REGULAR ARBITRATION PANEL

In the Matter of Arbitration

between

United States Postal Service

and

National Association of Letter Carriers
AFL-CIO

Grievant: Class Action

Post Office: Converse Post Office

G16N-4G-C 19269686
DRT: 10-474826
Local: 421-508-19

BEFORE: Thomas Strapkovic, Arbitrator

APPEARANCES:

For the U.S. Postal Service:	Jonathan Kleine, Labor Relations Specialist
For the National Association of Letter Carriers:	Richard Gould, Local Business Agent, NALC

Place of Hearing:	Converse Post Office
Date of Hearing:	January 28,2020
Date Hearing Closed:	February 18, 2020
Date of Award:	March 12, 2020
Relevant Contract Provision/s:	Articles 5
Contract Year:	2016-2019
Type of Grievance:	Contract/Past Practice

AWARD SUMMARY:

The grievance is sustained. Management is ordered to reinstate the "no lunch" program at the Converse Post Office in Converse Texas effective immediately.

Thomas Strapkovic
Arbitrator

INTRODUCTION:

The hearing in this case was held on January 28, 2020, at the Converse Post Office in Converse Texas before the undersigned Arbitrator who was duly appointed by the parties to render a final and binding decision in this matter. At the hearing, all witnesses provided sworn testimony and the parties were afforded full opportunity to present such evidence and argument as desired, including an examination and cross-examination of all witnesses. The parties agreed to submit post hearing briefs postmarked no later than February 14, 2020. The Postal Service's closing statement was postmarked February 13, 2020, and received on February 14, 2020. The National Association of Letter Carriers' closing statement was postmarked February 14, 2020, and received on February 18, 2020. Therefore, the record closed on February 18, 2020. The issue is defined below.

ISSUE:

Did management violate Articles 3, 5, and/or 19 of the National Agreement when they changed then discontinued and established past practice of letter carriers waiving their lunch period? If so, what is the proper remedy?

BACKGROUND:

On May 24, 2019, the Union initiated a class-action grievance, in which, the Union contended that management violated Articles 3, 5, and/or 19 of the National Agreement when they ended an established past practice of carriers taking no-lunches. The parties could not resolve this grievance at the Informal A on May 24, 2019. The parties met on July 9, 2019, at the Formal A level of the grievance process, but failed to reach a settlement. On July 16, 2019, this grievance was appealed to Step B. On August 19, 2019, the Rio Grande Dispute Resolution Team declared this grievance an impasse. The Union subsequently appealed this grievance to arbitration.

RELEVANT CONTRACT LANGUAGE:

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 and are otherwise inconsistent with its obligations under law.

POSITION OF THE PARTIES

Union:

The Union brought this case forward contending management violated Articles 3, 5, and 19 of the National Agreement when they discontinued a long-standing practice of letter carriers waiving their lunch periods. It is undisputed that carriers and supervisors have been allowed to forgo their lunch periods going back as far as 20 years. The fact that this practice was never challenged in all of that time is also undisputed. Moreover, the testimony of the Union's witnesses supported this long-standing past practice.

The Union presented evidence in the form of the Guarantee Waivers/No Lunch Authorizations Report that showed 3328 instances of "no lunch" authorizations from December 2017 through April 2019, when management accepted this past practice. This was a common practice with employees and supervisors who regularly skipped their lunches.

Management attempted to claim that the issue of "no lunches" was a safety concern or that somehow violated Federal Law, yet, there was no evidence in the case file of this claim. Furthermore, the Union questioned if the past practice was such a safety concern or some type of violation of the law, why did management allowed to take place in the first place and permitted for over 20 years. Management has not demonstrated any safety issues and Federal Law is very clear that employees are not required to have a lunch period.

The only language regarding lunches can be found in the Employee and Labor Relations Manual (ELM) Section 432.33 which states:

> "Except in emergency situations or where service conditions preclude compliance, no employee may be required to work more than 6 consecutive hours without a meal or rest. Of at least ½ hour."

This language is clearly intended more as a safeguard for employees. Its intent is to keep management from abusing employees by safeguarding against the employer requiring employees to work beyond six hours without lunch except for emergency situations or where service conditions preclude compliance. In no way does this section require the employee to take a lunch if they choose not to. Furthermore, management in the past created code 093 in TACS. This code is intended for employees who wished not to take a lunch and must be entered into the TACS system, otherwise the employee is automatically charged for a lunch.

Article 5 addresses several functions of past practice. The only function that requires appropriate notice and good faith bargaining is a past practice that implements separate conditions of employment where the contract is silent. The fact that management provided notice to the Union and engaged in some bargaining proves this is a silent function of this practice. Unfortunately, management's bargaining was far from good faith. Record evidence indicated that the Postmaster Colon did not have the authority to decide this issue by stating during his interview "my hands are tied". As the Union implied if the Postmaster could not make this decision they [Union] should have been bargaining with the person who could.

The Union argues that for management to succeed in changing a silent past practice, management must show that at least one of the following situations are present:

1. The company changes owners or bargaining unit.
2. The nature of the business changes.
3. The practice is no longer efficient or economical.

Management clearly failed to show any of these three requirements existed. The company is still the Postal Service and the nature of the business has not changed as the Postal Service delivers mail. Management has not shown that the practice is not efficient or economical, currently or in the past. A carrier forgoing their lunch changes nothing regarding time values. When a carrier chooses to take lunch, they don't get paid for their lunch period. A carrier who needs 30 minutes of overtime will incur the overtime whether a lunch is taken or not. Management provided no evidence showing any carriers utilized more overtime than normal because they did not take a lunch. Postmaster Colon testified that carriers were eating lunch at the same time they requested "no lunches", but provided a zero evidence of this.

In case B16N-4B-C 19012820, Arbitrator John Markuns recognize this in a similar case out of Lynn Massachusetts stating:

> "The binding past practice in question involves a benefit of personal value to those carriers who avail themselves of the "no lunch" option. See generally Elkouri & Elkouri, How Arbitration Works, Eighth Edition (2016), Ch.12.5 C. The practice essentially involved blanket management approval of carriers electing to "take" their lunch at the end of the day by leaving the Lynn installation a half hour earlier than they otherwise would have done. Carriers traditionally have significant discretion in when to take lunch while delivering their routes. The "no lunch punch" practice appears to have been in effect for over 30 years and likely as long as 35 years without discernible adverse effect on the postal operations at the Lynn installation.

> To justify change in the practice at this juncture, it is Management's burden to demonstrate how either its business has changed, or the practice is no longer efficient or economical. No doubt online shipping has become a focus of the Postal Service's business model with on-time delivery, scanning piece and accuracy of delivery as major customer concerns. However, management has not presented any evidence in this record to show how the binding past practice has hurt the Postal Service's ability to compete in this new environment. Nor has management proven that the past practice is no longer efficient or economical. Code 093 is built into TACS, and supervisors are clearly familiar with this process. Thousands of code 093's have been processed in Lynn. No evidence was introduced to how this process has become less efficient or economical."

In case E98N-4E-C 01216626, Arbitrator Jonathan Monat addressed safety and health concerns and assignment schedules brought up as new argument stating:

> "The National Agreement states that the "successful bidder shall work the duty assignment as posted." Management argued that the National Agreement was clear and explicit that "as posted" was the schedule posted on the bid sheet. However, the Union provided more than a preponderance of evidence that the mutually agreed upon practices of the "no lunch" policy modified the schedule posted on the bid sheet. The Postmaster recognized that local autonomy allowed the "no lunch" schedule... Management argued there were safety and health concerns at the time the Postmaster rescinded the "no lunch" policy. There is no evidence in the record to establish this as fact nor was there evidence in earlier steps raising this concern as the reason for the policies recession."

In this instant case, Management brought forward new arguments regarding Article 41.1.C.4 of the National Agreement which states the following:

> "The successful bidder shall work the duty assignment as posted. Unanticipated circumstances may require a temporary change in assignment. This same rule shall apply to Carrier Technician assignments, unless the local agreement provides otherwise.

This section is designed as a safeguard for the employee not as a deterrent for carriers deciding to forgo their lunch period. Without this language management would have free reign to move carriers to any assignment they wished. The JCAM language reiterates this in referencing carrier technician assignments.

> "Carrier Technician Assignments. The five routes on a Carrier Technician's string or group which constitute a full-time duty assignment are normally carried in the posted sequence. In the absence of any Local Memorandum of Understanding provisions or binding past practice concerning this issue (Article 5), management has discretion to move a Carrier Technician off the assignment he or she is working in the regular rotation to another route on the Carrier Technician's string. If a Carrier Technician is moved to another route on the string, that route becomes the carrier's assignment on that day for the purposes of Article 41.1.C.4 and the application of the overtime provisions of Article 8.5."

The language is clear that unanticipated circumstances would allow a change in assignment i.e. moving a carrier to another assignment. This reference to unanticipated circumstances has a

direct relation to Article 3.F regarding emergencies. In emergency situations management does have the right to do that which they cannot normally do. Article 3.F (emergencies) states the following:

> "this provision gives management the right to take whatever actions may be necessary to carry out its mission in emergency situations. An emergency is defined as "an unforeseen circumstance or a combination of circumstances which calls for immediate attention in a situation which is not expected to be of a reoccurring nature."

The situation presented in this instant case does not involve any unforeseen circumstances that would call for immediate action. Letter carriers and supervisors have engaged in forgoing their lunches for years without incident. Article 41.1.C.4 of the National Agreement does not apply to this situation, as the carriers that are requesting "no lunches" are still working their bit assignments.

The Union argues that this language leads to another issue brought forward by management. That the out-of-schedule pay provisions under Article 8.4 and voluntary schedule changes, but these provisions are not applicable in this case.

It is undisputed that Postmaster Colon failed to provide contentions [Formal A] and that the only contentions were provided by the Step B representative, which is all new argument. The National Agreement and JCAM are very clear that the grievance file is developed jointly and fully at the lower levels. In case N8-W-0406, National Arbitrator Richard Mittenthal explained in detail why new arguments are not permissible stating in part:

> "There remains the Postal Service's claim that the local clause in question is "inconsistent or in conflict with" Article XIII which concerns "assignment of ill or injured regular work force employees". The difficulty here is the lateness of this argument. Article XV describes in great detail what is expected of the parties in the grievance procedure. The Postal Service's Step 2 decision must make a "full statement" of its "understanding of... the contractual provisions involved." It's Step 3 decision must include "a statement of any additional... contentions not previously set forth..." Its Step 4 decision must contain "an adequate explanation of the reasons therefor." In this case, the Postal Service made no mention of Article XIII in Steps 2, 3 and 4. Its reliance on this contract provision did not surface until the arbitration hearing itself. Under such circumstances, it would be inappropriate to consider this belated Article XIII claim."

In the letters sent to the Branch President, Postmaster Colon stated that the practice of "no lunches" will be considered on a case-by-case basis; however, during the hearing Postmaster Colon testified that management is no longer approving any "no lunches". In this case,

management digressed from approving all "no lunches" to approving none with no explanation or proof that the "past practice" was ever a problem.

Management at Step B added new argument not raised at the previous steps of the grievance procedure. Though management met with the Union to discuss the past practice, they provided no evidence that it was in some way unsafe or presented any situation showing it was no longer efficient or economical. Management engaged in bad faith bargaining, in that, the Postmaster did not have the authority to settle the issue. Management stop the practice of "no lunches" altogether.

Therefore, the Union request that the arbitrator sustain this grievance and order the Postal Service to reinstate the policy of approving "no lunches" at the carrier's discretion and that management cease-and-desist from future violations of Article 5 of the National Agreement related to the "no lunch" policy.[1]

The Union submitted the following cites for authoritative and persuasive value:

N8-W-0406	Arbitrator Richard Mittenthal	September 21, 1981[2]
E98N-4E-C 01216626	Arbitrator Jonathan Monat	February 5, 2002
G11N-4G-C 14377095	Arbitrator Barry Simon	March 9, 2016
B16N-4B-C 19012820	Arbitrator John Markuns	May 2, 2019

Postal Service:

The Postal Service argues that the testimony and evidence presented at hearing shows a practice that stopped short of a settlement or a binding agreement. The evidence revealed that management continued the blanket no-lunch policy in accordance with Joint Contract Administration Manual (JCAM) Article 5, which states:

> "Changing the past Practices that Implement Separate Conditions of Employment. If the Postal Service seeks to change or terminate a binding past practice implementing conditions of employment concerning areas where the contract is silent, Article 5 prohibits it from doing so unilaterally without providing the Union appropriate notice. Prior to making such a change unilaterally, the Postal Service must provide notice to the union and

[1] Mostly verbatim from the Union's closing statement.
[2] National Level Arbitration.

engage in good faith bargaining over the impact on the bargaining unit. If the parties are unable to agree, the union may grieve the change.
Management changes in such "silent" contracts are generally not considered violations if
1) the company changes owners or bargaining unit,
2) the nature of the business changes, or
3) the practice is no longer efficient or economical. The first of these hazards rarely arisen in the Postal Service cases involving its numerous bargaining units.
A change in local union leadership or the arrival of a new postmaster or supervisor is not, in itself, sufficient justification to change or terminate a binding past practice, as noted in the previous paragraph.

Postmaster Colon referred to this article in his initial notification to the Union, and he cited this article in his final letter to the union. Postmaster Colon testified that the practice was not efficient and in accordance with JCAM Article 5. The Postmaster discovered that the practice was not efficient after reviewing an excess of stationary events in the Delivery Management Systems (DMS). The facts and testimony showed that the carriers who requested a no lunch were actually taking a lunch break. Carrier are not authorized to be stationary for 15 to 20 minutes while on the clock after they had requested a no lunch. The Postmaster testified that he simply cannot spend two (2) hours a day monitoring stationary events on the computer. The blanket no-lunch policy is clearly not efficient. Therefore, management exercised its rights that were agreed upon by the parties in JCAM Article 5. Moreover, these rights were also agreed to in Article 3 by both parties. Article 3 states in part:

"The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:
A. To direct employees of the Employer in the performance of official duties;
C. To maintain the efficiency of the operations entrusted to it;
D. To determine the methods, means, and personnel by which such operations are to be conducted;

Additionally, Arthur Goldberg, former Secretary of the Department of Labor, summarized management's rights in this manner:

"Somebody must be the boss; somebody has to run the plant. People can't be wandering around at loose ends, each deciding what to do next. Management decides what the employee is to do."

The Postmaster testified that many of the carriers at the Converse Post Office were operating in precisely the manner referenced by Goldberg. They were "deciding what to do next" and they decided to regularly sit stationary on the clock at the expense of the Service. This arrangement was inefficient.

In case I90C-4I-C 93040734, Arbitrator Lamont Stallworth stated:

> "Approval does not bind the Service nor in title the affected employees to a no-lunch break option whenever an employee makes such a request. The mere approval, no matter how frequent, of a PS Form 3189 granting an employee a schedule change for no-lunch does not add and does not rise to the level of a binding past practice."

If the Arbitrator sustains this grievance it would equate to allowing the employees to permanently change their schedule, which is inconsistent with the National Agreement, specifically Article 3, which gives management that exclusive right. Additionally, sustaining this grievance would render JCAM Article 5 of the National Agreement Article 41.1.C.4 meaningless in the Converse installation. Article 41.1.C.4 states:

> "The successful bidder shall work the duty assignment as posted. Unanticipated circumstances may require a temporary change in assignment. This same rule shall apply to Carrier Technician assignments in less the local agreement provides otherwise.

Furthermore, the blanket no-lunch policy at Converse did not even fall into the 3 categories described by Arbitrator Richard Mittenthal who explained that past practices were often established to:

1. implement existing contract language;
2. clarify ambiguous language; and
3. implement separate conditions of employment.

There is no existing language being implemented at the Converse Post Office that is different from other installations. There is no ambiguous language being clarified. There are no separate conditions of employment being practiced in response to a "silent" portion of the contract. On the contrary the contract language is plain: That successful bidder shall work the duty assignment as posted. Therefore, the Postal Service respectfully requests that the arbitrator deny any additional punitive remedies requested by the Union.[3]

In support of its position the Postal Service submitted the following arbitration cites for authoritative and persuasive value:[4]

G11N-4G-C 16398780	Arbitrator Paul Chapdelaine	May 6, 2017
B01N-4B-C 05003640	Arbitrator Thomas Sharkey	April 2, 2005
I90C-4I-C 93040734	Arbitrator Lamont Stallworth	May 28, 1996

[3] Mostly verbatim from the Postal Service's written closing statement.
[4] Arbitrator read the arbitrable cites provided for guidance.

DISCUSSION AND FINDINGS

In a contract case such as this, the Union is required to prove by the preponderance of the evidence that the Postal Service violated provisions of Article 5 of the National Agreement, when it discontinued the policy of granting "no lunches" to letter carriers. To support the Union's position that management had violated the National Agreement, the Union's advocate in this case testified and then solicited the testimony of letter carriers Edward Benitez, Pamela Caviel and Larry Morales. The Postal Service solicited the testimony of Postmaster Luis Colon.

Mr. Gould testified that he has been employed by the Postal Service since 1991 as a letter carrier and in 2014 was elected as the Vice President of Branch 421. Mr. Gould stated that he served as the Union's representative at the Informal A and Formal A process in this instant grievance.

Mr. Gould testified that there are generally three (3) situations in which a past practice can successfully be modified. The first one is if the company changes owners or bargaining unit. The second situation would be that the nature of the business changes in the third would be that the practice is no longer efficient for economical. Clearly, the Postal Service has not changed owners, the nature of the Postal Service has remained the same and lastly, the Postal Service provided nothing to him [Mr. Gould] in way of documentation or argument that the "no lunch" was no longer efficient or economical.

Mr. Gould stated that during his Formal A with Postmaster Colon he inquired as to how many safety infractions had occurred with the "no lunch" practice. Postmaster Colon replied there were none. Mr. Gould testified that he informed Postmaster Colon that the DMS report proves nothing as it does not indicate what the carriers are actually doing. Mr. Gould indicated that Postmaster Colon advised him that he was instructed to do this by his boss [James Alva] and that his hands were tied. Mr. Gould then informed Postmaster Colon that he [Mr. Gould] should be meeting with Mr. Alva instead. Mr. Gould testified that he secured written statements from letter carriers of the Converse Post Office which indicated that this past practice has been in place for more than 20 years.

Mr. Gould indicated that through discovery he secured the clock rings [Guarantee Waivers/No Lunch Authorizations] all employees including two supervisors who for the last two years have utilized code 093 [no lunch]. According to Mr. Gould, letter carriers/supervisors on a daily basis

would sign a log indicating they were taking no lunch. Mr. Gould testified that through his research he determined that the federal government/Fair Labor Standards Act does not require employees to take a lunch break and he supported his testimony with several postings from the US Department of Labor.

Under cross-examination, Mr. Gould was asked if Postmaster Colon had advised the Union in his letter dated March 1, 2019, that he would be changing the "no lunch" practice to a situation where the no lunch request would be considered on a case-by-case basis. Mr. Gould acknowledged this, but indicated that Postmaster Colon had changed the case-by-case basis to one of which all requests for no lunch were flatly denied.

The Union's next witness was Edward Benitez, who testified he has been employed by the Postal Service for 25 years in Converse Texas and for the last 16 years has worked as a letter carrier at the Converse Post Office. Mr. Benitez indicated that the carriers were informed that they could no longer opt for a no lunch. According to Mr. Benitez, this decision was made at the district office by James Alva. Mr. Benitez testified that he would utilize the no lunch program because it permitted him to leave early. Mr. Benitez indicated that during the summer months it was extremely beneficial to him to skip lunch because he is diabetic and wears braces.

Under cross-examination, Mr. Benitez testified that he works from 7:30 AM to 4 PM and takes his 30-minute lunch break between noon and 1 PM.

Pam Caviel testified that she is been employed by the Postal Service since 1996 as a letter carrier in Converse Texas and stated that the no lunch program has been in place for least the past 10 years or even longer. Ms. Caviel indicated that the Postmaster informed the letter carriers that the decision to stop the no lunch program came from above, someone of higher authority. Ms. Caviel testified that the carriers were asked on a daily basis whether or not they would be taking a lunch for the day. Ms. Caviel stated that management no longer permits the carriers take advantage of the no lunch program.

Under cross-examination, Ms. Caviel testified that her work hours are from 7:30 AM to 4 PM and that's her lunch break fluctuates depending on where she is on the route.

The Union's final witness was Larry Morales who is been employed by the Postal Service for the past 14 years as a letter carrier in Converse Texas. Mr. Morales indicated that to his knowledge the no lunch program has been in existence at least for the past 10 years and that during this time he participated in the no lunch program daily. Mr. Morris testified that Postmaster Colon told him that he was going to discontinue the no lunch program because some carriers abused it. According to Mr. Morales, Postmaster Colon stated that he had observed carriers leaving establishments with food and believed that these carriers were taking a lunch period without being charged for one. Mr. Morales testified that he told the Postmaster that instead of canceling the no lunch program he should "write-up" the carriers that were abusing program instead of dissolving the no lunch program. Mr. Morales stated that he believed that the no lunch program was more efficient and economical for the Postal Service and explained that in the winter months, after the sun sets, it takes him twice as long to finish certain parts of his route. Whereas, working straight through without lunch he would return earlier from the route before sunset. Mr. Morales reiterated that if a carrier was abusing the no lunch program they should be dealt with individually.

Under cross-examination, Mr. Morales testified his hours of work were from 7:30 AM to 4 PM and said his lunch period varies depending on where he is on that route.

The Postal Service's only witness was Postmaster Luis Colon who testified that he is been employed by the Postal Service for at least the last 12 years. Postmaster Colon testified that on March 1, 2019, he mailed Tony Boyd, President of Branch 421 NALC a letter advising the Union that the Postal Service was proposing a change to the past practice of "no lunch" program because he believed that the "no lunch" program was no longer efficient or economical. Postmaster Colon stated that his decision was based in part on a new program developed by the Postal Service, Delivery Management Systems (DMS). The DMS would generate a report which identified carriers spending time at establishments [stationary events] for an excessive amount of time i.e. 10 to 30 minutes.

Postmaster Colon indicated that the DMS report led him to believe that some of the letter carriers were taking extended breaks without having this time charged to a lunch period. Postmaster Colon testified that letter carriers receive two (2)10-minute breaks a day, one in the morning in the office and the other on the street while delivering mail.

Postmaster Colon stated that the decision to cancel the "no lunch" program was made by his superiors, but that he supported this because he believed that the letter carriers were actually taking a lunch without being charged for it and this would generate more work for him because on the following day he would have to make clock rings adjustments via TACS.

Postmaster Colon testified that on March 26, 2019, he sent a letter to the Union advising them that the "no lunch" program would be eliminated on April 27, 2019. Postmaster Colon testified that after the elimination of the "no lunch" program, the Converse Post Office has not experienced any safety concern issues.

Under cross-examination, Postmaster Colon testified that after the cancellation of "no lunch" program that his time using DMS was practically eliminated. Postmaster Colon acknowledged that he did not provide the Union with any contentions or documents supporting his efficient or economical assertions during the Formal A meeting with the Union. Postmaster Colon also conceded that DMS does not convey what the letter carrier is actually doing during the stationary event, but rather only indicates that the letter carrier is not delivering mail [no scanning activity] during this time. Postmaster Colon further acknowledged that he has not taken any disciplinary action against any letter carrier who he believed abused the "no lunch" program. Postmaster Colon admitted that he no longer considered approving "no lunch" on a case to case basis, rather the "no lunch" program was eliminated completely and that all letter carriers are required to take a 30-minute lunch break.

In case I90C-4I-C 93040734, Arbitrator Stallworth denied the Unions grievance.[5] In his award Arbitrator Stallworth indicates that the primary issue before him was:

> "Whether the Union can establish the existence of a no lunch past practice?"

Arbitrator Stallworth stated the following in his opinion:

> "The threshold issue in this case is whether a binding past practice between the Parties exists. The Union bears the burden of proof in this matter. To prove a past practice exists, the Union must establish that the "conditions in dispute" must be:
> 1. Unequivocal;
> 2. clearly enunciated and acted upon;
> 3. Readily ascertainable over a reasonable period of time as a fixed an established practice accepted by both parties.

[5] Submitted by the Postal Service.

Arbitrator Stallworth found that the Union presented no evidence that demonstrated that both parties knowingly entered into an arrangement or tacit agreement entitling employees to a no lunch break option. Absent such evidence, all that remains in the instant grievance is at best a situation where the Service routinely or regularly permitted employees no lunch.

In this instant case, the Union has established all three (3) factors. The "no lunch" program at the Converse Post Office has been in place for well over the past 10 years. Both craft employees and management personnel utilized the "no lunch" option on a daily basis[6]. The Postal Service utilized a daily sign-up sheet for letter carriers to exercise the "no lunch" program. The Postal Service developed code 093 for the specific purpose of "no lunch".

In case G11N-4G-C 16398780, Arbitrator Chapdelaine denied the Union's grievance[7]. In that case the fact situation was completely different from the ones in this instant grievance. In the Chapdelaine case sporadically employees would request no lunch periods for roughly a seven (7) month timeframe. Sometimes the requests were approved sometimes not. In this instant case, the "no lunch" program was utilized for over 10 years on a daily basis.

In contract cases, the burden of proof is on the Union to prove by the preponderance of the evidence that a contractual provision has been violated. If the Union proves a prima facie case that the contract has been violated the burden of proof then shifts to the Postal Service.

The first order of business is to determine whether or not the past practice exist. Record evidence and testimony has established that for at least the past 10 years the Converse Post Office has had a "no lunch" program in effect, in which most if not all, letter carriers participated in. This is also reflected in the employee statements as well as in the two correspondences sent to the Branch 421 Union President by Postmaster Colon. Therefore, the "no lunch" program at the Converse Post Office is a past practice. Simply put the Union has presented a prima facie case that the Postal Service violated Article 5 of the National Agreement when it eliminated the "no lunch" program on April 27, 2019.

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[6] Joint Exhibit 2 pages 16-77.
[7] Submitted by the Postal Service.

As the Union has as asserted this type of past practice is considered a "silent" part of the contract. If the Postal Service seeks changes in such a "silent" contract it is not generally considered a violation if:

1. The company changes owners or bargaining unit;
2. The nature of the business changes; or
3. The practice is no longer efficient or economical.

The Postal Service appears to argue that the elimination of the "no lunch" program is necessitated because it is no longer efficient or economical. However, the Postal Service is required to prove by the preponderance of the evidence that the "no lunch" program is no longer efficient or economical.

Record evidence and testimony established that it was the District Office that determined that the "no lunch" program in Converse Texas must be eliminated. This is credited to the testimony of Edward Benitez, Pam Caviel and Formal A representative Richard Gould. According to Mr. Benitez and Ms. Caviel Postmaster Colon had a meeting with the letter carriers in which he advised them that the decision to eliminate the "no lunch" program was made at the district level and "it was out of his hands". It is noted that Postmaster Colon supported this action as he testified that eliminating the "no lunch" program reduced the amount of time he used to correct clock ring errors in TACS. Postmaster Colon also testified that several carriers were abusing the "no lunch" program by spending too much time [stationary events] at certain business locations i.e. convenience stores, gas stations, restaurants etc. While this may be true nothing was presented at hearing to support this assertion. Nor did management present any evidence of safety and health concerns.

The Delivery Management Systems (DMS) generates a report which can identify the carrier, the stationary event and the amount of time spent during the stationary event. Yet, these reports were not presented to the Union during the Formal A meeting. Such a document could have been used to bolster the Service's argument that the "no lunch" program was no longer efficient or economical.

Union witness Larry Morales also testified that Postmaster Colon had informed him that several carriers were abusing the "no lunch" program by illegally taking lunch. Mr. Morales testified that he advised Postmaster Colon that he should discuss this with the individual carriers that were

abusing the "no lunch" program and if necessary, take disciplinary action against those carriers. Moreover, if certain letter carriers were abusing the "no lunch" program, management could have submitted the records of discussions, copies of corrective action taken etc. to the Union during the Formal A meeting. Absent these report or documents, the testimony of the Union's witnesses was not rebutted.

Indeed, Mr. Morales offered compelling testimony as to why the "no lunch" program was not only efficient but also economical. Mr. Morales credibly testified that during the winter months it could take him twice as long to deliver his route after darkness. Whereas, by utilizing the "no lunch" program he would finish delivering his route before darkness. Consequently, the "no lunch" program clearly is/was beneficial to the employees as it permitted them to leave work ½ hour early to spend additional time with their families etc.

in case E98N-4E-C 01216626, Arbitrator Monat sustain the Union's grievance[8]. In his findings and conclusions Arbitrator Monat stated in part:

> "In summary, the JCAM and other sighted arbitral authority define the criteria of past practice is widely accepted by arbitrators. The criteria include (1) clarity and consistency; (2) longevity; (3) acceptability; and (4) mutuality. The evidence submitted by the Union met the threshold burden to establish that a past practice exists at the Longview Post Office with respect to the "no lunch" policy. Management provided insufficient evidence to overcome the preponderance of the evidence of the past practice."

Therefore, the Union has established a prima facie case that the Postal Service violated Article 5 of the National Agreement. The Postal Service has failed to establish that the elimination of the past practice of the "no lunch" program was necessary for efficiency or economic reasons.

AWARD:

The grievance is sustained. Management is ordered to reinstate the "no lunch" program at the Converse Post Office in Converse Texas effective immediately.

[8] Submitted by the Union.