10] See J-2, Page 11

[11] See Talmadge B06N-4B-C 08359883, Levak F98N-4F-C 00210492, Parent F94N-4F-C 97111839 , Roberts, C11N 4C C 17574421

[12] Italics added

Further, Management's contentions cites the ELM 452.322, which states in relevant part, "The notice…must notify the employee of…the nature of the debt."[13]

I cannot find the inclusion of pay periods in a LOD to meet such an obligation as cited by Article 28, and this ELM citation.

While counsel for the Service has done an exemplary job at hearing, neither the "Statement", nor the "Invoice" can reasonably be viewed as providing a reason for the debt, or the actual nature of the debt, and absent the February 2015 notice, there is no sufficient reason given.

While the Service is right, and obligated to pursue monies owed them by employees that obligation remains intertwined with contractual obligations to pursue such debt in accordance with established principles, and practices, and a failure to do so, no matter the legitimacy of the reason(s), or amount of such a debt, will likely result in dismissing such a debt.

Procedural obligations, if not enforced by the Service, and/or the Union will most always trump other failures associated with a matter, be it judicial, legal, or arbitral.

Another mystery before me, as it regards the February, 2015 OWCP letter is the timeliness associated between this notice, and the issuance of the subject letter of demand in August/September, 2017.

There is no dispute before me that the HRM office had the original denial by OWCP on February 18, 2015, yet a letter of demand was not issued for nearly 31 months after.

Management noted that "HR discovered the claim denial…"[14] and then sent the LOD, but does not offer any explanation for a two year void, when it is obvious that HRM, in the least had possession of the denial by OWCP, which set in motion, albeit two years plus later, the letter of demand.

No further explanation for such a timeframe between the 2015 notice, and the 2017 LOD is found by the arbitrator in the case file, or at hearing.

In law, and arbitration a waiver known as "acquiescence" may result from one party's failure to act toward the other in a reasonable period of time.

[13] See J-2, Page 7

[14] See J-2, Page 29 (top)

The grievant testifies that during the two year period from his filing of the injury claim, to the receipt of the subject letter of demand, he was of the impression that no issue existed.

And there is no dispute that during the two year period, the Service undertook no action whatsoever related to their known claim denial.

Clearly the Service was aware of the grievant's claim denial as evidenced by Manager Logan's testimony, and their receipt of M-1 in February, 2015 but, for no known reason did not "discover" it for two years, thus contributing, even in the least toward the grievant's perception that no issue existed with his claim until August, 2017.

This inaction, however unintended offers tacit consent toward the payment to the grievant of the subject sum of monies.

It has been previously stated that where it may be the Employer's "mistake of judgement", when having full knowledge of all the facts, "it is unlikely that recoupment will be permitted."[15]

As stated in Elkouri, acquiescence is a "…failure of a person for an unreasonable length of time to act upon rights of which the person has full knowledge." This same waiver applies equally to the Service, the Union, and the employee.[16]

Further, the Doctrine of Laches is based upon the theory that, "equity aids the vigilant and not those who slumber on their rights"[17], as well as defining laches as, "The neglect for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law, should have been done."[18]

I simply cannot find before me justification for the delay in issuing the subject letter of demand after such a length of time, when the Service, without dispute had the information in their possession with which they could have, and most likely should have issued the subject letter of demand.

At the least, the grievant, and Union would have been in a far better position to respond to a timely LOD, and the Service more likely to prevail if all else being equal.

Further, the parties likely would have both been in a far better position to articulate their respective positions long before arbitration if only Management had responded appropriately to the Union's request for information, instead of taking the singular…

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[15] See Eastern Airlines, supra note 246, at 1009 – Milwaukee Linen Supply Co., 23 LA 392, 394 (Anderson, 1954)
[16] See Elkouri & Elkouri, How Arbitration Works, 5th ed. BNA Page 576
[17] See Black's Law, 6th ed
[18] See Lake Development Enterprises, Inc. v. Kojetinsky, Mo. App., 410 S.W. 2d 361, 367

…position that the grievant had to know the reason for the LOD, and was only attempting to avoid paying the sum demanded.

Assumptions are not facts, and in the final analysis it was likely a disservice to both parties to make such assumptions.

The Service has a contractual obligation, pursuant to Articles 19 and 28 to provide the employee with a reason for the letter of demand. A reference to pay periods two years prior may seem obvious but simply does not satisfy those obligations.

There is ample precedent for this position, as provided by the Union's very articulate counsel, and more known to arbitrators. That failure alone would give cause to sustain this grievance, but when one considers the failure to provide information requested by the Union, and the unreasonable, and unknown cause for the delay in issuing the subject letter of demand to the grievant, I simply cannot but sustain this grievance in total.

AWARD:

This grievance is sustained. The Service is ordered to immediately rescind the subject letter of demand issued to the grievant, and make no further effort to recoup said amount.

The Service is ordered to reinstate the subject eleven hours of annual leave taken from the grievant's balance to replace the eleven hours previously charged to continuation of pay.

The responsible parties are to meet, without undue delay for the purpose of insuring compliance with this award.

The arbitrator shall retain jurisdiction in this matter as it relates to the implementation of this award.

Note: I thank the parties counsel for their professional, and well prepared advocacy. Both sides were well represented.

Nothing Follows.