REGULAR ARBITRATION PANEL

In the Matter of Arbitration	Grievant:	Class Action
Between	PO:	Schertz, TX
UNITED STATES POSTAL SERVICE	DRT No:	G16N-4G-C 192509988
	Local No:	421=298-19
and	DRT No:	10-469206
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO		

BEFORE: Norman Bennett

APPEARANCES:

For the U.S. Postal Service: Diane E. Garcia (LRSP
For the Union: Juan A. Munoz, NALC LBA
Place of Hearing: Schertz, TX
Date of Hearing: October 3-4, 2019
Date of Briefs: November 4, 2018
Date of Award: April 22, 2020

Award Summary

The issue is whether the Postal Service violated Article 5 of the Agreement by its unilateral change in its no-lunch policy. The no-lunch policy afforded carriers the right to work through their lunch periods on request. The change proposed by the Service was a request to waive a lunch period would be decided on a case-by-case basis. One reason given for the change is: "No employee may be required to work more than six continuous hours without a meal break." The key word is "required." The Service is not requiring an employee to work more than six continuous hours when the employee elects not to take a lunch. The second reason is: "PS Form 1564 requires the designated meal and break points assigned to the route which must be adhered to." That language appears to require those carriers taking to lunch break to take it at a designated location. The third reason is safety. The Service did not raise the issue of safety as a reason for denying the grievance in the grievance procedure. The grievance is sustained. The no-lunch policy shall be reinstated.

Norman Bennett

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OPINION

The Issue

The Postal Service (Service) had a no-lunch policy (policy) in effect at the Schertz Post Office (PO) during the term of the 2016-2019 National Agreement (Agreement). The no-lunch policy permitted carriers to elect not to take a lunch break and to work though their lunch breaks. During the term of the Agreement, Postmaster (PM) T. Morgan at the PO notified the Union by letter of his intent to change the no-lunch policy to require carriers to take a lunch break.

The letter to the Union also offered the Union the opportunity to bargain over the proposed change. After a very brief meeting with the Union, the PM notified the Union that the proposed change had been adopted by the Service and had become effective. The issue is whether the Service violated Article 5 of the Agreement by the change in the no-lunch policy? If so, what is the appropriate remedy?

Applicable National Agreement Prosisions

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.

Applicable JCAM Provisions

JCAM - 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 6(d) of

the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under the law. (The preceding Article, Article 5, shall apply to City Carrier Assistant Employees.)

Prohibition on Unilateral *Changes*. Article 5 prohibits management taking any unilateral action inconsistent with the terms of the existing agreement or with its obligations under law. Section 8(d) of the National Labor Relations Act prohibits an employer from making unilateral changes in wages, hours or working conditions during the term of a collection agreement.

In H1N-5G-C 14964, March 11, 1987 (C-06858) National Arbitrator Bernstein wrote concerning Article 5:
The only purpose the Article can serve is to incorporate all the Service's "obligations under law" into the Agreement, so as to give the Service's legal obligations the additional status of contractual obligations as well. This incorporation has significance primarily in terms enforcement mechanism-it enables the signatory unions to utilize the contractual vehicle of arbitration to enforce all of the Service's legal obligations. Moreover, the specific reference to the National Labor Relations Act is persuasive evidence that the parties ere especially interested in utilizing the grievance and arbitration procedure spelled out in Article 15 to enforce he Service's NLRB commitments.

Not all unilateral actions are prohibited by the language in Article 5 -only those affecting wages, hours or working conditions as defined in Section 8(d) of the National Labor Relations Act. Additionally, certain management decisions concerning the operation of the business are specifically reserved in Article 5 - unless otherwise restricted by a specific contractual provision.

Past Practice

The following explanation represents the national parties' general agreement on the subject of past practice. The explanation is not exhaustive, and is intended to provide the local parties general guidance on the subject. The local parties must insure that the facts surrounding a dispute in which past practice plays a part are surfaced and thoroughly developed so an informed decision can be made. Article 5 may also limit the employer's ability to take a unilateral action where a valid past practice exists. While most labor disputes can be resolved by application of the written language of the Agreement, it has long been recognized that the resolution of some disputes requires the examination of the past practice of the parties.

Defining Past Practice

In a paper given to the National Academy of Arbitrators, Arbitrator Mittenthal described the elements required to establish a valid past practice.

First, there should be clarity and consistency. A course of conduct which is vague and ambiguous or which has been contradicted as often as it has been followed can hardly qualify as a practice. But where those in the plant invariably respond the same way to a particular set of conditions, their conduct may very well ripen into a practice.

Second, there should be longevity and repetition. A period of time has to elapse during which a consistent pattern of behavior emerges. Hence one or two isolated instances of certain conduct do not ordinarily establish a practice. Just how frequently and over how long a period something must be done before it can be characterized as a practice is a matter of good judgment for which no formula can be devised.

Third, there should be acceptability. The employees and supervisors alike must have knowledge of the particular conduct and must regard it as the correct and customary means of handling a situation. Such acceptability may frequently be implied from long acquiescence in a know course of conduct. Where this acquiescence does not exist, that is, where employees constantly protest a particular course of action through complaints and grievances, it is doubtful that any practice will be created.

One must consider, too, the underlying circumstance which gives a practice its true dimensions. A practice is no broader than the circumstances out of which it has arisen, although its scope can always be enlarged in the day-to-day administration of the agreement. No meaningful description of a practice can be made without mention of these circumstances. For instance, a work assignment practice which develops on the afternoon and night shifts and which is responsive to the particular needs for night work cannot be automatically extended to the day shift. The point is that every practice must be carefully related to its origin and purpose.

Finally, the significance to be attributable to a practice may possibly be affected by whether or not it is supported mutuality. Some practices are the product, either in their inception or in the application of a just understanding, others develop from choices made by the employer in the exercise of it managerial discretion without any intention of a future commitment.

Functions of Past Practice

In the same paper, Arbitrator Mittenthal notes that there are three distinct functions of past practice.

To implement Contract Language. Contract language may not be sufficiently specific to resolve all issues tht arise. In such cases, the past practice of the parties provides evidence of how the provision at issue should be applied. For example, Article 15, Section 2, Step 3 of the 1978 National Agreement (an successor agreements through the 2000 National Agreement required the parties to

hold Step 3 meetings. The contact language, however, did not specify where the meetings were to be held. Article Mittenthal held that in the absence of any specific controlling contact language, the Postal Service did not violate the National Agreement by insisting that Step 3 meetings be held at locations consistent with past practice (NR-NAT-0006, July 10, 1979, C-03241.

To Clarify Ambiguous Language. Past practice is used to assess the intent of the parties when the contract language is ambiguous, that is, when a contract provision could plausibly be interpreted in one of several different ways. A practice is used in such circumstances because it is an indicator of how the parties have mutually interpreted and applied to ambiguous language. For example, in a dispute concerning the meaning of a LMOU provision, evidence showing how the provision has been applied in the past provides insight into how the parties interpreted the language. If a clear past practice has developed, it is generally found that the past practice has established the meaning of the disputed provision.

To Implement Separate Conditions of Employment. Past practice can establish a separate enforceable condition of employment concerning issue here the contract is "silent." This is referred to by a variety of terms, but the one must frequently used is *the silent contract.* For example, a past practice, even though there are no contract or LMOU provisions concerning the issue.

Changing Past Practice

The manner by which a past practice can be changed depends on its purpose and how it arose. Past practices that implement or clarify existing contract language are treated differ than those concerning the "silent contract."

Changing Past Practices that Implement or Clarify Contract Language. If a binding past practice clarifies or implements a contact provision, it becomes, in effect, an unwritten part of that provision. Generally, it can only be changed by changing the underlying contract language or through bargaining.

Changing Past Practice 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 contact 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 adequate notice to the union and 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 change 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 has rarely arisen in 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.

Discussion

Article 5 of the Agreement prohibits a unilateral action to change wages, hours and other terms and conditions of employment without notice to the Union. Such notice must also provide the Union an opportunity to bargain about the propose change. A no-lunch policy (policy) permits a carrier to work through his/her lunch period on request. Section 5 of the JCAM (Section 5) permits a past practice "to implement separate conditions of Employment" wherein the Agreement is "silent." A no-lunch policy is a past practice as defined in Section 5.

The Service admits the existence of a past practice under Section 5 of the JCAM regarding the no-lunch policy. The Service also acknowledges it cannot change the past practice without compliance with Section 5 of the JCAM. Section 5 requires notice to the Union and opportunity for the Union to bargain before the proposed change in the policy. There was considerable evidence at the hearing about whether the no-lunch policy had been established by past practice. Because the Service admits the existence of a past practice, the only relevant evidence concerns the reasons given for the change in the past practice.

PM Morgan sent Union President T. Boyd a letter, dated 22 February 2019,[1] regarding changing the no-lunch policy. It states as follows:

> The purpose of this letter is to provide written notification no lunch requests will be considered on a

[1] Dates herein refer to the year 2019 unless otherwise designated.

> case by case basis at the Schertz Post Office. This decision is based on the mealtime requirement. No employee may be required to work more than 6 continuous hours without a meal or rest period of at least ½ hour. In addition the PS Form 1564A requires the designated meal and break points assigned to the route which must be adhered to. The purpose of the mealtime breaks and breaks for each employee is to ensure they receive proper rest and restoration to complete their job assignment safely.

PM Morgan met very briefly with Union representative Boyd on April 8. During that meeting, PM Morgan referenced the letter as the reason for the change in the no-lunch policy. The Union representative objected to the change in the past practice. PM Morgan later sent Union representative Boyd a letter of notification that the policy had been changed for the reasons set forth therein.

The first reason set forth in the letter is: "No employee may be required to work more than six continuous hours without a meal or rest period of at least ½ hour. The key word is "required." The Service is not requiring an employee to work when the employee elects not to take a lunch break. The second reason is: "PS Form 1564 requires the designated meal and break points assigned to the route which must be adhered to." That language appears to require those carriers taking a lunch break take it at specified locations. This sentence could have required lunch breaks be taken in plain language, but it did not do so.

The third reason set forth in the letter is: "The purpose of the mealtime and breaks for each employee is to ensure they receive proper rest and restoration to complete their job assignments safely." By its terms, the expressly-stated objective of this requirement is safety. Both parties agree that their positions for either denying or sustaining a grievance must be raised in the grievance procedure.

The Union objected at the hearing to virtually all of the issues raised by Management. The stated grounds for those objections were

that such issues were not raised in the grievance procedure. Performance issues including safety were the basis of several of those objections. In its brief, the Union renews those objections and complaints about having to defend against issues not raised in the grievance procedure. For example, supervisor Tillman testified that he had seen carriers eating while they were driving. The Union asked Tillman on cross examination why this alleged safety violation was not brought up in the grievance procedure. Tillman responded there was nothing in the file to show this matter was brought up in the grievance procedure.

Management's reasons for denying the grievance are set forth in page 4 of the Step B Decision, as follows:

> The fact that a past practice exists does not mandate it must remain in effect. Lapses of time and changes in circumstances may, absent express language to the contrary, nullify rigid adherence to the terms of the past practice. The union claims that management did not have sufficient reasons to rescind the no lunch on demand practice. There is no question that the Service met the contract requirement of notice to the Union and did engage in a good faith bargaining session. Because the result was not what the union desired, management listened to their concerns. In the case of a modification or rescission of a past practice the bargaining required is not with respect to the decision itself, but only with regarding to the effect it has on the bargaining unit. Some of the employee's statements spoke about the heat, which is three months of the year. Management is equally concerned. Whether it is summer, winter, spring, summer or fall, a lunch break is important in the type of work performed by the carriers.
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> The outcome of this matter is dependent upon who has the ultimate burden of proof. The burden of proof is on the union to satisfy the Service did not negotiate in good faith but that it acted arbitrarily and capriciously. This is a very difficult burden to meet. The postmaster decision on discontinuance of the blanket no lunch policy is fair and not unreasonable. Any change of schedule requires a request and approval. Article 3 of the National Agreement allows management the right to promote the

efficiency of the operations. The JCAM Article 3 Management Rights states in relevant 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,
> B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary actions against such employees.
> 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.
> E. To prescribe a uniform dress to be worn by letter carriers and other designated employees, and
> F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.
>
> The national parties have understood and agreed that scheduled daily meal period of one-half hour is both beneficial to employees and he efficiency of the Service as it pertains to workload leave.
> The JCAM allows management to change a pst practice if done properly and with reason.

Safety is not listed as a reason for denying the grievance. "Efficiency" could be reasonably interpreted to refer to a large number of issues. In this opinion, "efficiency" is not specific enough to raise safety as a reason for Management's denial of the grievance. Had proper notice been given, the Union could have argued that there is no evidence the no-lunch policy contributed to a safety incident over the many years the policy had been in effect. Management then could have rebutted that argument and presented evidence in support of its position. The failure to raise the specific issue of safety as a basis for denying the grievance does not meet the standard for grievance-procedure disclosure on which both parties agree.

Although not deternative in this case, Management argues, "The outcome of this matter is dependent upon the ultimate burden of proof." One possibility is the standard set forth in Section 8(d) of the National Labor Relation Act (NLRA). Under that standard, neither party is required to agree to a proposal of the other party. However, that standard appears more applicable to private-sector parties that have the right to pursue economic remedies such as the right to strike. Postal workers do not have the right to strike.

Another possibility is the standard applicable under Article 30. Article 30 provides for local negotiations for 30 specified issues. An arbitrator has latitude within parameters to choose the proposal of either party in an arbitral review under that process. A no-lunch policy is not listed as an issue for which local bargaining is permitted. Consequently, the standard of review applicable under Article 30 does not appear to be applicable in JCAM, past-practice cases.

Management is right in arguing the standard of review is critical in JCAM, past-practice cases. Neither the Agreement nor the JCAM offer guidance as to the appropriate standard of review in such cases. In this view, arbitral fiat is not a sufficient standard on which to decide JCAM, past-practice cases. It is this opinion that more guidance from the National parties would be helpful regarding the standard of review in JCAM, past-practice cases.

Based on notice issues discussed above, the grievance in this case must be sustained. The no-lunch policy shall be reinstated.

AWARD

The grievance is sustained. The no-lunch policy shall be reinstated.

Norman Bennett

Norman Bennett, Arbitrator
DATED: 4/23/2020