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NATIONAL ARBITRATION PANEL

In the Matter of Arbitration

between

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION, AFL-CIO

Case Nos. Q06C-4Q-C 11001666
Q06C-4Q-C 11008239

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO - INTERVENOR

and

NATIONAL POSTAL MAIL HANDLERS UNION, AFL-CIO - INTERVENOR

BEFORE: Shyam Das

APPEARANCES:

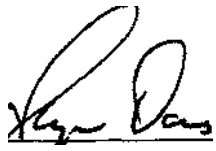
For the Postal Service:	Brian M. Reimer, Esquire
For the APWU:	Darryl J. Anderson, Esquire
For the NALC:	Keith E. Secular, Esquire
For the NPMHU:	Matthew Clash-Drexler, Esquire

Place of Hearing:	Washington, D.C.
Date of Hearing:	July 28, 2011
Date of Award:	April 18, 2012

Relevant Contract Provisions:	Articles 5, 10.2, 15 and 19, and Joint Contract Interpretation Manual
Contract Year:	2006-2010
Type of Grievance:	Contract Interpretation

Award Summary:

The issues raised in these two cases are resolved as set forth in the above Findings.



Shyam Das, Arbitrator

On July 6, 2010 the Postal Service sent an Article 19 notice to its unions informing them that it intended to revise certain regulations in Section 510 of the Employee and Labor Relations Manual (ELM) concerning the Family and Medical Leave Act of 1993 (FMLA), as amended. Among those revisions was a new requirement in ELM 515.52 that employees use only the Department of Labor (DOL) WH-380 forms when they seek to have their absences protected by the FMLA.

On October 4, 2010 the APWU filed an Article 19 appeal to arbitration protesting, in part, the proposed change to ELM 515.52. The Union submitted its 15-day statement of issues and facts on October 19, 2010. The Postal Service submitted its 15-day statement on October 18, 2010. As an initial matter, the Postal Service asserted that the Union's Article 19 appeal was procedurally defective because the Union had not first requested and attended a meeting concerning the proposed ELM changes.

On October 27, 2010, the APWU initiated a Step 4 national dispute under Article 15, in which it stated:

> It is the APWU's position, consistent with the Collective Bargaining Agreement, applicable Department of Labor (DOL) regulations, the parties' established accepted past practice (for over 15 years), and the mutual understanding and agreement between the parties at the national level, that: (1) employees are not required to use a specific format or form for FMLA certification; (2) employees may use APWU forms for FMLA certification, or any other format or forms that contain the information required under 29 CFR 825.306; and (3) the submission of FMLA certification using DOL WH-380 forms is optional.

The Postal Service and the APWU agreed to combine the Union's Article 19 appeal and its Article 15 grievance in a single arbitration proceeding. The NALC and the NPMHU are intervenors in this proceeding.

At arbitration, the Postal Service argued that the Article 19 appeal should be dismissed based on the APWU's failure to follow the requirement of Article 19. The Postal Service further maintained that the APWU cannot escape its failure to follow Article 19 by filing a subsequent

Article 15 grievance, and that grievance, accordingly, should be denied. On the merits, the Postal Service insisted that the challenged change to the ELM did not violate Article 19 or any other provision of the National Agreement. The Postal Service agreed not to seek bifurcation, with the understanding that the Arbitrator initially would rule on the arbitrability issue.

The FMLA first was enacted in 1993. Section 103(b), 29 USC §2613(b), sets forth the following certification provision:

> (b) SUFFICIENT CERTIFICATION.--Certification provided under subsection (a) shall be sufficient if it states
>
> (1) the date on which the serious health condition commenced;
>
> (2) the probable duration of the condition;
>
> (3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;
>
> (4)(A) for purposes of leave under section 102(a)(1)(C), a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and
> (B) for purposes of leave under section 102(a)(1))(D), a statement that the employee is unable to perform the functions of the position of the employee;
>
> (5) in the case of certification for intermittent leave, or leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;
>
> (6) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 102(a)(1)(D), a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; and
>
> (7) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 102(a)(1)(C), a

> statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

Current DOL regulations include the following, 29 CFR §825.306 (b):

> (b) DOL has developed two optional forms (Form WH-380E and Form WH-380F, as revised) for use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements.... These optional forms reflect certification requirements so as to permit the health care provider to furnish appropriate medical information. Form WH-380E and WH-380F, as revised, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in §§825.306, 825.307, and 825.308. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists.

The DOL Preamble to §825.306 (73 Fed. Reg. No. 222 [Nov. 17, 2008], at 68013) states:

> Current §825.306 addresses how much information an employer can obtain in the medical certification to substantiate the existence of a serious health condition (of the employee or a family member) and the employee's need for leave due to the condition. This section also explains that the Department provides an optional form (Form WH-380) for use in the medical certification process; other forms may be used, but they may only seek information related to the condition for which leave is sought, and no additional information beyond that contained in the WH-380 may be required....

In 1995, Headquarters Labor Relations managers sent memos to Human Resources Area Managers regarding documentation for FMLA requests. In one memo, Manager Anthony Veg l iante stated:

> The attached APWU Forms 1 through 5, dated June 26, 1995 provide supporting documentation for leave requests covered by the Family and Medical Leave Act (FMLA). These forms have been reviewed by the appropriate Headquarters functional areas and are acceptable for usage by managers to approve or disapprove FML leave requests.
>
> The Postal Service does not require a specific format for FML documentation. Information provided by the employee is acceptable as long as it is in compliance with Publication 71, Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act IV, Section IV.

In another memo, Acting Manager Patricia Heath stated:

> The DOL WH-380 form does not require medical information that directly violates the employee's right to privacy. However, we realize health care providers may give more detail than requested on the form (i.e., prognosis and diagnosis) and that employees may not want to provide this information to their immediate supervisors. Therefore, to address the union's concern, the Postal Service reviewed and approved APWU and NALC FMLA forms that, when properly filled out by the health care providers, provide enough information is provided [sic] to certify that the absence qualifies as a covered condition under the FMLA.
>
> Employees do not need to use the WH-380 or the union forms, they only need to provide the required information as listed on Publication 71....

In 2000, the APWU initiated a Step 4 dispute over the implementation of Resource Management Database (RMD) software. In that case, the APWU asserted: 'We believe that the Postal Service has implemented a new policy of requiring employees to only use a WH-380 form, a policy that is also contrary to an agreement between the parties concerning the use of such forms." The parties entered into a pre-arbitration settlement of that case on March 28, 2003, which states in part:

> Optional FMLA Forms: There is no required form or format for information submitted by an employee in support of an absence for a condition which may be protected under the Family and

> Medical Leave Act. Although the Postal Service sends employees the Department of Labor Form, WH-380, the APWU forms or any form or format which contains the required information (i.e. information such as that required on a current WH-380) is acceptable.

In June 2007, the parties included the RMD pre-arbitration settlement in the provisions of the USPS-APWU Joint Contract Interpretation Manual (JCIM) relating to Article 10, as well as the following statement:

> Documentation to substantiate FMLA is acceptable in any format, including a form created by the union, as long as it provides the information as required by the FMLA.

The October 2004 USPS-NPMHU Contract Interpretation Manual (CIM) also includes an equivalent provision to that in the 2003 USPS-APWU RMD settlement, citing that settlement as the source.

In revised regulations that took effect in January 2009, the DOL changed some of the FMLA certification requirements and modified its WH-380 forms. The APWU updated its FMLA certification forms and provided them to the Postal Service. The parties then engaged in a series of correspondence, in which the Postal Service raised concerns regarding the APWU's revised forms and expressed its view that they were not equivalent to the revised WH-380. The Postal Service did not, however, state that it would not accept certifications on APWU forms. Its position at that time was expressed as follows in a July 8, 2009 email from a Headquarters Labor Relations manager to Area managers:

> DOL Forms WH-380E and WH-380F are the preferred "Certification(s) of Health Care Provider." When properly completed, these forms provide all information necessary to determine if leave qualifies for FMLA. However, if you receive certification in any other form including forms provided by the unions, you cannot refuse the form. Accepting the union form does not indicate you accept the certification as complete. You must carefully examine the form received to ensure that it provides complete information, sufficient to establish a serious

> health condition. If one or more necessary entries are missing or incomplete, or if the certification is insufficient, you must notify the employee that the certification is incomplete or insufficient and give them the opportunity to cure the deficiency. You must specify in writing the additional information that is needed to make the certification complete and sufficient (WH-382, Designation Notice).

On July 6, 2010, the Postal Service issued its Article 19 notice that triggered the present disputes. The ELM change requiring that employees use only the WH-380 forms subsequently went into effect after the 60-day period provided for in Article 19.

Linda DeCarlo, Director of Health and Safety for the Postal Service, testified that it receives close to 250,000 leave requests for FMLA protection per year. After enactment of the FMLA in 1993, initially decisions as to whether to designate leave as FMLA protected leave were made by employee supervisors. That responsibility later was transferred to FMLA coordinators assigned at each Postal Service district office. DeCarlo said the Postal Service currently is in the process of centralizing decision making at a single location.

DeCarlo explained that the main reason for the ELM change in dispute was that mandatory use of the WH-380 was better for the employee. In addition, use of a uniform form allows the Postal Service to streamline its operation, which enhances its ability to issue timely decisions.

On cross-examination, DeCarlo said that if an employee brought in a statement from their physician that contained all the information required by the FMLA but not on a WH-380, the employee would be required to return to the doctor to have the information copied onto the WH-380. If that required additional payment, the employee would be responsible for it.

Margaret Adams, a Resource Management Specialist for the Postal Service, testified regarding a survey she conducted in late November 2010. She asked all the FMLA Coordinators to pull from their files any 50 FMLA certifications submitted on union forms and to determine the number of these forms which resulted in a cure or clarification request because

the information provided on the form either was incomplete or insufficient. This survey revealed that 57.14 percent of the total 3262 union forms reviewed were required cure or clarification.

Adams acknowledged that no equivalent survey was conducted regarding FMLA certifications submitted on WH-380 forms. Based on her visits to various District FMLA offices, quarterly telecons and other discussions with individual FMLA coordinators, she believed that use of the WH-380, especially in its new format (since 2009) has made a big difference. She estimated that less than 20 percent, and possibly many fewer, of the WH-380 forms result in a cure or clarification request.

Greg Bell, Executive Vice President of the APWU since November 2010, previously served as the Union's Director of Industrial Relations and oversaw FMLA issues. After the DOL's revised regulations took effect in 2009, he had discussions and corresponded with Postal Service Labor Relations managers regarding the APWU's revised FMLA certification forms. He testified that when that dialogue ended at the end of March 2010, the Postal Service had not asserted that the APWU forms would not be accepted or that the Postal Service would only accept WH-380s. In the ongoing correspondence, he added, he typically reiterated the Union's position regarding the optional aspect of the WH-380 and the Postal Service's obligation to specify any deficiencies in the information submitted by an employee on whatever form they used. He also noted that whenever the APWU headquarters heard from the field that an FMLA coordinator was not accepting APWU forms, the Union contacted the Postal Service and those issues were resolved.

Bell also testified that if the Union receives an Article 19 notice of an ELM change that it determines is a clear violation of the National Agreement, it typically exercises its discretion to file a Step **4** grievance under Article 15. He cited, as one of many such examples, a Step 4 dispute initiated in 2000 protesting a revision to ELM 510 as a violation of Article 10.

Relevant provisions of the National Agreement include the following:

ARTICLE 5
PROHIBITION OF UNILATERAL ACTION

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

ARTICLE 10
LEAVE

* * *

Section 2. Leave Regulations

A. The leave regulations in Subchapter 510 of the Employee and Labor Relations Manual, insofar as such regulations establish wages, hours and working conditions of employees covered by this Agreement, shall remain in effect for the life of this Agreement.

* * *

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.

Section 4. Grievance Procedure-General

D. It is agreed that in the event of dispute between the Union and the Employer as to the interpretation of this Agreement, such dispute may be initiated at the Step 4 level by either party. Such a dispute shall be initiated in writing and must specify in detail the facts giving rise to the dispute, the precise interpretive issues to be decided and the contention of either party....

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....

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Union at the national level at least sixty (60) days prior to issuance. The Employer shall furnish the Union with the following information about each proposed change: a narrative explanation of the purpose and impact on employees and any documentation concerning the proposed change from the manager(s) who requested the change addressing its purpose and effect. Proposed changes will be furnished to the Union by hard copy or, if available, by electronic file. At the request of the Union, the parties shall meet concerning such changes. If the Union requests a meeting concerning proposed changes, the meeting will be attended by manager(s) who are knowledgeable about the purpose of the proposed change and its impact on employees. If the Union, after the meeting, believes the proposed changes violate the National Agreement (including this Article), it may then submit the issue to arbitration in accordance with the arbitration procedure within ninety (90) days after receipt of the notice of proposed change. Within fifteen (15) days after the issue has been submitted to arbitration, each party shall provide the other with a statement in writing of its understanding of the precise issues involved, and the facts giving rise to such issues....

An MOU regarding the JCIM, included at page 328 of the National Agreement, states, in part: "The parties will be bound by these joint interpretations and grievances will not be filed asserting a position contrary to a joint interpretation." The preamble to the 2007 JCIM states:

> The 2007 APWU/USPS Joint Contract Interpretation Manual (JCIM) update is provided as a resource for the administration of the National Agreement. Jointly prepared by the American Postal Workers Union, AFL-CIO, and the United States Postal Service, this manual provides a mutually agreed to explanation on how to apply the contract to the issues addressed.
>
> When a dispute arises, the parties should first go to the JCIM to determine if the issue in dispute is addressed. If it is, the parties are required to resolve the dispute in accordance with this manual.
>
> The JCIM will continue to be updated with additional material as we continue to narrow our differences and expand our joint understanding of the National Agreement. We encourage you to use the JCIM to ensure contract compliance and to foster more professional working relationships.

EMPLOYER POSITION

Arbitrability

The Postal Service initially contends that the Union's Article 19 appeal should be dismissed because the Union did not request, much less attend, an Article 19 meeting before filing the appeal. Under Article 19, the Postal Service maintains, the Union can only file an appeal to arbitration after it has requested a meeting, attended a meeting and determined that it is not satisfied with the result of the meeting.

The Postal Service insists that an Article 19 meeting is not a mere technicality. It points out that it was the APWU that insisted on the language that requires "manager(s) who are knowledgeable about the purpose of the proposed change" to attend the meeting. In this case, the Postal Service asserts, an Article 19 meeting would have given the APWU the opportunity to discuss an argument it first raised at the arbitration hearing that the Postal Service violated

Article 10 when it made the protested change to the ELM. The Postal Service had never heard this argument before, and this is the very type of harm that an Article 19 meeting should prevent. The Postal Service cites Case No. H7C-NA-C 10 (Snow, 1989) in support of its position.

The Postal Service further argues that the APWU should not be allowed to escape its failure to follow Article 19 by raising a new dispute under Article 15. Otherwise, the requirements of Article 19 would be rendered meaningless because a union could always take such action. The Postal Service acknowledges that in Case No. HOC-3N-C 416 (1994) Arbitrator Snow allowed the Union to raise an argument in an Article 15 case that the Postal Service's interpretation of an ELM regulation violated language in the National Agreement, even though the ELM language had never been challenged. In the instant case, however, the National Agreement does not address requests for FMLA certification. That is a matter entirely dealt with by the Postal Service in its manuals and handbooks.

Merits

The Postal Service contends that the ELM change does not violate Article 19 or any other part of the National Agreement.

The Postal Service asserts that the APWU's claim, that the new policy requiring use of only the WH-380 forms violated Article 10.2.A, should be dismissed because it was raised for the first time at arbitration. The APWU's brief passing reference to violation of Article 10 in its Article 15 15-day statement of issues and facts did not reference what part of Article 10 allegedly had been violated or why Article 10 had been violated and was insufficient to put the Postal Service on notice that it was raising this issue.

Even assuming, however, that the APWU had properly raised this argument, the Postal Service maintains that Article 10.2.A does not apply to all changes in ELM Subchapter 510, but only those that relate directly to wages, hours and working conditions. The new policy requiring employees to use only the WH-380 was not a change directly relating to wages, hours

or working conditions, even though it was contained in a larger Article 19 notice that included some changes to wages, hours and working conditions. The new policy had no effect on wages paid to employees or hours that they worked. In addition, it had no effect on working conditions, as a WH-380 is filled out by the treating physician. The new policy does not change the burdens on the employee who seeks FMLA protection. Prior to the new policy, employees submitting an APWU form had to do just as much.

The Postal Service also rejects the APWU's argument that the change violates Article 5 because it allegedly violates the FMLA. To the contrary, the FMLA and its implementing regulations allow such a requirement. The DOL's regulations specifically empower employers, not employees, to decide what forms employees must use when they seek FMLA protection for their leave, so long as those forms do not ask for more information than what is printed on the WH-380. By choosing to require use of the WH-380, the Postal Service clearly is complying with the law. The Postal Service cites a federal district court decision in Miedema v. Facility Concession Services, 2011 WL 1363793 (S.D. Texas, April 11, 2001). It further asserts that federal courts have held that employers have the right to institute rules to carry out their responsibilities under the FMLA, so long as those rules do not infringe upon substantive rights or discourage use of the FMLA.

The Postal Service contends that the March 28, 2003 RMD pre-arbitration settlement relied on by the Union merely recited the then-current policy of allowing use of the APWU's forms and other forms deemed by the Postal Service to be equivalent to the DOL forms. The settlement did not give the APWU anything new, and the Postal Service did not waive its rights to make future changes that are fair, reasonable, and equitable under Article 19. See: Case No. Q98C-4Q-C 02013900 (Das, 2006). Likewise, the JCIM language also cited by the Union gave an accurate interpretation of the policy as it existed in June 2007, when this part of the JCIM was published. Obviously, the JCIM will need to be updated to reflect the new policy.

Finally, the Postal Service contends that the new policy requiring employees to use only the WH-380 form when they seek for their leave to be protected by the FMLA easily meets the test of being fair, reasonable, and equitable.

The WH-380 form is generated not by the Postal Service, but by the agency (DOL) entrusted with administering FMLA. As postal witness Adams testified, WH-380 forms require cure or clarification less than 20 percent of the time, whereas the Postal Service's survey indicates that union forms require cure or clarification more than 50 percent of the time. Decreasing the frequency of occasions when it is necessary to return forms to employees for cure or clarification should benefit employees, as they should have less need to spend time and money returning to their physicians, and will not have their FMLA entitlements delayed as often.

Mandatory use of the WH-380 also should save processing time for the Postal Service. As it moves to centralize its FMLA function, there are obvious benefits in using one standard form to cover the approximately 250,000 leave requests for FMLA protection that come in per year. Moreover, as Arbitrator Dennis Nolan pointed out, in a case where the same postal unions were challenging form letters that the Postal Service was using in FMLA-covered situations, the WH-380 is a "safe harbor" for employers. See: NALC Case No. Q98N-4Q-C 01167325 (2008).

UNION POSITION

Abitrability

The Union insists its Article 19 grievance is arbitrable. Under Article 19, only the Union, not the employer, has a right to request an Article 19 meeting. This is because the purpose of the meeting is to require the employer to inform the Union of the purpose and intended effect of the proposed change so the Union can determine whether there is a dispute and make an informed decision about whether to appeal to arbitration. It would be anomalous to give preclusive effect to the lack of a meeting when the employer has no right to request, much less to demand, a meeting, particularly when the parties -- as in this case -- have been engaged in an ongoing dialogue about the subject of the protested ELM change.

The Union notes that under Article 19 if it delays in requesting a meeting or does not request a meeting the Article 19 process is not slowed down. The employer has a right to

implement the proposed ELM change 60 days after notice has been provided and the Union must appeal within 90 days of receiving such notice. Moreover, even if there was a requirement that the Union request a meeting, the employer should be required to show that it has been prejudiced by the lack of a meeting, which it has not done in this case.

The Union argues that it would be particularly anomalous to find a strict requirement for an Article 19 meeting under the circumstances of this case. The parties' discussions and agreements about the use of the WH-380 began soon after the passage of the FMLA in 1993. Those discussions led to the 2003 RMD pre-arbitration settlement that required the employer to continue to accept and process FMLA certifications that did not use the WH-380. That settlement was then made part of the parties' JCIM. Moreover, as testified to by Union witness Bell, the requirement that the Postal Service accept and process forms other than WH-380 was routinely enforced by the Union and complied with by the Postal Service. After publication of the amended WH-380 forms in January 2009, the APWU amended its forms as well, and a lengthy correspondence then ensued in which the Postal Service and the Union debated whether the APWU forms were "equivalent" to the WH-380 forms. In each of the Union's letters in this correspondence the Union reminded the Postal Service that it could not require employees to use the WH-380 form.

In other words, the Union stresses, the Postal Service was perfectly well aware of the APWU's position on the issue, and a meeting to "discuss" the matter further would have been a mere formality that would not have served the purpose of Article 19 meetings or expediting the Article 19 process.

To the extent the Postal Service relies on Arbitrator Snow's decision in Case No. H7C-NA-C 10, the Union disagrees with his dictum that the failure of the Union to demand a meeting as if an Article 19 notice had been provided is material to the arbitrability of the Union's appeal to arbitration in that case.

The Union insists that the Postal Service was not prejudiced by a lack of an Article 19 meeting in this case. In its 15-day statement under Article 19, the Union argued that the

proposed changes were not fair, reasonable, and equitable and that they violated Articles 5, 10 and 19 of the National Agreement. In light of the long history of the parties on this issue it simply is not credible that Postal Service representatives were unaware of the fact that the APWU regularly files Article 10.2 grievances when the employer attempts to amend part 510 of the ELM. The JCIM provisions that specify that the employer will not require use of the WH-380 form both reference Article 10.

The Union also asserts that its Article 15 grievance is arbitrable. The employer seems to be arguing that because the Union also has the right to challenge the employer's new policy under Article 19, the Union's Article 15 grievance and arbitration rights are cut off. This contention is contrary to the language of Article 15 and completely unsupported by the language of Article 19. The purpose of Article 19 is not to permit the employer to change the contract. The fundamental purpose of Article 19 is to permit the employer to modify its handbooks and manuals and to permit the Union to challenge those modifications on the ground that they are not fair, reasonable, and equitable. The authors of Article 19 also provided, that the manuals "shall contain nothing that conflicts with this Agreement." This oblique statement gives the Union the right to challenge proposed handbook and manual provisions under Article 19 on the ground that they conflict with the National Agreement. But it says nothing about cutting off the right of the Union to file an Article 15 grievance challenging the violation of the National Agreement.

Article 10.2, the Union argues, unequivocally prohibits the employer from making changes in ELM subpart 510 that affect wages, hours, or working conditions. Thus a prohibited amendment of Subchapter 510 is not just "inconsistent" with the National Agreement, it is not permitted to be made part of the ELM. Article 10.2 can only be given its intended meaning if, when prohibited amendments of Subchapter 510 are attempted, the Union has a right to challenge those amendments, not just using Article 19 procedures, but also by filing an Article 15 grievance to enforce Article 10.2. As Bell testified, this is the Union's regular practice.

Merits

The Union contends that its Article 15 grievance must be sustained because the Postal Service has violated the 2003 RMD pre-arbitration settlement agreement, the JCIM, the parties' MOU concerning the JCIM, and Articles 5 and 10 of the National Agreement.

The Union notes that although the RMD settlement agreement, like the MS-47 settlement agreement at issue in Case No. Q98C-4Q-C 02013900 (Das, 2006), does not provide that the employer never can change its FMLA handbook on the subject of the WH-380, the parties' agreement did not stop with the settlement. They also placed that settlement in the JCIM, which is binding and permanent unless changed. By placing the RMD settlement in the JCIM, the parties also placed it under the aegis of the MOU on the effect of the JCIM.

The JCIM makes clear, the Union asserts, that documentation to substantiate FMLA is acceptable in any format, including a form created by the Union, as long as it provides the information required by the FMLA. Under the preamble to the JCIM and the parties' MOU, the provisions of the JCIM are binding on both parties.

The Union asserts that the FMLA and related DOL regulations make clear that the use of form WH-380 is intended to provide a "safe harbor" for employers that permits them to enforce the certification requirements of the law without violating FMLA and HIPAA provisions that prohibit the employer from demanding too much information or irrelevant information. The FMLA, however, does not permit the employer to require use of the WH-380 forms. Both the law and the DOL's explanatory information accompanying its regulations make clear that the Postal Service's requirement that employees use the WH-380 forms is inconsistent with the FMLA. Accordingly, the Postal Service's actions violated Article 5 of the National Agreement.

The Union also contends that the requirement that FMLA leave certifications be provided on a WH-380 form imposes a change in working conditions through a modification of ELM Subchapter 510 in violation of Article 10.2. Before July 6, 2010, the ELM permitted employees to use a WH-380 form or equivalent documentation. The consequence of failing to

use the WH-380 form since the protested ELM change is that FMLA protection for the leave in question is lost. At a minimum, this permits the employer to impose discipline for absences that are not the employee's fault and that would, but for the requirement that this specific form be used, be protected by the FMLA. It also hardly could be said that the right to submit FMLA qualifying information to the employer in a non-standard format is protected by federal law and regulations, but is not a significant working condition. At a minimum, many employees will suffer inconvenience and may incur substantial expense, if they do not have a WH-380 form for their medical provider to complete.

The Union contends that the disputed ELM change deprives employees of rights protected under the FMLA and its regulations, rescinds a settlement agreement that is incorporated into the JCIM, and violates the proscription of Article 10.2. As such, the change is not fair, reasonable, and equitable. In addition, required use of WH-380 forms means that employees who use any other form or who use no form, but provide all the necessary information for certification under the FMLA, nonetheless will have their request for FMLA leave rejected. To correct that problem they will have to spend their time and likely incur additional expense to obtain the protection of the statute. The required use of the WH-380 provides employees less choice and therefore less protection. The Union also stresses that the employer's evidence in support of its contention that the APWU's form too often must be returned for cure or clarification does not address the critical question "more often than what?" because the employer did not bother to "survey" the experience in using the WH-380, the revised APWU form, or a medical provider's narrative.

As remedy, the Union seeks an order directing the Postal Service to cease and desist from requiring employees to submit FMLA medical certifications using only the WH-380 forms.

FINDINGS

Arbitrability

After receiving notice of the proposed changes to ELM 510, the APWU filed a timely appeal to arbitration and subsequently provided a timely 15-day statement. The Union did not, however, request a meeting -- and no meeting was held -- prior to its arbitration appeal.

The wording of Article 19 does contemplate that such a meeting will take place. It states: "If the Union, after the meeting, believes the proposed changes violate the National Agreement..., it may then submit the issue to arbitration...." Moreover, the requirement that each party provide a statement of the "precise issues involved and the facts giving rise to such issues" strongly suggests that the parties assumed there would have been some prior discussion of those issues. There is no requirement, however, that the Union present its position at this meeting -- to be attended by manager(s) who are knowledgeable about "the purpose of the proposed change and its impact on employees" -- in advance of its decision to appeal to arbitration and submission of its 15-day statement.

In this particular case, the record leaves little doubt that the Union's position in opposition to the mandatory use of the WH-380 forms, including its reliance on Article 10, was or should have been known to the Postal Service at the time the Union submitted its Article 19 appeal to arbitration. Article 10 was cited by the Union in its 15-day statement in the RMD grievance which led to the 2003 pre-arbitration settlement that later formed the basis for the provisions in the 2007 JCIM which are identified as relating to Article 10. The Union's position regarding optional use of the WH-380 also was reiterated in the correspondence that preceded the Postal Service's Article 19 notice. Thus, it is difficult to see how the Postal Service was prejudiced by the lack of a meeting in this case. (Article 10 also is cited in the Union's 15-day statement in its Article 19 appeal.)'

' This Article 19 15-day statement is mistakenly captioned "Article 15-15 Day Statement of Issues and Facts."

Ultimately, however, it is not necessary to rule on the issue of whether the Union's failure to request or attend a meeting precluded it from filing an Article 19 appeal challenging the ELM change in dispute. The Union also filed an Article 15 grievance asserting that the ELM change violated the National Agreement, including Articles 5, 10 and 19, and that it "is contrary to applicable regulations and law, and mutual understanding between the parties."

The Postal Service argues that if the Union's Article 19 appeal is precluded by its failure to properly follow the procedures in Article 19, then the Union should not be permitted to avoid the consequences of its failure by raising a new dispute under Article 15. In the Postal Service's view that would render the requirements of Article 19 meaningless. The Postal Service has cited no arbitral authority in support of this position. In Case No. HOC-3N-C 418 (Snow, 1994), the Postal Service argued that as a result of the Union's failure to object to rules promulgated under Article 19 fourteen years earlier, the Union forfeited its right to challenge the rules through "rights" arbitration. Arbitrator Snow noted: "It is not certain whether the parties ever intended Article 19 to have the sort of preclusive effect now asserted by the Employer." But he concluded there was no need in that case to resolve that "difficult question." In an earlier 1980 decision, Case No. N8-NA-0003, Arbitrator Gamser denied a grievance filed more than a year after the Postal Service gave Article XIX notice of changes in certain Handbooks. In the interim the parties had negotiated a new contract which readopted Article XIX without change, and Gamser concluded that by doing so the Unions agreed under Article XIX to continue in effect the terms of those Handbooks. In *dictum* he stated:

> If the Unions believed that the changes in the payroll computation contemplated by this Section [of the F-22 and F-21 Handbooks] were in conflict with the terms of the then existing National Agreement, particularly Article VIII-4-B, then a grievance should have been raised and processed to a resolution. If the contention of the Unions was that this change was neither fair, reasonable, nor equitable, a right to grieve also existed under the terms of Article XIX.

No broad pronouncements on the issue raised by the Postal Service are needed here. Even if the Union's Article 19 appeal in this case was deemed faulty, there can be no

reasonable claim that the APWU acquiesced in the protested ELM change. Its timely Article 19 appeal, even if defective, certainly put the Postal Service on notice as to the Union's position that the change violated the National Agreement, and the Union filed its Article 15 grievance within days after the Postal Service asserted its claim that the Union's Article 19 appeal was procedurally defective. On these particular facts, I am not persuaded that the Union should be barred from pursuing its Article 15 grievance, at least with respect to allegations that the change violated Articles 5 and 10 of the National Agreement. There is no necessity in this case to determine whether the Union -- having been given proper notice of the change -- could only raise a challenge that the change violates Article 19 because it is not fair, reasonable, and equitable in an Article 19 appeal, and not an Article 15 grievance.

Merits (Article 15 Grievance)

The issue here is not whether any of the Unions' forms -- which the Postal Service previously accepted if they contained the required information -- are valid, but whether the Postal Service may exclude any certification that is not on a WH-380, even if it satisfies the certification requirements set forth in Section 103(b) of the FMLA.

Article 10.2.A of the National Agreement provides that:

> A. The leave regulations in Subchapter 510 of the Employee and Labor Relations Manual, insofar as such regulations establish wages, hours and working conditions of employees covered by this Agreement, shall remain in effect for the life of this Agreement.

The Postal Service maintains that the Union's Article 10 claim should be dismissed because it was raised for the first time at arbitration. The Postal Service, however, agreed to waive "any arguments it may have had regarding the lack of a Step 4 meeting, exchange of 15-day statements...." Moreover, as previously noted, the Union's reliance on Article 10 was or should have been known to the Postal Service at the time the Union submitted its Article 19 appeal to arbitration, and was included in its Article 19 15-day statement.

The Postal Service further argues that Article 10.2.A does not apply because the provisions of Subchapter 510 of the ELM that were changed do not "establish wages, hours and working conditions." That argument is not persuasive.

In its 15-day statement in the RMD grievance, the Union asserted the applicability of the provision in Article 10.2.A as part of its contentions. In the 2003 pre-arbitration settlement of that grievance the parties agreed that: "There is no required form or format for information submitted by an employee in support of an [FMLA protected] absence...." The parties subsequently included this agreement in the provisions of their JCIM relating to Article 10. As the JCIM Preamble makes clear: "this manual provides a mutually agreed to explanation on how to apply the contract to the issues addressed." (Emphasis added.) The Postal Service stresses that the form submitted by an employee is filled out by the health care provider, and argues that the new policy does not change the burdens on the employee who seeks FMLA protection. But, as a Headquarters Labor Relations manager recognized in 1995 -- shortly after the FMLA was enacted -- employees and their Unions have privacy concerns that may influence an employee's choice of form on which to submit an FMLA certification. Although the WH-380 provides the Postal Service a "safe harbor" -- so it cannot legally be challenged for privacy violation -- that does not negate an employee's interest in what information is provided by their health care provider, and, hence, what form is used. Moreover, the Postal Service's insistence that only WH-380 forms be used could have a negative effect on when, if not whether, FMLA leave is approved, cause additional inconvenience and expense to the employee, and possibly subject an employee to discipline for an unauthorized absence, even if the employee submits certification that meets the statutory requirements. In short, the ELM 510 provision that was changed established a working condition and, hence, was not subject to unilateral change by the Postal Service under Article 10.2.A.

Significantly, there has been no change in the FMLA or the related DOL regulations that would necessitate mandatory use of the WH-380. On the contrary, under current DOL regulations, use of the WH-380 by an employer is optional. Because unilaterally changing ELM 510 to mandate use of previously optional WH-380 forms violated Article 10.2.A of the National

Agreement and the JCIM, there is no need here to decide whether the Postal Service's action in requiring use of the WH-380 also violated the FMLA, as the Union contends. [2]

Accordingly, the Postal Service is directed to cease and desist from requiring employees to submit FMLA medical certifications using only the WH-380 forms.

AWARD

The issues raised in these two cases are resolved as set forth in the above Findings.

Shyam Das, Arbitrator

[2] The federal district court decision cited by the Postal Service does not, in my reading of that opinion, address this issue.