

REGULAR ARBITRATION PANEL

In the Matter of Arbitration)	
)	Grievant: Cynthia Tomaschko
)	
)	Post Office: Buffalo, New York
United States Postal Service)	
)	Case No: C06N4CC12192036
)	
and)	Union No: 634.12
)	
National Association of)	DRT No: 11-242077
Letter Carriers, AFL-CIO)	

Before: EILEEN A. CENCI

Appearances:

For United States Postal Service: Regina De Feo

For National Association of Letter Carriers: Renee Baron

Place of Hearing: Buffalo, New York

Date of Hearing: September 6, 2013

AWARD: The grievance is sustained. Management violated the National Agreement when it denied the grievant's request to buy back her leave after OWCP adjudicated her claim for a recurrence of a work-related injury. The grievant must be permitted to buy back leave she used in 2011 while awaiting adjudication of her claim.

Date of Award: October 25, 2013

Regular Regional Arbitration Panel

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DANIEL E. TOTH

Eileen A Cenci

Eileen A. Cenci

OPINION

STATEMENT OF PROCEEDINGS:

This matter was arbitrated pursuant to the grievance and arbitration provisions of a collective bargaining agreement (National Agreement) between the United States Postal Service (Service) and the National Association of Letter Carriers (NALC or Union). A hearing was held before me on September 6, 2013 in Buffalo, New York. The parties appeared and were given a full and fair opportunity to be heard, to present evidence and argument and to examine and cross-examine witnesses. Each party called witnesses who testified under oath. Following the conclusion of the testimony the parties agreed to file post-hearing briefs, to be postmarked no later than September 18, 2013. The parties requested extensions of this deadline, which were granted, and the arbitrator received the briefs on September 26, 2013. The record was closed on that date.

ISSUE:

The parties agreed to adopt the issue from the Step B decision:

Did management violate the National Agreement when it denied the grievant's request to buy back her leave after OWCP adjudicated her claim?

If so, what shall the remedy be?

FACTS:

This case raises the question as to whether an employee who sustains a traumatic injury in the workplace has the right to buy back leave used while awaiting an OWCP adjudication of a claim that the injury has recurred, or whether the right to buy back leave pertains only to the period following the initial injury.

The grievant is a letter carrier who sustained a traumatic injury on the job on March 10, 2003. She completed a Form CA1 and received 45 days' continuation of pay (COP). Her injury was accepted by OWCP in a letter dated April 30, 2003.

The grievant was approved for a recurrence of her injury in 2004 and notified that there would be no provision for COP and that if she chose to use her own leave, she would not be eligible to buy it back. There is no evidence that the grievant either used her accumulated leave or filed a request to buy back leave after the 2004 recurrence.

The grievant suffered another recurrence of her initial injury on January 13, 2011. She used leave for partial days between January 13, 2011 and April 16, 2011. Her case was subsequently accepted as a recurrence of injury by OWCP in a letter dated January 30, 2012.

The grievant completed and filed form CA-7 requesting to buy back the leave she used prior to the January 20, 2012 adjudication. She was notified by letter dated May 1, 2012 that her request had been denied because the requested dates of the buy back fell after the adjudication date of June 1, 2006 and because the buy back was being initiated more than one year after her return to duty and more than one year after OWCP had approved her claim.¹

The Union filed a grievance, which was denied at the lower levels of the grievance process. After the B Team was unable to resolve the matter it was impasse and appealed to arbitration.

CONTRACT:

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...

EMPLOYEE LABOR RELATIONS MANUAL (ELM)

512.923 Leave Buy-Back—OWCP

The following provisions concern leave buy-back:

- a. Under the provisions of the Injury Compensation Program, current employees may be permitted to buy back sick and annual leave they used while awaiting adjudication of their cases by OWCP. In traumatic injury cases, employees may be permitted to buy back only the leave

¹ The parties stipulated that the date identified in the file for adjudication of the grievant's initial claim, June 1, 2006, was incorrect.

that is used after the end of the 45-day continuation-of-pay period.

514.4 Acceptable Reasons and Instructions for LWOP

e. Injury in line of duty.

2. In traumatic injury cases, an employee is entitled to a maximum of 45 calendar days of continuation of pay (COP) without charge to leave if written notice of injury is filed within 30 days of injury. The period of COP begins at the start of the employee's first full tour of duty thereafter, or the first day following the disability, whichever occurs sooner...

3. An employee may choose sick or annual leave in lieu of COP; however, this leave may be retroactively converted to COP provided a request is made within 1 year of the date the leave was used or the date of the claim approval, whichever is later.

4. Before being placed on LWOP, an employee may choose to use annual or sick leave until it is exhausted. Leave is earned during that part of a pay period in which the employee is in pay status.

5. On favorable adjudication of a claim by the Office of Workers' Compensation Programs (OWCP), LWOP may be substituted for a period of sick and/or annual leave so that the employee may accept disability compensation for the period of absence.

6. On favorable adjudication of a claim by OWCP, current employees may be permitted to buy back the leave that they used while awaiting adjudication (see 545.84). If the injury is a traumatic injury, only leave used after the end of the 45-day COP period may be bought back...

545.84 Leave Buy-Back

An employee may use sick or annual leave after the COP period expires, or during a period of disability due to an occupational injury. In such cases, the employee may be entitled to buy back the leave with compensation payments (see 512.923). The control office is responsible for informing employees, in writing, that:

a. The buy-back must be initiated within 1 year of the return to duty, or within 1 year of the date OWCP approved the claim, whichever is later.

b. Employees who are being separated because of disability or other reasons cannot buy back leave after they are off the rolls of the Postal Service.

POSITIONS OF THE PARTIES:

NATIONAL ASSOCIATION OF LETTER CARRIERS (UNION)

Nothing in the ELM prohibits the buyback of leave an employee uses while waiting for an adjudication of a claim that an injury has recurred. The ELM provisions governing leave buyback make no distinction between an initial injury and a recurrence. These provisions allow employees to buy back leave used after the COP period has ended and before their claim has been adjudicated. There can be more than one adjudication in a given case, including an adjudication on a recurrence. Employees should be permitted to buy back leave they use while awaiting each adjudication.

The regional arbitrators who have addressed this issue have agreed with the Union's position. The Union asks that the grievance be sustained and the grievant be made whole by having her leave buyback request honored.

UNITED STATES POSTAL SERVICE (SERVICE)

The ELM very specifically provides that in the case of a traumatic injury such as the one the grievant sustained, leave can only be bought back after COP has ended and prior to the adjudication date. COP is not paid on a recurrence of an injury, and the opportunity to buy back leave is also unavailable when leave is used for a recurrence. The grievant's only opportunity to buy back leave would have been after the 45 day period she received COP following her initial injury in 2003 and before her claim was adjudicated.

The grievant was notified in 2004 that if she elected to use her leave while disabled because of surgery she would not be entitled to reimbursement for the time used because leave buyback was not available.

Employees may only buy back leave within one year after their return to duty or after the day their claim was approved by OWCP, whichever is later. The grievant's request to buy back leave in 2011, based on a 2003 injury, was untimely and therefore properly denied.

The Service asks that the grievance be denied.

DISCUSSION:

The Service has argued in this case, as it has in a number of other arbitration hearings,

that the leave buy-back provisions of the ELM apply only after an initial injury but not after a recurrence of the injury. Two regional arbitration decisions were included in the record and a third was provided to me along with the briefs submitted by the parties. All three arbitrators ruled against the Service (Arbitrator Barbara Deinhardt, Case # C04117957, Arbitrator Anthony Ross, Case #C09205528, Arbitrator Thomas Erbs, Case #C12205085). The Service maintains that those cases were wrongly decided and that its position is supported by the clear language of the ELM. In particular, management argues that where there has been a traumatic injury, the leave buy-back provisions are applicable only following the 45-day COP period. Since COP is paid only after an initial injury and not after a recurrence it follows, from the perspective of management, that sick or annual leave buyback is unavailable for a recurrence. I do not agree with the interpretation of the ELM that has been advanced by management and I find the cited regional arbitration decisions persuasive.

ELM §512.923 allows employees to buy back sick or annual leave they used while awaiting adjudication of their cases by OWCP, but also provides that in cases of traumatic injury, employees can only buy back the leave that is used after the end of the 45-day continuation-of-pay period. This is not the same as saying that the leave buy-back provisions only apply in cases where the employee was eligible for COP or received COP. Nothing in the ELM specifically conditions the ability to buy back leave on eligibility for COP.

An understanding of the overall framework governing leave buyback is helpful to interpreting the language in question. Arbitrator Barbara Deinhardt gave a cogent explanation of the provisions and their effect in Case #C04117957 (Tewksbury, MA 2004).

After an employee is injured on the job, but before there is an adjudication of the employee's claim by the United States Department of Labor, it is the responsibility of the employee to pay any medical expenses and to cover absences from work with his/her own leave or leave without pay. Thereafter, if the claim is accepted, medical bills can be submitted for reimbursement and leave may be bought back.

The apparent purpose, or at least the effect, of the buy back process is to ensure that employees have a source of income while they are awaiting an adjudication of their right to compensation. If they did not have this opportunity, they would be faced with the choice of going without income during the pendency of their claim or in essence waiving their right to compensation during the pendency of their claim, because they would be using their own accumulated leave time to provide wage replacement. Once they have been notified, however, that their claim is compensable, they must stop using their own

leave and wait for the compensation process to be activated.

Arbitrator Deinhardt goes on to observe that the same need and purpose apply to the time period after an employee files a claim for recurrence of a work-related injury while he or she is awaiting the adjudication of the claim. The claim that an injury has recurred may or may not be accepted, and the outcome cannot be known at the time an employee files the claim. OWCP could determine that the injury is compensable as a recurrence or that it is a new one that is not compensable. In the absence of any provision for leave buyback employees awaiting adjudication on a claim for recurrence would have to choose LWOP, which would leave them without an income but allow for subsequent payment of compensation, or using their accumulated leave to continue to receive a salary, knowing they would forego wage loss compensation for that time period even after a favorable adjudication. The time period in question can be significant. In this case the grievant waited more than a year for an adjudication of her claim for recurrence. Many employees are not in a position to forego their income for such a lengthy period of time and would be forced to use their accumulated leave to cover absences while awaiting adjudication of a claim for recurrence, just as they do for initial injury claims. This would result in forfeiture of accumulated leave and an effective denial of wage loss compensation during the time period prior to adjudication. Nothing in the ELM suggests that such a result was intended.

Leave buyback is not specifically limited to the time period spent waiting for adjudication of an initial injury. Nor is the buyback of leave used while awaiting an adjudication of a claim for recurrence specifically excluded. Eligibility for leave buyback is not conditioned on eligibility for COP. Although employees who use annual or sick leave during the COP period may not buy back that leave using compensation payments, ELM §514.4.e.3 allows them to retroactively convert the leave they used to COP within a year. Employees are therefore not required to forfeit any leave they use either during the COP period or after it ends while awaiting adjudication of an initial injury claim that is ultimately accepted. Nothing in the ELM suggests that the result should be different in the case of a claim for recurrence.

The fact that the Service notified the grievant in 2004 that she would be ineligible to buy back leave used while waiting for an adjudication of her claim for a recurrence is not dispositive

of this case. The Postal Service stated its position on the matter at that time but there is no evidence that the grievant either used leave or sought to buy any leave back as a result of the 2004 recurrence. She therefore had no reason to challenge the position of the Service in 2004. When the grievant's request to buy back the leave she used in 2011 was denied, she filed a timely grievance.

The grievance is sustained. The grievant should be permitted to substitute LWOP for sick and/or annual leave pursuant to ELM §514.4.e.5, so that she may accept disability compensation for the period of absence.