APWU of Iowa-Arkansas-Missouri Postal Workers Union Present:

TRI-STATE 2008

March 13-15, 2008

Des Moines Iowa

APWU

UNDERSTANDING PAST PRACTICE THE UNWRITTEN CONTRACT

Prepared by:

Merlie H. Bell
Steven G. Raymer

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PAST PRACTICE
THE UNWRITTEN CONTRACT

Presented by:
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PAST PRACTICE

- The Unwritten Contract
- What is it?
- How to enforce it?

Understanding Past Practice

- What is a past practice?

  In the most simple terms Arbitrator Clair V. Duff put it this way:

  Past practice may be described as a pattern of conduct which has existed over of time and which has been known to the parties and not been objected to.

  (American St. Govain Corp. 46 LA 920, 921)

Understanding Past Practice

- Customs are equivalent to practices.
- What is a custom?
- A frequent or common use or practice; a frequent repetition of the same act; usage; habit
- In law, such usage as by long-established, uniform practice and common consent which has taken on the force of law.

The Unwritten Contract

- How is custom and practice part of the agreement?
- Arbitrators continue to hold custom and past practice enforceable through arbitration, even though not expressed in the collective bargaining agreement.

  (a uniform practice and common consent which has taken on the force of law.)

The Unwritten Contract

- The Labor arbitrator's source of law is not confined to the expressed provisions of the contract, as the industrial common law.
- The practice of the industry and the shop is equally a part of the collective bargaining agreement although not expressed in it.

The Unwritten Contract

- If the contract language is silent or not clear and distinct, past practice is universally relied on to define the understanding of what the language means to them.
- Bona fide past practices rise to the level of explicit terms of the agreement.

Custom & Practice as Part of The Unwritten Contract

- From the standpoint of jurisdiction, the customary way of doing things become the contractually correct way of doing things. (Arbitrator Mittenthal H0C-NA-C14)
- In short, past practice defines the parties meaning of contract language that may need clarification.

Custom & Practice as Part of The Unwritten Contract

- Evidence of custom & past practice may be introduced for any of the following major purposes.

1. To provide the basis for rules governing matters not written into the contract.
   (The reason for the practice or custom, the foundation that supports the practice)

Custom & Practice as Part of The Unwritten Contract

2. To clarify the proper interpretation of ambiguous contract language.

   (language which have different interpretations or two or more possible meanings and our repetitive actions have determined what the contract means.)

Custom & Practice as Part of The Unwritten Contract

3. To support allegations that clear language of the contract has been amended by mutual action or agreement.
   (Clerks have performed duties within the Mailhandlers job description for the last 30 years, Carriers transporting mail in MVS vehicles for 20years)

Practices can evolved into Employee Rights and Benefits

- Uniforms
- Rolling chairs to distribute mail
- Bulletin Boards
- Drinks at the manual case
- Table and chairs in a hallway
- Wash up times
- Breaks

Recap

- Custom and practice is pattern of conduct that extends overtime which is known and accepted by the parties.
- A long-established, uniform practice and common consent takes on the force of law.

Recap

- Arbitrators hold custom and past practice enforceable through arbitration, even if not expressed in the contract.
- Where contract language is silent or not clear, past practice is universally relied on to define what the language means to the parties.

Recap

- Evidence of custom & past practice provides for;
- Matters not written into the contract,
- Proper interpretation of ambiguous contract language,
- Where the contract has been amended by mutual action or agreement

Binding Past Practice

- When does the practice becomes binding on the parties?
- Arbitrator Richard Mittenthal concluded that in order for a past practice to rise to the level of a binding past practice, one ordinarily would expect it to be clear, consistently followed, followed over a long period of time and to mutually accepted by the parties.

Defining Past Practice JCIM and a New Day

- Prior to June 2004 most parties relied upon a "paper" by Arbitrator Mittenthal to describe the needed elements to establish a past practice.
- The JCIM beginning in June 2004 gives the definition agreed to by the parties at the national level for our bargaining unit by referencing the Mittenthal "paper".

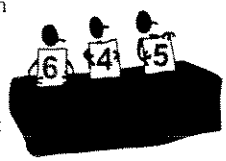
Defining Past Practice

- The JCIM lists three points containing five elements that must be met in order to establish a past practice in an APWU bargaining unit.

1. Clarity and Consistency.
2. Longevity and Repetition.
3. Acceptability.

Clarity and Consistency

- It should be clear what has been done.
- It should be done in the same way in nearly every situation.
- Where the situation doesn't not change, the practice should be followed on a consistent basis.
- If these are not met it is not a past practice.



Longevity and Repetition

- A consistent pattern should exist.
- A long period of time is needed.
- Please note that the JCIM uses the word "consistent" to define these elements so normally if you meet the standard of consistency in the first element you will meet the standard here.

Acceptability

- Both parties must have knowledge of the practice. Frequently called mutuality.
- Also, a long acquiescence helps establish the acceptability. Note this long period would help in the previous elements too.

Underlying Circumstances

- Where did the practice come from, or how did it start?
- Gather facts to show how the practice was established.
- It could be for only one tour or section.

Underlying Circumstances

- 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 contract.
- The point is that every practice must be carefully related to its origin.

Underlying Circumstances

- Some practices are the product, either, in their inception or in their application, of a joint understanding; others develop from choices made by the employer in the exercise of its managerial discretion without intention of a future commitment.

Functions of a Past Pracctice

- Mittenthal noted three functions of a past practice in his paper.

1. To implement Contract language.
2. To clarify Contract language.
3. To implement separate conditions of employment ,or silent language if preferred.

Recap

- The JCIM past practice elements and mutual understanding between the Union & the USPS
- Clarity and consistency
- Longevity and repetition
- Acceptability
- Underlying circumstances
- Functions

Changing Past Practices

- In order to change a practice involving contract language either the contract language itself must change, or bargaining must take place for either party to obtain the change.

Changing Past Practices and the Law

- The National Labor Relations Act prohibits the employer from making unilateral changes in wages, hours or working conditions or other terms and conditions of employment during the term of the collective bargaining agreement.

Changing Past Practices and the Law

- **Obligation to bargain collectively**
- For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.

Conditions of Employment

- Means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise affecting working conditions.
- Ref: U.S.C. Title 5 Section 7103(a)(14)

Changing Past Practices and the Law

- The duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification–

(1) serves a written notice upon the other party of the proposed termination.

(2) offers to meet and confer with the other party for the purpose of negotiating.

Article 5
Prohibition of Unilateral Action

- Article 5 of the Collective bargaining agreement and the JCIM incorporates the prohibition of unilateral changes as stated in the National Labor Relations Act Section 8d.

Unilateral Change is Prohibited

- Unilateral defined, means done or undertaken by one person or party.
- Affecting one side only.
- Not by mutual consent.

Employee Rights and Benefits

- Over the years, the give and take between management and employees have resulted in certain employee rights and benefits which are covered by the agreement or which evolved out of a **well established practice**.

Employee Rights and Benefits

- Wages, hours, working conditions, other terms and conditions of employment, employee rights and benefits are all part of the contract. **They are either written into the agreement or are silent, though they exist though practice.**

Recap - unilateral changes in wages hours or working conditions

- The NLRA prohibits the employer from making unilateral changes in wages, hours or working conditions or other terms and conditions of employment during the term of the contract.

Recap

- Unilateral; affecting one side only; not by mutual consent.
- When changing practices bargaining must take place.

Recap

- Employee rights and benefits which evolved out of a well established practice are covered by the agreement.
- Conditions of employment; policies, practices, and matters, established by rule, regulation, affecting working conditions are covered by the agreement.

Changing Past Practices

- To change a past practice that stems from silent contract language there must be notice given by the PO and "good faith bargaining" must take place.

Changing Past Practices

- Management changes in such "silent" contract are generally not considered violations if,

1. The company change owners or bargaining unit.
2. The nature of the business change or,
3. The practice is no longer efficient or economical. (a change of persuasive force)

NEW SHERIFF IN TOWN

- The JCIM makes it clear that a change in either management or the union leadership is not "sufficient justification to change or terminate a binding past practice."

Arbitrator Parkinson in case number C90C-4C-C93014395

- Postal Service claims a uniform allowance was given to the Technicians in error (for 10 years)
- Technicians wore on their person the benefit of the allowance and it was well know to everyone.
- Furthermore, there is no dispute that this benefit constituted a long standing practice.
- Postal Service acted upon it by providing the benefits for all these years
- Hence it has all the attributes of a past practice which in effect has ripened into one that is binding

The Practice Has

- Clarity and consistency
- Longevity and repetition
- Acceptability
- Function / Implement silent language
- Evolved into a benefit
- Develop from choices made by the employer in the exercise of its managerial discretion
- Unilateral change

Arbitrator McCaffree in case number W0G-5G-C961

- Past practice of the clothes allowance to the SSPU Technicians at Salem Oregon became binding.
- Employer unilaterally initiated this benefit to the employees.
- The Employer discontinued the practice unilaterally where a binding past practice had been established.
- Although in some instances the employer may discontinue a 'gratuity' here the matter is a 'working condition.

The Practice Has

- Clarity and consistency
- Longevity and repetition
- Acceptability
- Function / Implement silent language
- Evolved into a benefit
- Develop from choices made by the employer in the exercise of its managerial discretion
- Unilateral change

Arbitrator Jonathan Dworkin in case C1C-4K-C18134

Practice of permitting clerks to sit in rolling chairs while distributing mail to customer boxes was ended after twenty two years.

- The practice was formed to settle a grievance.
- The Joplin Postmaster held his position for ten years before he questioned the safety of the practice.
- A benefit of employment was removed.
- The practice continued in an unbroken pattern spanning several collective bargaining agreements.

The Practice Has

- Clarity and consistency
- Longevity and repetition
- Acceptability
- Function / clarify Contract language
- Underlying reason / formed to settle a grievance
- Evolved into a benefit of employment
- Unilaterally discontinued

Jonathon Dworkin in case number C4C-4A-C1805

- Three bulletin boards had been assigned to the APWU for a long time and were always recognized as belonging to the Union.
- Management unilaterally removed the APWU bulletin boards and placed them in different locations throughout thefacility.
- Its purposes were to eliminate eye-sores and create orderliness.
- The practice was a mutual understanding between the parties on how the silent portion of Article 22 would be interpreted for that facility.
- It filled in the contractual gap, prescribing the number of APWU bulletin boards required by Article 22 for that particular facility.

The Practice Has

- Clarity and consistency
- Longevity and repetition
- Acceptability
- Function / Clarify ambiguous language

Ernest Marlatt in case number S4C-3U-C24483

- As far back as anyone could remember manual distribution clerks at the Pasadena Post Office were allowed to bring drinks to their cases and consume them there.

Management advised that beverages were are creating a problem in the work areas. And if not properly treated, would be eliminated from workroom floor.

There was no change in conditions at the Post Office which would impact on the continuation of the privilege."

- An unwritten practice in existence for a substantial period of time and is a benefit to the employees becomes part of the contract.

The Practice Has

- Clarity and consistency
- Longevity and repetition
- Acceptability
- Function / clarify Contract language
- Underlying reason / Develop from choices made by the employer in the exercise of its managerial discretion.
- Evolved into a benefit
- Unilaterally discontinued

Sarad D Jay in case number E00C4EC040185553

- Fargo post office, employees on the overtime list were contacted by telephone and offered overtime opportunities.
- In 1996 an additional phone number could be used for call-ins.

- Employees listed the bowling alley number as their second number and it was routinely used by management.
- Management notified the Union during a labor-management meeting of their intent to only list one number for overtime call-ins

The Practice Has

- Clarity and consistency
- Longevity and repetition
- Acceptability
- Function / Implement silent contract language
- Underlying reason / Develop from choices made by the employer in the exercise of its managerial discretion.
- Evolved into condition of employment
- Unilaterally discontinued

Grievance Denied !

- So you go through all of the JCIM language and management still wants to change/end the practice what do you do?

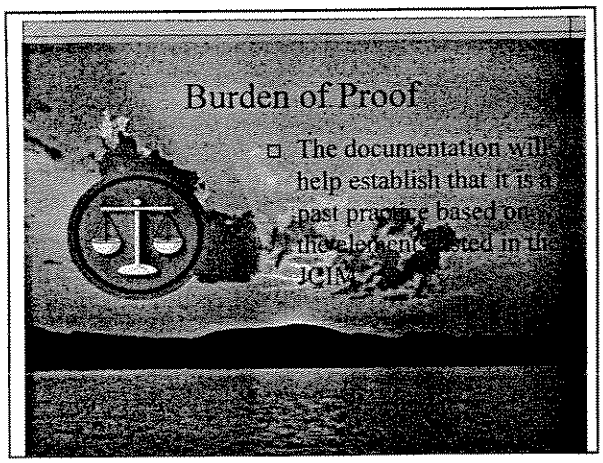
DOCUMENT,
DOCUMENT,
DOCUMENT!

Document

- How long has the practice been in place?
- Is there a clear contractual or negotiated rule regarding the practice?
- When did the practice change?
- Why did it change?
- Obtain documentation from management why the practice ceased.
- Witness statements or interviews (history)

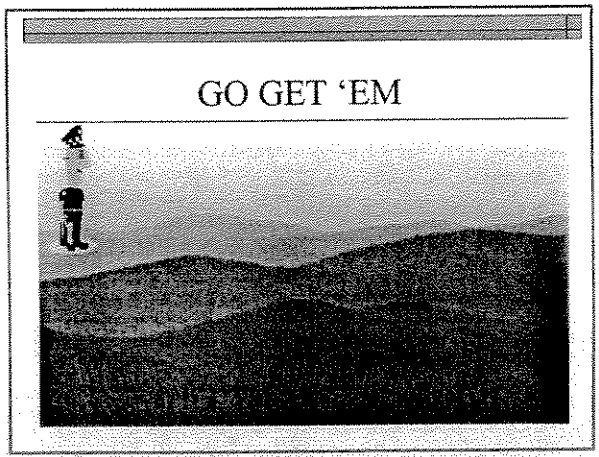
Document

- Interview senior employees/ former union stewards / retirees / other craft members
- Management interviews or statements
- LMOU provisions (if applicable)
- Labor-Management minutes / local history
- Management documents or correspondence expressing the past practice
- Proposals if bargaining took place on change
- Grievance settlements



Argument

- Show how the practice meets the elements listed in the JCIM.
- Discount any arbitration cites that do not support our theory of the case.
- Show that our arbitration cites are after the JCIM or are mentioned in those awards to support their decision in that award.



Past Practice Arbitrations

Arbitrator	Case Number	AIRS Number
Philip Parkinson	C90-C4-C93014395	23949
Kenneth McCaffree	W0G-5G-C961	21678
Johnathon Dworkin	C1C-4K-C18134	4480
Johnathon Dworkin	C4C-4A-C1805	11492
Ernest Marlatt	S4C-3U-C24483	
Sarad D. Jay	E00-C4E-C040185553	42319

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE Cincinnati, OH and AMERICAN POSTAL WORKERS UNION, AFL-CIO	CASE NO: C90C-4C-C 93014395 DATE OF HEARING: February 2, 1995 DATE OF AWARD: February 13, 1995

BEFORE

PHILIP W. PARKINSON, ESQ.

ARBITRATOR

Representing the Postal Service - Jennifer J. Laible,
Labor Relations Specialist

Representing the APWU - Wayne Bertram,
National Business Agent

I. THE GRIEVANCE

By letter dated April 22, 1992, five (5) Self Service Postal Technicians (SSPT) were informed by the Manager of Personnel Services of the Cincinnati, OH Post Office of the United States Postal Service (hereafter referred to as the "Postal Service") that action would begin to discontinue their uniform allowance as of May 1, 1992. Thereafter, a grievance was filed on their behalf on May 13, 1992, by the Greater Cincinnati, Ohio Area Local Union of the American Postal Workers Union (hereafter referred to as the "Union"). The grievance was denied at Step 1 of the parties' grievance procedure and thereafter set forth at Step 2 on their grievance appeal form. This appeal form is dated May 28, 1992 and alleges that:

> On May 1, 1992, after receiving letters on April 20, informing SSPC Technicians that their clothing allowance would be with drawn, the clothing allowances of the SSPC Technicians were with drawn in spite of having received them since the jobs inception in 1982 and 1983. Technicians are in the public eye more than four hours a day and such are required to wear a uniform, even though there is no category of SSPC Technician in the allowance program. (sic)

The grievance also contends that as a result of this action the Postal Service violated Articles 5, 15, 19, 26, and 37 of the parties' Collective Bargaining Agreement[1] and as the corrective action, they request that the clothing allowance be restored to the SSPC Technicians and that it be upgraded to include outside garments. A Step 2 meeting was held on December 10, 1992, and on December 14, 1992, the Postal Service denied the Step 2 appeal stating that the Employee and Labor Relations Manual (ELM) "does not specify Self Service Postal Technicians to receive a uniform allowance. Until such time that the ELM would be revised to include the Self Service Postal Technicians, uniform allowances will not be established or continued."

Footnote

1. AGREEMENT between the United States Postal Service and the American Postal Workers Union, AFL-CIO, 1990-1994, (hereafter referred to as the "Agreement").

Following this the Union filed exceptions to the Step 2 answer noting that the ELM at Section 931.2, et. al., lists duties of the window clerks for SSP Technicians. They point out that past practice has been clearly established over the past decade. They also felt that the following facts were not taken into consideration in arriving at the decision:

> EL 303 - Qualification Standards for Bargaining Unit Positions has the same language regarding appearance for SSPC Technicians as for Window Clerks under "ADDITIONAL PROVISIONS".

Subsequently, the Union appealed the case to Step 3 on the basis that they had received uniform allowance since the jobs inception in 1982 and 1983 and that the Technicians "are in the public eye more than four hours a day and such are required to wear a uniform, even though there is no category of SSP Technician in the allowance program." They also contend that there were violations of the Agreement and list the same provisions as in their Step 2 grievance. The Postal Service then issued a denial of the grievance at Step 3. In the Step 3 denial of September 14, 1993, the Postal Service points out that 932.11 of the ELM outlines those employees who are entitled to uniform allowance and that the SSP Technicians are not listed. Accordingly, the Postal Service denied the grievance.

The case was then appealed to arbitration and the undersigned was appointed to hear and decide the case. A hearing was held on February 2, 1995 at the Postal Facility in Cincinnati, OH. At the hearing the parties were afforded full opportunity to present evidence, both oral and written, to cross-examine the witnesses, and to argue their respective positions. At the conclusion of the hearing the record was closed.

II. BACKGROUND

Mr. Jim Ziegler has worked for the Postal Service for some eighteen (18) years. Currently he works as a Self Service Vending Technician and has worked in that position for approximately ten (10) years starting in 1984. He said that the

SSPT's are an alternative stamp source. Since the Postal Service started using machinery they service the equipment. They stock the machines and repair the machines. Mr. Ziegler said that they are both clerks and mechanics. Their duties include the whole range of the operation of the equipment, including supplying the stamps, the accounting procedures, and the monetary aspects. The machines are located in post office lobbies, major hospitals, suburban shopping centers, downtown office buildings, and other public places. He said the machines are large and have many sharp edges and that while repairing them an SSPT is constantly in different positions while working. Currently there are five (5) SSPT's servicing Cincinnati. Each of them has a certain route which they divide within the city. All of the machines that they service are in view of the public. They service machines according to the need and volume and it was his testimony that he spends about five (5) to seven (7) hours a day on his route. Currently they use a Postal Service vehicle, but in the past they used their own vehicle and even now they occasionally will use their own vehicle. Mr. Ziegler said that when working on a machine there is no way the public can identify them as a Postal employee. The five (5) SSPT's take in, in any one (1) year, about four (4) million dollars according to the witness. Mr. Ziegler pointed out that on an average week he spends two-thirds of his time in front of the public and one-third of it is in the office with the accounting end. This would include the book work, replenishing his stamp stock, etc. When he bid on the job, he said that the bid specified a uniform allowance. He stated that after the allowance was taken away from them, their station manager gave each of them two (2) shirts. The station manager "took this upon himself." Mr. Ziegler testified that he is often times approached by the public while he is at a machine. Sometimes people will question why he is taking money out of the machine because there is no way the public knows he is a Postal Service employee.

When questioned how often he gets on the floor for repairs, he said several times a month. He also noted that he has nothing with the Postal logo on his person. However, from the old uniform allowance he still has some shirts. He added that his bid position specified Window Clerk, but he does not work as a Window Clerk. When questioned why the station manager gave them two (2) shirts after the uniform allowance was discontinued, he said because they had grieved the matter. On redirect-examination Mr. Ziegler testified that when he bid the job, window work and distribution was also part of the bid, but he does not do window work. He said that occasionally he will do distribution work as needed. He estimated that the distribution work he does includes parts of two (2) or three (3) days for a total of six (6) hours in a two (2) month period.

Mr. Ronald Clark has worked for the Postal Service for twenty-nine (29) years and as a SSPT since 1984. He said that he spends on the average about six (6) to eight (8) hours a day in the public eye, four days a week. One day a week he stays in the office to count money, do book reports, etc., unless he is paged to do a repair or has some problem on a machine for that particular day. He stated that many times he has come into a lobby and sees somebody having trouble with a machine in obtaining stamps. They don't know who he is when he goes to try to help them. He also said that the clothing allowance was on the bid when he started the job. Mr. Clark testified that the station manager supplied him with two (2) shirts after they took away the clothing allowance.

It was stipulated by the parties that the Union has other witnesses available and they would say that they spend twenty-four (24) to thirty (30) hours a week in the public eye.

Mr. Richard Gargana has worked for the Postal Service for some seventeen (17) years. He is currently a Human Resources Specialist. His duties include placement and maintenance operations. He said that the designation activity code in the system that the Postal Service uses would accept a uniform allowance for a full-time clerk, but later on it was

discovered that the SSPT's were getting uniform allowances in error. The Postal Data Center in St. Louis notified them that this group of individuals were not entitled to the uniform allowance, so rather than recoup the monies they simply stopped the uniform allowance. Once they discovered the error they had a responsibility to fix it. It was his testimony that the ELM does not specify that the SSPT's are to receive a uniform allowance. He said it was not a local decision to discontinue the allowance, but it was an error that they had to fix. On cross-examination, Mr. Gargana explained that in 1980 they would send papers and mail to Minneapolis and other Data Centers and it would be keyed there, however, in 1986 they "went on line" and no longer did things manually. He now has direct access to the St. Louis Postal Data Center. The system stated that the SSPT's were not entitled to uniform allowance and that they were informed on a local basis level that they had made a mistake. Mr. Gargana further explained that the St. Louis PDC handles uniform allowance. They administer the uniform allowance and if they "goof" locally and the Data Center says you can't do this, then they have no choice-they must stop. Mr. Gargana said that the ELM states who would get a uniform allowance and anyone outside of that does not get it. He also said, on cross-examination, that they cannot over-ride the PDC System in St. Louis. He emphasized that the SSPT's had uniform allowance in error and they took it away because St. Louis said that we could not give it.

III. POSITION OF THE PARTIES

A. UNION

The Union claims that the Postal Service has violated the Agreement at Article 26, Sections 3 and 5, inasmuch as where you have programs in effect they are to be continued. They also allude to the Employee and Labor Relations Manual (ELM) at 931.21, Sub-Section (a). The Union contends that employees must present a neat appearance to the public. In this

case there are five (5) people who are in the public eye at least six (6) hours a day. They often come in contact with the public. It is important to be identified as a Postal employee more so than even a Window Clerk because when you are servicing a person as a Window Clerk, they know you have to be a Postal employee. However, if an employee is taking money out of a machine, it is important that the person is identified. The ELM condones this and also provides that an employee look professional. They also allude to the PO-102 Handbook at Section 922.4 which codifies that servicing personnel must look professional at all times. If they are excluded from uniform allowance then, according to the Union, the PO-102 is meaningless. The Union feels that uniform allowance should be given to these five (5) employees irrespective of the Postal Service's witness who thought he couldn't get it in the system. They point out that the Postal Service did not bring in the manager who made the decision to discontinue the uniform allowance and there is no evidence to show that anybody outside the office made the decision to discontinue the uniform allowance.

The Union argues that there is a long standing past practice which constitutes a binding agreement. Additionally, it was part of their bid posting and they were told that they would get a clothing allowance. They point out that since 1982 there were three (3) National Agreements negotiated and the practice was continued. The Union alludes to an arbitrator's decision which they contend is identical to the case before this arbitrator. They conclude that the practice is unequivocal, clearly enunciated and acted upon. It is a binding portion of the Agreement and cannot be taken away. The Union requests that the grievance be granted in their favor and that the clothing allowance be returned to the individuals retroactive to the date it was taken away from them.

B. POSTAL SERVICE

The Postal Service alludes to the testimony of their witness who said that originally it was an erroneous practice to provide uniform allowance. Furthermore, they said that the allegation of the grievants that the uniform allowance was part of their bid is unsupported. The ELM specifies certain categories for uniform allowance and the SSPT is not one of the employees listed. The Postal Service contends that if the parties had intended the SSPT's to receive uniform allowance they would have negotiated it. The employees were notified properly and despite the fact that the Union relies on the PO-102, they point out that this says that servicing persons should have a uniform allowance, but this does not mean that they must or will. The term should is an indeterminate word and the section furthermore alludes to the Employee and Labor Relations Manual (ELM) at section 930. The Postal Service submitted three (3) arbitration decisions in support of their position.

IV. PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE 19 - HANDBOOKS AND MANUALS

ARTICLE 26 - UNIFORMS AND WORK CLOTHES

Section 3. Uniform Entitlement Continuation

Employees who are currently furnished uniforms pursuant to the contract program shall continue to be so entitled. Such uniforms shall be issued in a timely manner.

V. OPINION

The Union believes the issue to be whether the Postal Service violated the Collective Bargaining Agreement and/or its attachments when it eliminated the long standing practice of providing clothing allowance to the SSPC Technicians and if so what is the appropriate remedy. It is noted that the Postal Service agrees that the Union has laid out the issue properly, however, the disagreement, according to the Postal Service, is whether Section 930 of the ELM provides for uniform allowance

for the five (5) employees involved in these grievances. The Postal Service points out that they do not fall into those categories which specify uniform allowance. Since it was an error, the allowance cannot continue even if it is a past practice if it violates the Agreement. On the other hand, the Union argues that these technicians meet all the criteria necessary to receive clothing allowance. They point out that they meet the public more than 50% of the time and also the nature of their work is such that they are entitled to uniforms. The Union further points out that this has been a long standing practice for more than ten (10) years that was authorized by the Postal Service.

There are several factors involved in the issue at hand which persuade me that the Union's claim for clothing allowance for the five (5) employees involved herein is a proper request. Initially and relevant to the case is the fact that these SSPC Technicians service the city of Cincinnati and, as such, they are visible in many public locations such as major hospitals, the suburban shopping centers, the downtown office buildings, and the many Postal Service lobbies. These employees are putting their best foot forward in view of the public in both servicing the stamp machines and the repair of the machines. They are highly visible and most of them spend the majority of their work week servicing their particular route in Cincinnati. It seems to me that it would be good business for the public to be aware that a person who is dealing with these machines, whether it be the monetary, the repair part or the stocking part, be identifiable to the public.

Although the Postal Service claims it was never proven that when the employees accepted the bid position, the uniform allowance was part of such bid, nevertheless it was not refuted, and the testimony appeared to be credible. Consequently, when Mr. Ziegler, for example, came on board as a SSPC Technician in 1984 and he accepted the bid for the job, his unrefuted testimony was that the bid specified uniform allowance. Subsequently, he had the uniform allowance for some eight (8)

years before the letter of April 22, 1992, which informed him that it would begin to be discontinued as of May 1, 1992. Despite this, their station manager, subsequent to the discontinuance, provided each of them with two (2) shirts. The Station Manager also made a plea on behalf of the Technicians for a restoration of their clothing allowance. In a letter to the Labor Relations Department, he stated, among other things, that "We are well aware that the SSPU's generate millions of dollars per year in Postal revenue, and requires constant maintenance along with customer interaction. I think that we should recognize that a uniform allowance for SSPU Technicians is a small price to pay for professionalism when compared to the revenue generated or the cost of a grievance." (sic)

Although the Postal Service alleges that the uniform allowance was given to the Technicians in error, such an argument is diminished when one considers that for some ten (10) years the Technicians received this allowance. This type of so called error is not one which is subtle or undetectable inasmuch as the Technicians wore on their person the benefit of the allowance, and it was well known to everyone. Consequently, one must look to Article 26, Section 3 which states that "Employees who are currently furnished uniforms pursuant to the contract program shall continue to be so entitled." The Union correctly points out that during this period of time there were three (3) collective bargaining agreements negotiated and during the same period of time the Technicians received the uniform/clothing allowance. Furthermore, there is no dispute that this benefit constituted a long standing practice. It was condoned by the Postal Service for a number of years, it was an obvious benefit that all parties were aware of, and the Postal Service acted upon it by providing the benefits for all these years. Hence it has all the attributes of a past practice which in effect has ripened into one that is binding.

The Postal Service in its defense alludes to the Employee and Labor Relations Manual (ELM) provisions. Interestingly enough, the ELM, at Section 922.41 states that,

"Servicing personnel look professional at all times since they are a representative of the Postal Service. The servicing person should have a uniform allowance in accordance with Employee and Labor Relations Manual (581.21)." The Technicians, of course, would meet the desire of the Postal Service pursuant to this requirement, i.e., that they look professional at all times if they continued to receive a uniform allowance. On the other hand, the Postal Service alludes to Section 932 of the ELM which they point out, does not include the SSPC Technicians. This section is the uniform requirements section and has a list of those employees who receive work clothes and/or contract uniforms. Although the technicians are not listed under these provisions, they likewise, are not excluded. On the other hand, the purpose in the scope of the work clothes and uniform allowance section indicates that uniforms are provided to certain employees because they provide immediate visual identification with the USPS to the public and also to project an appearance to the public which is neat, professional, and pleasing. The ELM goes on to state that work clothes are provided to certain employees, "when it is important that they be recognized and identified with the USPS, work clothes are provided for employees who work in public view." Consequently, the ELM, in this arbitrator's opinion, places these employees in a category which falls within the purview of its spirit and intent and as such, they should receive the uniform allowance.

Both parties submitted arbitrators' decisions in support of their position; however, the Union's submission of a case by Arbitrator Kenneth M. McCaffree[2] appears to be precisely what is involved in the instant case. In that case two (2) SSP Technicians had received clothing allowances for some sixteen (16) and ten and one-half (10½) years respectively and then it was discontinued. In his decision, the arbitrator granted the

Footnote

2. United States Postal Service (Employer, Service) and American Postal Workers Union, Salem (or) Area Local (Union, APWU), February 11, 1993, @ p. 7 and 8.

Union's grievance and restored the clothing allowance to the employees on the basis that there was a past practice which was binding in nature to the Postal Service. He also stated that pursuant to Section 930 of the ELM, the "Absence of any specific mention of the SSPU Technician is not crucial, because it is not among those for whom the Employer require special clothing." The arbitrator stated that, "The absence of such a listing is not a prohibition against the Technicians receiving the appropriate clothes if the Employer believes that such a practice was appropriate in certain instances." He noted that "The practice was unequivocal, clearly enunciated, and acted upon, readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties and not prohibited by written agreement between the parties." This reasoning is, in my considered opinion, logical and the case is clearly applicable to the instant situation. Therefore, for all of the above reasons, it is my determination that the five (5) employees involved herein should receive uniform/clothing allowance and consequently the clothing allowance should be restored to these five (5) Technicians. Their request that it be upgraded to include outside garments is denied. It must be pointed out that the Union specified that this case applies only to these five (5) employees who meet the criteria to receive the allowance and not to any other Technicians who may or may not have an allowance.

AWARD

The grievance is granted to the extent that the clothing allowance be restored to the five (5) SSP Technicians specified in this case.

Philip W. Parkinson

PHILIP W. PARKINSON

February 13, 1995
Washington, Pennsylvania

21290 P

REGULAR REGIONAL PANEL

FEB 16 1993

A.P.W.U.

In the Matter of Arbitration between UNITED STATES POSTAL SERVICE (Employer, Service) -and- AMERICAN POSTAL WORKERS UNION Salem (OR) Area Local (Union, APWU)	GRIEVANT: Local POST OFFICE: Salem, OR CASE NUMBER: Management: W0G-5G-C 961 Union: As above

BEFORE ARBITRATOR: Kenneth M. McCaffree
Hansville, Washington 98340

APPEARANCES FOR:
U.S. POSTAL SERVICE: Robert V. Conser
Labor Relations Representative
Portland Div., U.S.P.S.
715 NW Hoyt St
Portland, OR 97208-9410

AMERICAN POSTAL WORKERS UNION: Ron Rasmussen
National Business Agent,
APWU
6629 NE 82nd Ave., #204
Portland, OR 97220

DATE OF HEARING: January 21, 1993

PLACE OF HEARING: Salem, OR

AWARD:
Grievance sustained. Management violated the National Agreement when it rescinded the SSPU Technician employees Uniform/Work Clothes Allowance on June 28, 1991. Employer directed to make the employees whole for any lost benefits of the Clothes Allowance since June 28, 1991 and to continue such benefit at Salem Oregon Post Office until November 21, 1994 or until the parties to the Agreement shall agree otherwise.

DATE OF AWARD: February 11, 1993

Kenneth M. McCaffree

OPINION, DECISION AND AWARD

INTRODUCTION

These proceedings concerned a grievance over the elimination of a clothing allowance for two SSPU Technicians by the Employer on June 28, 1991. The Union alleged a violation of Articles 26.3, 26.5 and various sections of Handbooks and Manuals because these two employees have been provided a clothing allowance since awarded these jobs several years ago. The Employer contended that the ELM excluded the SSPU position employees from those who are entitled to a clothing allowance. When the issues in dispute could not be resolved in earlier steps of the grievance procedure, the Union appealed to arbitration and these proceedings ensued.

The parties confirmed that no issues of arbitrability existed. Accordingly, the arbitrator gave the parties full and equal opportunity to examine witnesses, offer documentary evidence, and otherwise to make known their respective positions and arguments thereon in the matters in dispute. These witnesses testified under oath: Ian Travers, SSPU Technician; Steven Pedigo, SSPU Technician; and Terrill J. Nigg, Postmaster at Albany, Oregon, previously, Manger Customer Services. The arbitrator accepted these exhibits.

J-1. National Agreement.
2. Moving papers, eight pages.
3. Ltr, Loprinzi to Humphreys, 6/27/91.
4. Ltr, Vegliante to Middlebrooks, 5/23/91.
5. Handbook PO-102, Chapter 9.
6. ELM, Section 930 Work Clothes and Uniforms.
7. Handwritten Statement by Travers and Pedigo, 8/29/91, two pages.
8. USPS Grievance Summary, Step 1.
9. Standard Position Description for SSPU Technician.

U-1. Ltr, from Schroeder on Image Guidelines, 9/28/89.
2. Step 4 Resolution re H7C-NA-C 50 and 62, 7/13/92.
3. Ltr, Neill to APWU NBA's, 7/17/90.

E-1. Ltr, Valenti to Ross and Thompson, 3/10/90, four pages.

The parties made closing oral arguments. The arbitrator tape recorded the proceedings solely to supplement his written notes.

ISSUE

Did Management violate the National Agreement when it rescinded the SSPU Technician employees Uniform/Work Clothes Allowance on June 28, 1991? If so, what is the appropriate remedy?

APPLICABLE AGREEMENT PROVISIONS

ARTICLE 26 - UNIFORMS AND WORK CLOTHES

Section 3. Uniform Entitlement Continuation

Employees who are currently furnished uniforms pursuant to the contract program shall continue to be so entitled. Such uniforms shall be issued in a timely manner.

Section 5. Program Continuation

The current Work Clothes Program will be continued for those full-time maintenance, motor vehicle and clerical employees who have been determined to be eligible for such clothing based on the nature of work performed on a full-time basis in pouching and dispatching units, parcel post sorting units, bulk mail sacking operation, and ordinary paper sacking units....

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. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

Certain parts of Handbook PO-102 and of the ELM are reproduced below as appropriate. The Union cited Sections 931.2, Purpose and Scope of Entitlements and Allowances for Work Clothes and Uniforms, and the fact that many categories of employees are granted allowance if in the view of the public for 4 hours per day, as found in Section 932 Regular Uniforms. The Employer cited lists of

assignments in Section 932 and specifically Section 932.11,.12 and .13 on the absence of SSPU Technician from those lists (J 5 and 6).

FACT SUMMARY

Employee Travers had been a SSPU Technician for over 16 years. Employee Pedigo had been one for 10.5 years. Both employees were awarded these positions through regular bidding procedures, and in both cases, the bid had indicated that a clothes allowance was included. Both employees had received clothing allowances since each was awarded the SSPU Technician position.

On June 27, the Employer advised supervisors that clothes allowance for SSPU Technicians was to be discontinued (J 2, 4). Accordingly, the supervisor of employees Travers and Pedigo advised these employees that the clothes allowance was discontinued as of June 28, 1991.

The Union grieved the Employer's decision to cancel the clothes allowance, and alleged that these employees "are in the public eye" more than 50% of their work day and also do service and repair work on vending equipment as part of their duties. The latter qualifies as "dirty work" and entitles the employee to a work clothes allowance (J 2, p 8). The Employer denied the grievance at Step 2 and contended that the ELM and Handbook 102 failed to provide such allowance for SSPU Technicians. After appeal to and denial at Step 3, the matter came to this arbitration.

Other aspects of testimony and further details in exhibits are set forth below as appropriate.

DISCUSSION

A. Positions and Contentions

1. Union. The Union claimed that the cancellation of the allowances for work clothes for SSPU Technicians was a violation of the National Agreement. According to the Union, the Agreement provides for the continuation of the clothes allowance. The

allowance has been a past practice for a long time, recognized and acknowledged by all parties. It was a part of the bid job description. In addition, the Union maintained that the SSPU Technicians met the essential criteria for work clothes allowance set forth in the handbooks. These employees worked 20 hours per week or more in full view of customers and the public. It was essential to give a positive image of the Service. Also, those employees perform off site meter settings, clean areas where machines are located, as well as service, maintain and repair the machines. The Union cited other groups who received the allowance and were in the public view no more than these technicians. Finally, the Union pointed out that the language of the Agreement at Article 26 supersedes the language in the handbooks and manuals. On this basis, the continuation of the allowances were mandated by the parties in the Agreement. The grievance should be sustained, the employees made whole, and the allowance continued for these SSPU Technicians.

2. Employer. The Employer contended that the cancellation of the clothes allowance for the technicians was consistent with the Agreement. Although the Service is concerned about its public image as reflected by employees, the Employer contended that the ELM at Sections 930 thur 938 provide for Uniform and Work Clothes Allowances for those employees in the "public eye." The SSPU Technician is not listed in the ELM as a group to receive a clothes allowance. Further among those who may receive such an allowance, entitlement depends upon employment at least half the day, or four hours per day, five days a week in the public's view. Here, the Employer contended that the work of the SSPU Technician usually removes them from public contact or view. Also this category of worker has little "dirty work" in the servicing of the self service units, even though some employees do get an allowance for work that is unusually dirty. Finally, the language of Article 26 and Handbook 102 refer to the program set out in the ELM. Thus the absence of the SSPU Technicians in the categories found in the ELM

provide a basis for the Employer to discontinue the allowance without a violation of the Agreement. The grievance should be dismissed, the Employer concluded.

DISCUSSION

I concluded that the Union position should prevail in the instant case, and accordingly I sustained the grievance. The following considerations led to this conclusion.

The crux of this issue was the long standing and mutually accepted past practice of the parties in providing a clothes allowance to SSPU Technicians at the Salem Post Office over and against the absence of any mention of the entitlement of this category of employee to a clothes allowance in the ELM or else where in the Agreement.

Clearly the past practice was recognized and accepted by both parties. The clothes allowance was made a part of the bid job description, and has been continued without interruption for over 15 years, and through the negotiation of at least five agreements. The employees affected at Salem continued to receive the allowance after the completion and effective date of the current National Agreement. In all respects, the practice must be regarded as clearly understood, followed consistently and accepted by both parties over a long period of time.

The issue focused further on the binding nature of the past practice of providing clothes allowance to these employees, in the absence of any mention expressly of the SSPU Technician in the applicable sections of the ELM. In the first place, these employees met the broad guidelines under which certain categories of workers were required to wear uniform and work clothes. The "level of visibility to the public" has substantial as provided in the ELM, Section 931.13. Although some disagreement existed between the employees and their supervisor on this matter, on balance, I concluded that these technicians were in public view the requisite number of hours per week, on a regular basis, that would ordinarily

entitle them to the work clothes allowance.[1] Employee Pedigo testified that he spent no more than three hours per day inside the post office. Although employee Travers stated that his hours in the public view varied from week to week, he alleged that on average about half was what happened. In addition, both noted that servicing meters sometimes took extra time, and in the case of a repair problem, most of a day could be spent with one of the machines at a public location.

Second, the ELM represents a regulation drafted and enforced by the Service, and once in effect, became incorporated in the Agreement through the provisions of Article 19. Here the Employer adopted certain guidelines, rules and requirements concerning uniform and clothes allowances. Section 932 is entitled "Uniform Requirements." Section 932.1 is headed "Employees Required to Wear Uniforms and Work Clothes."

Although the provision of uniforms and work clothes benefits the employee, the emphasis in Section 930 is toward maintaining an appropriate image to the public, a goal of the Service. Hence, the regulation assumes an Employer purpose in addition to the provision of a benefit to an employee. Under these circumstances, the absence of any specific mention of the SSPU Technician is not crucial. The SSPU Technician is not among those for whom the Employer requires special clothing, as the uniform of the letter carrier or that of the window clerk. But the absence of such a listing is not a prohibition against the technicians receiving the appropriate clothes if the Employer believed that such a practice was appropriate in certain instances.

The language of Article 26 leaves the above analysis

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[1] I relied here on the provisions in Sections 932.11 and .12 that called for four hours per day, five days per week, in the public view as the basis for requiring uniform and work clothes. These guidelines applied to clerks, primarily, although some motor vehicle operators were included as well. The job description of the SSPU Technician calls for work as a distribution clerk, window clerk or a combination of both, from time to time (J 9).

undisturbed. Article 26.3 requires that "employees who are currently furnished uniforms pursuant to the contract program shall continue to be so entitled." Article 26.5 provides for the continuation of the Work Clothes Program. Both of these provisions cover only those employees whom the Employer requires to wear uniforms and work clothes, and had done so previously under the uniform and work clothes program.

The past practice of the clothes allowance to the SSPU Technicians at Salem, Oregon became contractually binding under the circumstances here. The fact that the Employer may have unilaterally initiated this benefit to these employees does not necessarily give the Employer the right to cancel the allowance by its unilateral decision. Even though the Employer found that its purpose for the provision of the clothes in these cases was no longer being served, and justified the discontinuance of the practice, the Employer's decision failed to recognize the "benefit" to employees. The practice was "(1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties," and not prohibited by a written agreement between the parties.[2] Although in some instances, the Employer may discontinue a "gratuity," here the matter is a "working condition." Further, unilateral action to discontinue past practices may occur where legitimate functions of management and the methods of operation or direction of the working force are at issue. Here the past practice arose to no such level of significance. Rather, the concern was with the maintenance of an employee benefit as a nominal working condition.[3]

Accordingly, I concluded that the past practice of providing

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[2]See Elkouri and Elhouri, 4th ed, How Arbitration Works (BNA, Washington, 1985) p 439.

[3]The parties may wish to refer to Elkouri and Elkouri, op cit, at pages 440 ff. for a more extended discussion of these issues.

a clothes allowance to the SSPU Technicians at Salem became a binding condition of the Agreement and independent of the provisions of Article 26 and the ELM. The Employer was not privileged to discontinue the practice unilaterally where such a binding past practice had been established. Thus, Management did violate the National Agreement when it rescinded the SSPU Technician employees uniform/work clothes allowance on June 28, 1991.

One matter remains. Employer Exhibit 1 and Union Exhibit 2 affirms that the parties have and or are discussing revisions of the ELM. Only Employer Exhibit 1 deals expressly with the ELM, Section 930 on Work Clothes and Uniforms. This exhibit, which is a letter from the Employer to the APWU, states affirmatively that the position of SSPU Technician is "currently not entitled to a clothing allowance." Although a reasonable presumption exists that the Union has not disagreed with this statement, the matter leaves the nature and character of the binding past practice discussed above unaffected, under the circumstances of this case. The ELM and the Agreement do not prohibit the furnishing of a clothing allowance to these technicians. Accordingly, the past practice is binding and not a violation of the Agreement, nor necessarily inconsistent with it. The Employer is still bound contractually to provide the clothes allowances during the term of the current Agreement.

Obviously, a party to an agreement may not be required to continue a practice or custom beyond the term of an agreement without the parties putting the conditions of the past practice into the written agreement. Various letters and discussions, as evidenced in E 1 and U 2, serve notice to the Union that changes shall be made at the end of the current Agreement or as otherwise may be agreed between the parties in the interim. Until these eventualities, the Employer is bound by a past practice to continue the clothes allowance for SSPU Technician at the Salem Post Office.

DECISION AND AWARD

After study of the testimony and other evidence produced at the hearing and the arguments of the parties on that evidence over the issues in dispute, and on the basis of the above discussion and conclusions, I decided and award that management did violate the National Agreement when it rescinded the SSPU Technician employees Uniform/Work Clothes Allowance on June 28, 1991. Because of this contract violation, the Employer is directed to make the employees whole for any lost benefits of the clothes allowance since June 28, 1991, and to continue such benefit at the Salem, Oregon Post Office until November 21, 1994 or until the parties to the Agreement shall agree otherwise.

Respectfully Submitted

Kenneth M. McCaffree

KMM:mem

USPS - APWU CONTRACTUAL GRIEVANCE PROCEEDINGS
CENTRAL REGION
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration
Between:

THE UNITED STATES POSTAL SERVICE
Joplin, Missouri

-and-

THE AMERICAN POSTAL WORKERS UNION
AFL-CIO
Joplin, Missouri Local

Case No. C1C-4K-C 18134
APWU No. 83-M-485

Decision Issued
January 20, 1984

APPEARANCES

FOR THE EMPLOYER

John L. Richardson	Labor Relations Specialist
Charles Tyler	Superintendent
Robert A. Higgins	Joplin Postmaster

FOR THE UNION

Robert D. Kessler	National Vice President
Claud Daniels	Local President
Kent Richardson	Witness

ISSUE: Articles 3, 19, and 37 -- Postal Sevice's abolishment of past practice according to which clerks were permitted to sit in rolling chairs while distributing mail to customer boxes.

Jonathan Dworkin, Regional Arbitrator
16828 Chagrin Boulevard
Shaker Heights, Ohio 44120

BACKGROUND OF DISPUTE

Twenty-two years ago, in 1963, Management of the Joplin, Missouri Post Office issued a directive prohibiting clerks from using stools while distributing mail. The employees protested, the matter was discussed, and a settlement was achieved allowing the clerks rolling chairs of the kind commonly used by stenographers and typists. It is unclear whether the chairs were "authorized" by the Postal Service at the time; there is evidence that they may have been purchased from an official postal catalog. In any event, the Joplin clerks continued to distribute mail from these chairs for an uninterrupted period of twenty years. The practice was in place before the Postal Reorganization Act, and it remained in effect during each Collective Bargaining Agreement subsequent to passage of the Act.

In February, 1983, a Postal Service methods improvement team surveyed the Joplin Post Office and made a number of suggestions for enhancing security, safety, and efficiency. Removing the stools and requiring employees to stand while distributing to boxes were among the team's recommendations. The Joplin Postmaster complied. On March 18 he notified Tour 1 clerks that they would no longer be provided with chairs or stools in the box section.

The Union responded by initiating this grievance which demands that the chairs be returned. The Employer remained firm in its refusal, and the Union appealed to arbitration. A hearing was convened in Joplin, Missouri. At its outset, the Representative of the Postal Service stipulated that the

appeal to arbitration was procedurally correct and that the Arbitrator was authorized to issue a conclusive award on the merits of the controversy.

POSITION OF THE UNION

The Union maintains that the allowance of chairs was a binding past practice which had been in effect for two decades. The practice, it is argued, created a benefit of employment for the clerks which could not be unilaterally abolished by the Postmaster. The Union presented several arbitral decisions holding that a practice becomes an incorporated part of a collective bargaining relationship and is entitled to the same observance it would receive if it were formally drafted into the labor-management contract.

According to the Union, the concept that practices are binding and cannot be unilaterally discontinued has been universally recognized and applied by arbitrators in both private sector and Postal Service disputes. One of the representative decisions submitted on this point merits particular attention. In 1979, the Greenville, South Carolina MSC Postmaster removed stools that had been used by window clerks in several stations for more than twenty years. The resulting grievance was heard by Arbitrator Leonard V. Larson (Case No. S8C-3P-C 2752; Decision Issued December 28, 1981). In one of the stations where renovations had diminished the space behind the counter, Arbitrator Larson held that the Employer was authorized to abandon the practice because the conditions supporting it had changed. However, in stations where no such changes had occurred, he held that Management's action violated employment rights and could not stand. Arbitrator

Larson's reasoning was directly supportive of the Union's position in this dispute. He defined the nature and effect of a binding practice as follows:

> It is generally understood that while a collective bargaining contract is in effect, the employer may not, for no reason or for economy reasons only, withdraw or terminate an unwritten practice which has existed for a substantial period and which is a benefit to the employees. The practice must be consistent and of such duration that the inference is that the parties have tacitly agreed to it, if indeed they have not orally agreed to it. The practice then is a part of the whole contract, and the employees and the union can insist on its continuance during the life of the contract.

The Union urges that Arbitrator Larson's opinion is correct and that its adoption in this case requires sustaining the grievance. Moreover, it points out that Article 5 of the Agreement prohibits managerial actions which change existing conditions of employment, and it argues that this contractual statement reinforces the common understanding that practices are binding. Article 5 provides:

PROHIBITION OF UNILATERAL ACTION

> The Employer will not take any actions affecting . . . 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.

The Union acknowledges that practices which conflict with specific provisions in the Agreement are not binding. It contends, however, that no

such conflict exists here. In fact, the Union maintains that several contractual provisions are clearly supportive of its position. For example, Article 37, Section 5A of the Agreement confirms that seating for distribution clerks is an affirmative safety measure. The Section states:

> **Section 5. Anti-Fatigue Measures**
>
> A. The subject of fatigue as it relates to the safety and health of an employee is a proper subject for the consideration of the Joint Labor-Management Safety Committee as provided in Article 14 of the National Agreement. The Employer will continue to furnish adjustable platform stools for periods of sustained distribution as heretofore.

The main reason for the Joplin Postmaster's decision was the methods improvement team's determination that using chairs for distribution to boxes was unsafe. The Union contends that this determination was arbitrary and wholly unsupported. In the Union's view, experience is the best indication of safety, and the twenty-year experience in this office proves the safety of the chairs. In the entire period, there has not been a single accident attributable to their use.

In summary, the Union contends that the Postmaster disregarded what was clearly a binding past practice when he unilaterally removed chairs from the box section. His action, it is argued, was arbitrary, inconsistent with the spirit and intent of Article 37, Section 5, and in direct violation of Article 5 of the Agreement. The Union requests an award requiring the Postmaster to restore the chairs.

POSITION OF THE EMPLOYER

The Postal Service admits that no mishaps have yet occurred because of chairs in the box section. It contends, however, that Management does not have to wait for an accident before it can make safety adjustments in office procedures. It argues that the Agreement obligates local Supervision to exercise vigilance to intercept accidents before they happen -- to continually improve safety in the workplace. The Employer maintains that Article 14 of the Agreement indisputably imposes this obligation on Management and places a concomitant responsibility on the Union. Article 14 provides in part:

> Section 1. Responsibilities
>
> It is the responsibility of management to provide safe working conditions in all present and future installations and to develop a safe working force. The Unions will cooperate with and assist management to live up to this responsibility.
>
> Section 2. Cooperation
>
> The Employer and the Unions insist on the observance of safe rules and safe procedures by employees, and insist on correction of unsafe conditions. [Emphasis added]

The Employer argues that the Postmaster's decision was not arbitrary or whimsical; it was thoughtful compliance with the mandate of Article 14. Rolling chairs in the box area were unacceptably hazardous. When the methods improvement team surveyed the office, it observed that the box section was narrow, congested, and filled with employees. Carts and hampers of

mail moved in and out of the area continuously. Some employees stood at cases distributing mail while those in chairs had to move around them. The situation was dangerous and its perpetuation was regarded as an invitation to injury. According to the Postmaster, he and the methods improvement team were especially apprehensive that a rolling chair might run over the foot of a standing employee. They were also sensitive to the risks of distributing mail to boxes from a seated position. The boxes are set at heights ranging from twelve to sixty-three inches above the floor. In this respect, they cover a much greater area than letter cases where adjustable platform stools are sometimes appropriate. The platform stools are designed so that a person may sit on them while distributing mail to letter cases without bending and with minimal reaching. This protection does not exist for employees in rolling chairs at boxes. The Postmaster believed that the practice posed serious orthopedic dangers.

The Postmaster testified to reasons for his decision other than his concern for safety. He stated that the practice was inefficient. He felt that abolishing it was consistent with Article 3, Section C of the Agreement which vests the Employer with the exclusive right "To maintain efficiency of the operations entrusted to it." Additionally, the Postmaster felt that eliminating the practice would cure an inequity. In his opinion, it was unfair that some able-bodied employees were permitted to sit while others were forced to work standing throughout a tour.

In his concluding statement, the Representative of the Postal Service cautioned that sustaining this grievance would be equivalent to rewriting the Agreement. While it is conceded that the Postmaster unilaterally

abandoned a long-standing practice, it is argued that the practice was not binding. It was unsafe and, therefore, in conflict with Article 14. The Postal Service contends that, in Article 37, Section 5, the negotiators of the Agreement specified what anti-fatigue devices are permissible. The Section speaks to "adjustable platform stools" which are appropriate for use only at letter cases. Nothing in the Agreement even suggests that using rolling secretary chairs at boxes is authorized.

OPINION

It should be emphasized that this dispute does not concern the adjustable platform stools mentioned in Article 37, Section 5 of the Agreement. Those devices are for stationary distribution at letter cases, and would not be suited for distribution at boxes. In other words, this is not a case in which the Employer could be directed to reinstitute the practice by substituting authorized platform stools for the rolling chairs which the Postal Service claims are not authorized. If the grievance is sustained, the award will have to require restoration of the chairs. Neither party offered evidence of the existence of some other approved device for distributing to boxes.

In the Arbitrator's opinion, a proper decision in this case turns on the question of whether the practice claimed by the Union was binding. If it was, the Postmaster exceeded his authority by unilaterally abolishing it. A practice is a way of doing things -- a mutually recognized, repetitive response to given circumstances. It comes about through implicit (or

explicit) agreement and usually (but not always) defines a benefit or condition of employment. The Arbitrator agrees with Arbitrator Larson's concept that a binding practice is part of the "whole contract" between the parties. Once established, it is obligatory to the same extent as it would be if it were set forth in contractual language. It cannot be ignored by Management on the grounds that it is costly or inefficient any more than other negotiated benefits can be extinguished for those reasons.

Not all practices are binding. No matter how long it has existed as a mutually accepted benefit, a practice is not enforceable if it is in conflict with written contractual provisions. Practices can augment labor-management contracts; they can create benefits of employment in areas where an agreement is silent; they can define and clarify ambiguous contractual language; but they cannot alter a contract by changing its terms, rewriting or abolishing any of its provisions. A practice which contravenes a collective bargaining agreement is a nullity and may be disregarded by an employer at will.

Even a binding practice will lose enforceability under certain conditions. As stated, a practice is a mutually recognized response to given circumstances. Accordingly, when the circumstances to which a practice responds change in a material way, the practice no longer has a foundation. An example appears in Arbitrator Larson's decision discussed earlier. As noted, the case stemmed from Management's removal of stools from behind screen-line counters. Arbitrator Larson held the practice binding and enforceable in some of the affected stations. However, one of the stations had been renovated and the space behind the counter was diminished. This

was determined to constitute a material change in circumstances permitting the Employer to disregard a practice which would have continued to be binding if the change had not occurred.

It is to be observed that no evidence was presented in this dispute suggesting that changes in the Joplin Post Office caused the practice in question to lose viability. The Arbitrator was permitted to view the box section and was able to see its congestion and spatial constrictions first hand. However nothing in the record indicates that the area is any more confined than it has been throughout the twenty years the practice has existed. Conditions are the same and, therefore, unless the practice was void because of conflict with the National Agreement, it must be enforced.

The Employer contends that the practice violates three contractual provisions, Articles 3, 14, and 37.

Article 3 is the Management Rights Clause. It acknowledges the Postal Service's exclusive authority to maintain efficiency. The Representative of the Postal Service argues, in effect, that this provision implicitly grants Management the right to do away with inefficient practices. The Arbitrator disagrees. The powers of Management in Article 3 are not unbridled; they are qualified in the first paragraph which states that the rights vested in the Employer are "subject to the provisions of this Agreement and consistent with applicable laws and regulations." If one accepts the theory that binding practices are part of the "whole contract," it follows that Management cannot exercise its authority under Article 3 in such manner as to unilaterally abolish practices solely to increase efficiency.

Article 37, Section 5 is a Clerk-Craft provision which addresses anti-fatigue measures. Subsection A requires individual post offices to

"furnish adjustable platform stools for periods of sustained distribution as heretofore." The Postal Service implies that this Section is the exclusive, final word on what anti-fatigue devices are permissible under the Agreement and that distribution chairs other than platform stools are explicitly unauthorized. It follows, according to the Employer, that a practice of distributing mail from rolling chairs is prohibited. Again, the Arbitrator disagrees. Article 37, Section 5 does not state that platform stools are the only anti-fatigue devices which can be used, nor does it exclude the possibility of binding practices which provide other kinds of relief for employees. To the contrary, the A[illegible]'s implies that discovering ways to combat fatigue is a dynamic process to which the parties are committed. Subsection A begins with the statement that "[t]he subject of fatigue . . . is a proper subject for consideration of the Joint Labor-Management Safety Committee." Subsection B charges the Joint Committee with responsibility for determining "[t]he feasibility of a study of seating devices, including seats with back supports." In the Arbitrator's judgment, neither the intent nor the spirit of Article 37 is violated by the practice in issue here.

The remaining question is whether the practice conflicts with Article 14. Article 14 is the Safety provision which binds the Union and the Employer to apply themselves continually to maintain safe working conditions. The Postal Service contends that the practice of distributing mail to boxes from rolling chairs created an intolerable hazard in the Joplin Post Office. If this contention is factual, the grievance cannot be sustained. The clear language and purpose of Article 14 voids an unsafe practice. Therefore, if the Postmaster's judgment that the practice was not

safe was reasonable and factually based, he had more than the right to discontinue it; he had the obligation to do so.

Burden of persuasion is a critical aspect of this dispute. Normally, in controversies other than those stemming from discipline, the burden is upon the Union, and a managerial decision will stand unless the Union's evidentiary responsibility is met. However, this is not an immutable rule. The burden of proof characteristically shifts during the hearing of a case. Once the Union presents evidence which tends to support a grievance, the burden may be transferred to Management to explain why the grievance should be denied. This is particularly appropriate when Management has taken an action and is the only party having information necessary to justify it.

The concept of shifting evidentiary responsibilities applies in this dispute. The Union presented a prima facie case when it proved that a benefit of employment was removed by the Joplin Postmaster's sudden abandonment of a twenty-year practice -- a practice that was formed to settle a 1963 grievance. The Union's evidence confirmed that the practice continued in an unbroken pattern spanning several Collective Bargaining Agreements. The Union also stated without refutation that no accidents occurred because of the practice and, although the Arbitrator recognizes that this argument is a logical fallacy, he finds it compelling nevertheless. It is particularly persuasive in view of the fact that the Joplin Postmaster held his position for ten years before he questioned the safety of the practice.

At some point, it was necessary for the Employer to support its affirmative defense to the grievance -- that the practice was unsafe -- by sufficient evidence. The Postal Service attempted to do so through the tes-

timony of the Postmaster. He stated that the primary reason for his determination that the practice was not safe was that the methods improvement survey team told him it was not and ordered him to abolish it. The Postmaster then viewed the distribution methods from a new perspective and agreed with the findings of the team.

The Arbitrator finds this evidence insufficient. The Postmaster's statement of what the team told him was hearsay which, although admissible, was not any more persuasive than the Union's contention that the practice never caused injury. The Postal Service submitted no cogent written safety evaluation nor did it introduce a report of the methods improvement survey team to back up the Postmaster's recollection of the team's findings. Under the circumstances, the Arbitrator is not convinced that the practice is unsafe and, therefore, the grievance will be provisionally sustained.

The reason for sustaining the grievance is that the Arbitrator does not know with any degree of probability whether or not the practice is truly safe. It would be improper, in the judgment of this Arbitrator, to forever bind the Postal Service to a practice which is in fact contrary to Article 14 of the Agreement. Accordingly, the award that follows is not intended to prejudice the Employer's rights in this regard. If, in the future, the Postal Service can develop a reasonably convincing case against the safety of the practice, preferably based on the opinions of experts, it should be able to abolish the practice once again. Of course, as the parties are fully aware, another way to rid the Joplin Post Office of the practice would be through bilateral negotiations.

AWARD

The grievance is sustained because the record does not confirm that the practice of using rolling chairs to distribute mail to boxes in the Joplin Post Office is a safety hazard which violates Article 14 of the Agreement. The Postmaster is directed to return the chairs to the affected employees and to observe the practice in the same manner as it has been observed since 1963.

This award is not intended to prejudice the Postal Service's right to abolish the practice in the future if a survey, preferably by safety experts, confirms that it is not safe. In such instance, the practice would conflict with Article 14 and be invalid.

Decision Issued
January 20, 1985

Jonathan Dworkin, Arbitrator

USPS - APWU CONTRACTUAL GRIEVANCE PROCEEDINGS
CENTRAL REGION
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration Between: THE UNITED STATES POSTAL SERVICE Chicago, Illinois Bulk Mail Center -and- THE AMERICAN POSTAL WORKERS UNION AFL-CIO Chicago Bulk Mail Center Area Local	*	Case No. C4C-4A-C 1805 Decision Issued May 14, 1987

APPEARANCES

FOR THE EMPLOYER

Mary Savage	Labor Relations Representative
Orville Towner	Director, Plant Maintenance

FOR THE UNION

Percy Harrison, Jr.	General President

ISSUE: Article 22 -- Whether Management could unilaterally remove APWU bulletin boards and replace them with a centralized information area.

Jonathan Dworkin, Regional Arbitrator
16828 Chagrin Boulevard
Shaker Heights, Ohio 44120

BACKGROUND OF GRIEVANCE;
REMOVAL OF UNION BULLETIN BOARDS

The grievance protests Management's removal of APWU bulletin boards from the work area of the Chicago Bulk Mail Facility. The action, conceived by the Maintenance Manager, was not malicious or intended to harm the Union. Its purposes were to eliminate eyesores and create orderliness in what seemed a chaotic proliferation of poorly maintained bulletin boards scattered throughout the workplace. All unions were affected, not just the APWU.

The bulletin boards were not simply removed -- they were replaced. An attractive information center of glass and wood was built at the north end of the building near the entrance. It was designed to accommodate each bargaining unit's postings and Management's as well. The information area was an enclosed space surrounded by walls of bulletin boards. Standing desks in the middle added to its utility. The location was convenient to all; every employee passed it daily on the way to his/her work area.

According to the Maintenance Manager's testimony, the idea of building the structure occurred to him when several employees complained about not receiving timely information.[1] He knew from past

[1] Subsequent clarification of the testimony disclosed that the complaints were largely irrelevant. They pertained to bidding notices on Management's bulletin boards. The APWU bulletin boards at issue in this dispute were separate from Management's. They were maintained entirely by the Union and carried only Union notices.

experience that centralization of bulletin boards was a successful innovation in the South Suburban (Chicago) Post Office and thought a similar construction would correct problems at the Bulk Mail Facility. So he drew plans and issued directives to build the information center. When job was finished, he ordered removal of individual bulletin boards from workroom walls.

Three APWU boards were displaced: One was at the north end of the first floor, adjacent to the main canteen, cafeteria, and vending machines. This board was in the general area of the new information center.[2] The second was on an outside wall of the blockhouse, approximately six hundred feet south of the first. The blockhouse contains tour offices, and a small canteen. It is adjacent to the space provided for APWU conferences and central to the Union office. The third board was also on the blockhouse, about ten feet from the second. The Union used both boards; one for Clerk Craft postings, the other for Maintenance Craft.

Contending that the Manager's unilateral action modified

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[2] During the hearing, the Union conceded that the new information center is an improvement over what existed previously at the building entrance and it would be an unnecessary duplication of services to restore this bulletin board. The Union is open to relinquishing this board even if the grievance is sustained. Its demand is primarily for restoration of the other two boards removed from the blockhouse.

working conditions and constituted an actionable unfair labor practice, the Union filed a charge against the Postal Service before the National Labor Relations Board (Case No. 13-CA-25141-P). The NLRB Acting Regional Director found that the complaint was amenable to contractual dispute resolution procedures and deferred to arbitration under authority of Collyer Insulated Wire, 192 NLRB 150 (1971). The conditions for deferral were set forth in a letter of July 5, 1985, in which the Acting Director stated:

> . . . I have determined that further proceedings on this charge should be administratively deferred if the respondent promptly notifies this office, in writing, that it is willing to arbitrate the dispute which is the subject of the instant charge notwithstanding any contractual time limitations on the filing and processing of grievances to arbitration . . .

The Postal Service complied with the conditions, thereby waiving timeliness arguments, and the dispute was submitted to arbitration. The contractual issues are whether the removal of Union bulletin boards violated Articles 5 and 22 of the National Agreement and/or Sections 612.231 and 613.232 of the Employee & Labor Relations Manual (E&LR). Those provisions state in relevant part:

ARTICLE 5

PROHIBITION OF UNILATERAL ACTION

The Employer will not take any actions affecting . . . 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 22

BULLETIN BOARDS

The Employer shall furnish separate bulletin boards for the exclusive use of each Union party to this Agreement, subject to the conditions stated herein, if space is available. If sufficient space is not available, at least one will be provided for all Unions signatory to this Agreement. . . . There shall be no posting . . . except upon the authority of officially designated representatives of the Unions.

[Employee & Labor Relations Manual]

612.2 Methods

. . .

.231 Bulletin Boards serve as a means of providing information of interest to employees, such as that required by law or regulation, official management information, and items of general interest. Bulletin Boards are to be placed in locations and numbers convenient to employees - at or near employee entrances, lunch rooms, locker rooms or elsewhere in the work area. It is useful to separate board space for different types of material divided into broad categories.

. . .

> .232 . . . In addition to providing bulletin board space for management use, the Installation Head will provide bulletin board space for Union use consistent with the terms of the applicable collective bargaining agreement.

Neither the complaint before the Board nor the pending arbitration hearing dissuaded the Employer from its firm position that the change of bulletin boards was a contractually proper, legitimate exercise of Management Rights. In fact, Supervision of the Bulk Mail Center was surprised that the dispute was carried this far since the new information center was an undeniable improvement which most employees seemed to favor. The Postal Service's arguments for denying the grievance are summarized in the following excerpt from its written position statement:

> It is management's position that the Information Center was constructed for the convenience of employees by concentrating all information in one location and improving its organization, aesthetic beauty and benefit to the employees. Under the old system, bulletin boards were scattered in several locations and the display of information on all the boards was disorderly, unsightly, and required a duplication of information. Frequently, because of poor organization and duplication, employees missed information posted or occasionally complaints were received that postings were on one bulletin board and not on others. This required employees to travel from one board to another to make sure they were apprised of information needed.
>
> Therefore, considering the condition of these boards, management constructed the Information Center adjacent to the employee entrance, which was a central location. All employees must enter

and exit the facility by passing the Center, and they could be sure that all information posted is in that location. The employee would not have to search for information or find it on another bulletin board after the fact.

OPINION

Article 5 of the Agreement incorporates Section 8(d) of the Labor Management Relations Act. Section 8(d) describes the mutual duty of employers and unions to bargain in good faith and, coupled with other provisions of the Act, it prohibits unilateral changes in working conditions during the term of a collective bargaining agreement. The Union's assertion that Article 5 was violated assumes that the number and locations of APWU bulletin boards in the Bulk Mail Facility were protected employment conditions. If this contention is accurate, the Employer had a contractual and legal duty to bargain for the change; it could not properly remove the boards without Union input and consent.

The Union's position regarding the alleged unfair labor practice is certainly arguable. However, the grievance is on firmer ground in alleging that Management violated Article 22 and the explanatory E&LR language. The Bulletin Board Clause of the Agreement requires the Employer to furnish separate bulletin boards for each signatory union so long as space allows. Lack of space was

not a factor; the desire to create a more accessible and attractive posting environment was the motivation. In carrying out its purpose, Management eliminated two of the three APWU bulletin board locations. This may or may not have been contrary to E&LR Sections 612.231 and 612.232 which encourage as much posting space as will enhance the convenience of the unions. However, as the Postal Service argues, neither the Agreement nor the E&LR specifies any particular number of bulletin boards which must be provided -- neither states that a single, centralized information center is not enough.

The Postal Service's focus on the lack of a numerical standard in the Agreement points to the contractual ambiguity. It appears that the number of bulletin boards necessary to comply with Management's contractual commitment is subject to interpretation and, unquestionably, interpretations will differ from post office to post office. The size of a facility, number of bargaining-unit employees, ease of access to postings, and reasonable convenience are all factors which must be assessed. It is clear that Article 22 is not meant to incorporate nationwide uniformity. It is intentionally ambiguous.

An ambiguous contractual provision is open for clarification in several ways, one of which is through binding practice. It is unnecessary to burden this decision with a lengthy explanation of how practices come into existence and under what circumstances they

are binding. The parties are thoroughly familiar with the applicable principles. It is appropriate, however, to emphasize that a practice is really nothing more than a consensual, mutually-recognized response to given conditions. It is a way in which contracting parties implicitly agree to interpret unclear provisions of their agreement or fill in gaps resulting from contractual silence. Once a binding practice is established, it prevails and is immune from unilateral modification during a contractual term. A practice is binding if it does not conflict with express language of the agreement and so long as the conditions which support it remain reasonably static.

The Arbitrator finds that the Union's claim is supported by a binding practice. The three bulletin boards had been assigned to the APWU for a long time and were always recognized as belonging to the Union. The practice did not conflict with anything in the National Agreement. The bulletin boards were located in a work area unaccessible to the public; they did not interfere with Management's authority to preserve a sound business relationship with postal customers. There is absolutely no evidence that the bulletin boards impeded safety or diminished efficiency.

The grievance will be sustained on the finding that Management overreached its authority by changing an established binding past practice. It is important to note that the practice constituted a mutual understanding between the Union and Bulk Mail Center

Supervision on how the silent portion of Article 22 would be interpreted for that facility. It filled in the contractual gap, prescribing the number of APWU bulletin boards required by Article 22 for that particular facility. Supervision was not at liberty to change the practice without bargaining on the subject.

In his closing statement, the Representative of the Postal Service made two basic arguments for denying the grievance, both of which merit answers. He stated that Management had a sound reason for making the change and most employees approved of it.

Neither the Union nor the Arbitrator challenges the reasonableness of what the Maintenance Director did. He made the workplace more gracious and attractive. His motive was to provide a special benefit for Post Office employees, and no one can honestly say he did not succeed. But he and every other administrative employee of the Postal Service was bound by a Collective Bargaining Agreement -- an Agreement which sometimes stands in the way of legitimate managerial goals. The dilemma is not unique. If one subscribes to the Reserved Rights of Management Doctrine, s/he necessarily believes that all right of control is vested in the employer except as it is circumscribed by contract. In other words, labor-management contracts grant rights and privileges to employees by taking the power to deny those rights away from management. The fact that an agreement fosters some inefficiencies and decentralizes control is an inherent, unavoidable reality. It

does not license an employer to ignore its commitments or to violate its bargain. Moreover, the Arbitrator is really not authorized to weigh the good resulting from the supervisory action at issue. He is empowered only to determine whether it was contractually permissible.

The contention that the grievance should be denied because most employees favored the change, is so contrary to the fundamental principles of collective bargaining that it should be dismissed out of hand. Employee approval or disapproval was starkly irrelevant to the issues of this dispute. While rank-and-file membership may have an interest in this grievance, it is not a party to it. The parties are the United States Postal Service and the American Postal Workers Union -- the Union which is legally and contractually recognized as the exclusive representative of the Unit. Management had no authority to negotiate for removal of the bulletin boards with individual employees, and it is absurd to regard employee approval as a sound basis for denying the Union's grievance. If the Arbitrator were to adopt that argument as materially supporting the Postal Service's position, his decision would stand out as irresponsible.

AWARD

The grievance is sustained in its entirety. The Postal Service is directed to restore the APWU bulletin boards which were unilaterally removed when the Information Center was constructed.

In the hearing, the Union expressed willingness to relinquish its right to the bulletin board previously located at the north end of the building, adjacent to the canteen. The Arbitrator makes no decision on this offer. It is an appropriate subject for bargaining. The Union may be willing to give up one bulletin board and to change the locations of others. These are subjects upon which the Employer may bargain if it choses.

This decision is based upon the finding that the Postal Service unilaterally breached a binding past practice which constituted a mutual clarification of ambiguities in Article 22 of the Agreement. As such, the award stems strictly from contractual interpretation. The elements of the Union's Unfair Labor Practice Complaint previously filed before the National Labor Relations Board have not been addressed.

Decision Issued:
May 14, 1987

Jonathan Dworkin, Arbitrator

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE and AMERICAN POSTAL WORKERS UNION, AFL-CIO	§ § § § § § § § §	Class Action Pasadena, TX S4C-3U-C 24483

BEFORE ARBITRATOR
ERNEST E. MARLATT

APPEARANCES

For the U.S.P.S: Mr. Ralph Harrison, Labor Relations Assistant

For the Union: Mr. Rudy Perez, Jr., National Business Agent

BACKGROUND OF THE CASE

The above grievance came on for hearing before the undersigned arbitrator on April 25, 1988, at the Post Office, Pasadena, Texas. Post-hearing briefs were waived by the parties.

On February 14, 1986, Postmaster Harry L. Bennett posted a policy letter addressed to all main office mail processing employees, which stated,

> Effective with the posting of this notice, there will be no food or drink allowed on the workroom floor at any time, before tour, after tour or duing tour.

The Union filed a timely grievance against this policy, alleging that it was a unilateral change in past practice. Although the grievance itself cites Articles 3c, 15, and 19 of the National Agreement, these provisions do not appear to be in point and the real basis for the grievance is of course 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.

The material facts are not substantially in dispute. The evidence indicates that as far back as anyone could remember, manual distribution clerks were allowed to pick up drinks during their breaks or before clocking in and carry the drinks to their work stations and consume them there. This privilege was not extended to window clerks or machine clerks, for obvious reasons, but the letter carriers were (and still are) allowed to bring drinks to their cases before going out on the route.

From time to time, this practice caused concern on the part of management. As early as October, 1982, at a joint labor-management meeting, the Union was advised that "coffee and cokes are creating a problem in work areas. If not properly treated, will be eliminated from workroom floor." About three months following this meeting, the Postmaster sent a more detailed memo to all employees noting that "we are now experiencing a problem with employees bringing excessive amounts of the above mentioned items onto the workroom floor at all times of the day, sometimes in glass containers."

Apparently the problem of containers which were breakable or too large was resolved. However, in the early summer of 1985, the Postmaster again decided to abolish the privilege of bringing beverages to the clerks' work stations, and the Union filed a grievance, Local No. 267-85 (S4C-3U-C 10451). The parties reached a somewhat tentative agreement at Step 3 that:

> The past practice of allowing employees to bring drinks on the workroom floor at the beginning of the tour shall continue until such time that local management allows for union input, provides

> a business reason why the practice must cease and give[s] a reasonable advance notice when the practice will cease.

This apparently did not work out, and about three months later the Postmaster signed a letter reciting that although an agreement had been reached with the APWU to allow manual distribution clerks to bring their coffee or drinks on the workroom floor, this agreement would terminate on December 31, 1985. The Union continued to discuss grievance No. 267-85 (which also appeared to concern itself with breaks during overtime) at the local level. The Postmaster responded to the grievance with a letter dated January 24, 1986, addressed to the local union president, Bobbie Chambers, setting out in more detail his reasons for opposing the bringing of drinks to the cases:

> I have talked to the maintenance employees and supervisors and find that there are numerous half-full cups, cans and other sundry containers on top of cases, in the pigeonholes and cases, on tables, belts, etc.

This statement was corroborated by Mr. Robert Preston, Superintendent of Maintenance, who testified that he had personally seen drinks left at the cases after the clerks had clocked out, or spilled on the mail or on the floor or leaking out of trash cans.

The Postmaster thereupon posted the policy change which was quoted at the beginning of this opinion. No resolution having been reached in the grievance steps, the case was certified to arbitration.

DISCUSSION AND CONCLUSIONS

An unwritten practice which has existed for a substantial period and which is a benefit to the employees becomes a part of the National Agreement itself and cannot unilaterally be changed by the employer during the life of

the Contract unless some change in operations makes the practice impossible, unsafe, or inefficient. See, for example, the analysis of past practice by arbitrator J. Earl Williams in SIC-3F-C 2799 (1984). A violation of the practice is a violation of the agreement.

A similar case arose in Humble, Texas, involving the letter carriers, S8N-3U-C 35787. Arbitrator John F. Caraway held that the Postal Service was bound by the long standing practice to allow the carriers to pick up beverages and snacks and consume them at their work stations. He did add by way of dicta that management had the right to abolish a practice "where it interferes with normal operations and good housekeeping" and it is perhaps this loophole that management relies upon in the present case. I would disagree, however, that "good housekeeping" is a sufficient basis to eliminate a practice which has contractual status. Management may avoid or correct abuses of "good housekeeping" by instructions at stand-up safety meetings and, if necessary, by disciplinary action against employees who violate these instructions. There is no compelling business reason to deprive the entire work force of a privilege just because it is capable of abuse by one or two careless employees.

The Postal Service made no attempt to deny that there was a long-standing practice at the Pasadena Post Office allowing manual distribution clerks to bring drinks to their cases and consume them there. The employees were only allowed to pick up their drinks during breaks, so there was no evidence of any loss of productive time. Nor is there any evidence of changed conditions at the Post Office which would impact on the continuation of the privilege.

It might be argued (although the Postal Service did not so contend) that the past practice is no longer binding because it was abolished by management prior to the negotiation of the 1987 National Agreement. Since this argument was not presented, I need not address it except to comment that the Union's right to contest the abolishment of the privilege should not be cut off merely because a new contract was negotiated at the national level while this grievance was pending.

However, this opinion should not be construed to hold that the existing practice is carved in stone for all perpetuity unless and until it is abolished by mutual agreement. The Postmaster, if he chooses, can give notice of intention to abolish the privilege contemporaneously with the expiration of the the existing contract. The Union then has a right to file a grievance concerning such action, since a grievance is defined in Article 15 as any "dispute, difference, disagreement or complaint between the parties related to wages, hours and conditions of employment." Thus, even though this is not one of the topics which is locally negotiable under Article 30, the parties may always bargain and negotiate for a grievance settlement at Step 2, and any such resolution will be binding upon both parties so long as it is not inconsistent or in conflict with some specific provision of the National Agreement. If they are unable to reach mutual agreement, the dispute may proceed to Step 3 and ultimately to arbitration.

AWARD

Manual distribution clerks at the Pasadena Main Post Office shall continue to be allowed to bring beverages to their work stations upon reporting for work and following breaks, during the life of the 1987-1990 National Agreement.

Nothing herein shall be deemed to prohibit Management from issuing reasonable and necessary rules to insure good housekeeping and safety in connection with beverage items carried to or consumed at work stations, and to take disciplinary action against employees who violate such rules.

Ernest E. Marlatt
Arbitrator
P. O. Box 130199
Houston, TX 77219

May 5, 1988.

Archie E. Salisbury
[illegible] REGION
[illegible], AFL-CIO
Suite 1231 [illegible] 1321 Union Ave.
[illegible] 38104

MAY [illegible]

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	)	Grievant: Class Action
between	)	Post Office: Fargo, ND
UNITED STATES POSTAL SERVICE	)	USPS Case No. E00C-4E-C 04018553
and	)	APWU Case No. 88JD3803
AMERICAN POSTAL WORKERS UNION, AFL-CIO	)	

BEFORE: Sara D. Jay, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Thomas Elias, Labor Relations Specialist
For the Union: Willie Mellen, National Business Agent

Place of Hearing:	Fargo, ND
Date of Hearing:	March 10, 2005
Date of Award:	April 9, 2005
Relevant Contractual Provisions:	Articles 5 and 8
Contract Year:	2000-2005
Type of Grievance:	Contract

Award Summary

The grievance filed on behalf of the Fargo, ND, main branch challenging the change in overtime phone number policy effective October 1, 2003, is granted. As to timeliness, the Union is not obliged to grieve an anticipated action of management before that action occurs. The action was promptly grieved following its implementation, and is therefore timely. As to the refusal to permit employees to continue to list a second telephone number for overtime calls, the Union demonstrated the existence of a binding practice allowing such listing on request. The Employer did not change the practice for demonstrable reasons of efficiency or by negotiated agreement. Thus, the Employer violated the Agreement and the JCIM by unilaterally changing the practice, and is ordered to reinstate the practice.

Sara D. Jay, Arbitrator

Introduction

The hearing in this case was held on March 10, 2005, at the Postal Facility located at 657 Second Ave., Fargo, North Dakota, before Sara D. Jay, who was duly appointed by the parties from their panel to render a final and binding decision in this matter. At the hearing, both parties were given a fair and equal opportunity to present their respective cases. The arbitrator accepted exhibits into the record; witnesses were sworn or affirmed and testimony was subjected to cross-examination. Closing arguments were made orally on March 10, 2005, on which date the record is deemed closed.

Issues

The parties did not agree on a statement of the issue, asking the arbitrator to frame the issues. As presented through evidence, the issues are:

> Is the grievance procedurally arbitrable? If the grievance is arbitrable, was there a past practice of permitting employees to list a second telephone number for purposes of the overtime desired list and did the Employer violate the terms of the Agreement and the JCIM by terminating that practice? If so, what shall the remedy be?

Relevant Contract Provisions

Article 5. Prohibition of Unilateral Action

> The Employer will not take any actions affecting wages, hours and other terms or conditions of employment ... which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

Article 8. Hours of Work

> *Section 5.C.1*
> *a.* When during the quarter the need for overtime arises, employees with the necessary skills having listed their names will be selected in order of their seniority on a rotating basis.

b. Those absent or on leave shall be passed over.

Other Relevant Provisions

Local Memorandum of Understanding, 2000-2003

Item 14G. Agreement for Calling In Overtime
Management will follow the overtime desired list in exact rotation even though a clerk has pre-approved annual leave scheduled or is coming back from annual leave .... All clerks will be asked if they want the overtime ....

Additional sections of the Agreement, as well as portions of the Joint Contract Interpretation Manual, (JCIM) have been cited by the parties, and will be examined in the body of the decision.

Factual Background

At the Fargo main post office, overtime is allotted primarily according to a voluntary system under which employees request being listed on the "overtime desired list." Employees on the list are called in rotation, according to the terms of a Local Memorandum of Agreement (LMOU). The employees on the list are contacted by telephone and offered the overtime opportunity. Beginning in 1996, a few employees asked that a second telephone number be listed for occasions when they were not available at the first number. For the most part, these second numbers were cell phone numbers, which were less common in 1996. At a later point, probably in 1999, a number of the employees began participating in a morning bowling league prior to the beginning of their tour. They advised the Employer of the phone number of the bowling alley, and asked to be contacted at that number during the mornings of their participation. The Employer used the bowling alley number to contact the employees for overtime opportunities on a regular basis. Since 1996, some employees have had a second number listed. The number has ranged from one up to six employees in a unit of up to 67 on Tour 1 as of November 2003, in addition to the approximately seven bargaining unit members listed as using the bowling alley.

On one occasion in 2003, the Employer failed to reach an employee by calling only his alternate number, resulting in his being omitted from the offer of an overtime opportunity. The employee grieved the omission. The grievance was settled on a non-precedential basis. As a result of the grievance, new local management examined the use of a second number for the overtime desired list.

On September 10, 2003, at a Labor Management meeting, the Employer raised the issue of phone numbers for overtime opportunities. Minutes of that meeting state: "Management would like to have only one number listed for each employee. Union stated that if this is done, all employees must be informed that they need to decide what number they want called." Union representatives present at the meeting stated that they objected to the change, but understood that the change was not open to discussion. The minutes do not record any negotiation of the change in practice, or any discussion beyond that quoted above.

The change to a single phone number was made effective October 1, 2003. The Union initiated a class action grievance on October 14, 2003. The grievance was denied at Step 1, with management stating that the grievance was untimely and that management had never agreed to add more than one phone number to calling lists. The matter has been duly processed through the grievance steps, and is now presented for arbitration.

Positions of the Parties

Position of the Union

The Union takes the position that Management's change in the practice of permitting a second number violated the Agreement. In support of its position, the Union cites the JCIM's past practice section, stating that the practice of permitting a second number meets the criteria for establishing a past practice. The Union asserts that the JCIM controls the method of changing a past practice, and that the Management has failed to comply with the required method. Management has

failed to either bargain or change the underlying contract language, the Union states. In particular, the Union points to language in the JCIM which bars a change in practice by new personnel if the reason is that they do not like the practice. Citing various arbitration awards, the Union states that Management has failed to change the practice according to the means agreed by the parties, and that the change thus violated the Agreement.

In response to Management's assertion that the grievance is untimely, the Union answers that a threat cannot be grieved, but only the event when it occurs. The event did not occur until October 1, 2003, when the change was implemented. Additionally, the Union suggests that the failure to call a second number is a continuing violation, reoccurring each time an employee who preferred having two call numbers is not called. In support of this contention, the Union cites awards by Arbitrators Aaron, Mittenthal and Snow.

As a remedy for the violation, the Union requests restoration of the practice. The Union further requests that all represented employees be made whole, including but not limited to the appropriate missed overtime opportunities.

Position of the Employer

The Employer takes the position that the grievance is untimely. According to the Employer, the Union was notified on September 10, 2003, that the practice would be changed, and no grievance was filed within 15 days. The labor-management meeting minutes do not reflect any statement by the Union that it would grieve the change, but only reflect a request that employees be given the opportunity to select a preferred telephone number. The Union may have been on notice even prior to that time, the Employer states, as it raised problems with the second telephone number at the time the earlier grievance was filed in August 2003.

On the merits, the Employer takes the position that there was no binding practice regarding the use of additional phone numbers. Management began calling the bowling alley as a favor to the employees involved in the league. As soon as management realized that the Union believed

management had to call a second number, it ended the practice. As to individual employee listings of a second number, the Employer notes that very few employees used the option of having a second number, and few have indicated they would be inconvenienced by elimination of the ability to list a second number. The practice has been used seldom and inconsistently, the Employer states. In further support of its position, the Employer notes that Article 8 does not contain any language requiring the listing of a second phone number to notify employees of overtime, nor does Item 14 of the MOU. There have been no requests to add the second number to the MOU, the Employer states.

Even if there is a practice, the Employer asserts that the practice was properly changed or altered. The basis for the practice has been changed due to the difference in conditions, in part due to the increase in cell phone availability and use. It would be impractical to continue the practice so as to allow all employees to have a second number to be called; the list could not be timely finished so that employees would be available to work overtime promptly when needed. The Employer asserts that it changed the practice properly according to contractual procedures, to any extent it was required to do so.

Discussion

Timeliness

A threshold issue in this case is whether the grievance was timely initiated under the provisions of the Agreement. The Agreement requires that a grievance by the Union be "initiate[d] ... within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance." Article 15, Section 2, Step 1 (a). The Employer has argued that the Union was or should have been aware that the change would be made to the overtime calling list as of September 10, 2003, from the discussion at the labor-management meeting. Thus, a grievance filed on October 14, 2003, was untimely.

Ordinarily, a Union is not expected to grieve an action until it is actually taken. This is

because management still may change its position until the decision is actually implemented. Particularly where a change in policy is involved, a Union which grieves upon announcement of a pending decision but prior to implementation risks being advised that its grievance is premature. Only after the Employer makes an actual decision will the parties know how and whether the decision will be applied.

Arbitrator Frances Penn has found that "decisions to be made in the future and actions to be taken at a later time" do not begin the time limitations for filing a Step 1 grievance. *APWU and USPS*, Case C7S-4S-C 27600 (April 8, 1991). On similar facts, she found that a decision to implement was sufficient to allow the Union to grieve, and that it need not wait until actual harm from the decision could be shown.

Because it is decided that the grievance was timely based on the October 1, 2003 implementation date, it is not necessary to examine the Union's contentions that this is a continuing grievance.

On the Merits

The substantive dispute here centers on whether there was a binding past practice and, if so, whether it was properly terminated. The nature of a past practice has been defined by these parties through their Joint Contract Interpretation Manual (JCIM), Article 5. While other definitions and reference may be available, these parties have agreed that the JCIM is controlling. As to the existence of a past practice, the JCIM adopts the classic definition of Arbitrator Richard Mittenthal, given at a meeting of the National Academy of Arbitrators. Summarily stated, Arbitrator Mittenthal wrote that a past practice must have clarity, consistency, longevity and repetition, and mutual acceptability. He also wrote that there are different functions of a past practice. Some exist to implement contract language, some to clarify ambiguous language, and some to implement separate conditions of employment where the contract is silent.

Here, the contract is silent on how employees are to be contacted for overtime. The LMOU

requires that overtime opportunities be filled "in exact rotation," language which implies but does not state that management is to make at least reasonably diligent efforts to contact the employee who has the opportunity. There is no reference in the national agreement or the LMOU to means of contacting the employees. Thus, there is no latent ambiguity to be interpreted. *Contrast, USPS and APWU,* Case No. J90C-4J-C 95036189 (Edwin Benn, 1995). In that case (Benn Award), the arbitrator found a latent ambiguity in a contract provision that requests for annual leave shall not be "unreasonably refused." He further found that the Union had not shown a practice of granting leaves when there were four or fewer employees on leave, but had shown a practice of granting leaves liberally, and that management had unilaterally changed the past practice in violation of the agreement. In defining the past practice, Arbitrator Benn used the criteria cited by Arbitrator Mittenthal for the NAA of clarity, consistency and longevity.

In this case, the practice was unequivocal, clearly enunciated & acted upon over a number of years. Permitting employees to list a second telephone number for overtime calls at their request has taken place since 1996. This practice took place consistently over a reasonable period of time, seven years, and was a fixed practice accepted by both parties. While only a small number of employees participated in the practice, there has been no instance shown of a person requesting a second number listing and being refused. There have also been no instances shown in which an employee asked for more than two numbers to be listed. There have been no breaks in the practice prior to 2003, showing consistency and longevity. The practice was consistent even though it was not widespread.

A past practice does not need to have the participation of every member of the unit to be a known and consistent practice. *See,* Benn Award, *supra.* A practice arises by taking place consistently, in more than a negligible number of instances, with knowledge and consent of both parties. Here, both parties were well aware of the practice of including an alternate number to reach employees when those employees so requested, singly or as a group.

Defining a practice sometimes is problematic, as in the Benn award. In another example,

USPS (Ann Arbor) and APWU, Case C1C-4B-C 7458 (Linda DiLeone Klein, 1983)(Klein Award), the Union claimed a practice of allowing five minutes to wash up before lunch and five minutes before the end of shift had been established; Management claimed that the past practice was to allow a reasonable time, without defining that time specifically. Based in part on statements made by a supervisor that wash-up time prior to the end of tour would "no longer" be allowed, Arbitrator Klein found that the practice was to allow five minutes wash-up time.

In this case, it has been demonstrated that there was a consistent practice of adding a second number to the overtime desired list on request, whether the request was made by an individual or by a group. The evidence contradicts the suggestion that calling a second number was an intermittent favor done for selected employees. The second number was added to the list, and remained as a part of the list until changed or removed. The practice is to add a second number to the overtime calling list, upon the request of the employee or group of employees.

Once a past practice has arisen, it becomes part of the contract, and can only be changed as the contract could be changed. For these parties, the JCIM provides for changes in the past practice. Where, as here, the contract is silent and the past practice has implemented a separate condition of employment, Article 5 of the JCIM provides in pertinent part as follows:

> 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 engage in good faith bargaining over the impact on the bargaining unit...
> 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....
> 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.

The JCIM statement is in accord with prior arbitration awards such as that of Arbitrator Rodney Dennis, *USPS and APWU* Case NIC-IE-C-25157 (1985)(Dennis Award), who found that a past

practice concerning break times could not be change because no bargaining had taken place. The JCIM, which seeks to synthesize prior awards and arbitral views, may have drawn from the award of Jonathan Dworkin, *USPS and APWU,* Case No C1C-4K-C 18134, APWU No. 83-M-445 (1984), in rejecting the Service's rationale for terminating a past practice for alleged safety reasons, as no safety dangers had been substantiated. *See also, USPS and APWU,* Case No. S4C-3U-C 24483 (Eugene Marlatt, 1988)(unwritten practice cannot be changed during contract unless change in operations makes the practice impossible, unsafe, or inefficient).

Here, the Employer has suggested that there are changed circumstances justifying a change in the prior practice. With increased use and availability of cell phones, it is suggested that it will place an unreasonable burden on supervisors to make additional calls to contact employees for overtime. However, an increased burden was not demonstrated. First, not all employees have or will want to use a second number. No significant increase in demand was shown. In fact, the Employer stated that too few employees were engaged in the use of a second telephone number for a true practice to exist. Second, it appears that the practice adds to, rather than detracting from, efficiency. Multiple employees can be reached simultaneously by continuing to use the bowling alley contact number. From credible testimony of one employee, it seems that cessation of the practice may actually have increased the burden in reaching employees. That employee testified that after the change, she received three messages on her home telephone offering overtime, when she could have been reached directly by using her second number, providing the supervisor with a faster response. Lastly, it is not likely that the burden will be increased. The practice is to allow addition of a second phone number; there was no evidence or request that the practice be re-defined to allow employees to add an unlimited amount of additional phone numbers. Thus, there will be no "parade of horribles" in which a supervisor must call three or four numbers per employee, adding significant time to the attempts to reach the next listed employee for overtime.

The Employer's decision to change the policy did not occur because of any inconvenience or outside report causing it to doubt the efficiency or safety of the practice. Contrast, Dworkin Award

(methods improvement team objected to stools; past practice found binding and no safety problem shown). There is no evidence, or even a suggestion, that it was taking too long for management to contact employees for overtime due to too many number listings. The change in phone number overtime listing was apparently prompted by an individual grievance and a change in management who was unaware of prior history. If this was a basis for the policy change, it would not demonstrate changed circumstances within the meaning of the JCIM, but contravenes it.

If management wishes to change a practice, the JCIM gives the procedure, requiring notice and bargaining. In this case, management gave notice it was considering a possible change. However, no bargaining took place. At best, there was a misunderstanding as to whether management was willing to engage in good faith negotiations about the practice. The Union believed that an announcement had been made of a management decision, and the Union made the practical request that employees be allowed to choose the phone number to be listed, if they were to be limited to one number. This exchange does not suggest bargaining took place.

In closing, it is noted the Union requested that employees be made whole. The facts of this case make it very difficult to show injury to any individual employee, thus it is impossible to order a make-whole remedy. The remedy is therefore limited to ordering that the practice be reinstated.

Date: April 9, 2005

Sara D. Jay, Arbitrator

Understanding Past Practice

Exercises

UNDERSTANDING PAST PRACTICE
THE UNWRITTEN CONTRACT

Arbitrator Parkinson in case number C90C-4C-C93014395 discusses past practice relative to a uniform allowance. Arbitrator Parkinson states at page 9, "Although the Postal Service alleges that the uniform allowance was given to the Technicians in error, such an argument is diminished when one considers that for some ten (10) years the Technicians received this allowance. This type of so called error is not one which is subtle or undetectable inasmuch as the Technicians wore on their person the benefit of the allowance and it was well know to everyone." and Arbitrator Parkinson continues on page 9, "Furthermore, there is no dispute that this benefit constituted a long standing practice. It was condoned by the Postal Service for a number of years, it was an obvious benefit that all parties were aware of, and the Postal Service acted upon it by providing the benefits for all these years. Hence it has all the attributes of a past practice which in effect has ripened into one that is binding." And arbitrator Parkinson quotes from arbitrator McCaffree which is our next cite.

In case number W0G-5G-C961 Arbitrator McCaffree teaches about past practice and also on a uniform issue. The arbitrator states at page 8: "The past practice of the clothes allowance to the SSPU Technicians at Salem Oregon became contractually binding under the circumstances here. The fact that the Employer may have unilaterally initiated this benefit to these employees does not necessarily give the Employer the right to cancel the allowance by its unilateral decision. Even though the Employer found that its purpose for the provision of the clothes in these cases was no longer being served, and justified the discontinuance of the practice, the employer's decision failed to recognize the "benefit" to employees. The practice was '(1) unequivocal; (2) clearly enunciated and acted upon, (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties,' and not prohibited by a written agreement between the parties. Although in some instances the employer may discontinue a 'gratuity' here the matter is a 'working condition'. And the arbitrator continues at page 8, "I concluded that the past practice of providing a clothes allowance to the SSPU Technicians at Salem became a binding condition of the Agreement and independent of the provisions of Article 26 and the ELM. The Employer was not privileged to discontinue the practice unilaterally where such a binding past practice had been established."

The above cases are similar in that the ELM did not provide for uniforms but both arbitrators granted the grievance because a binding past practice had been established.

In case number C1C-4K-C18134 Arbitrator Jonathan Dworkin discusses past practice and a unilateral action or removing the practice. The Postal Service abolished the practice of permitting clerks to sit in rolling chairs while distributing mail to customer boxes. The practice was in place before the Postal Reorganization Act and it remained in effect during each Collective Bargaining Agreement subsequent to the passage of the Act. The clerks in the Joplin Post office continued to distribute mail from these chairs for an uninterrupted period of twenty two years. Arbitrator Dworkin states at page 7, "In the arbitrator's opinion, proper decision in this case turns on the question of whether practice claimed by the Union was binding. If it was, the Postmaster exceeded his authority by unilaterally abolishing it. A practice is a way of doing things -- a mutually recognized, repetitive response to given circumstances. It comes about through implicit (or explicit) agreement and usually (but not always) defines a benefit or condition of employment. The arbitrator agrees with Arbitrator Larson's (case number S8C-3P-C2752) concept that a binding practice is part of the 'whole contract' between the parties. Once established, it is obligatory to the same extent as it would be if it were set forth in contractual language. It cannot be ignored by management on the grounds that it is costly or inefficient any more than other negotiated benefits can be extinguished for those reasons." And Arbitrator Dworkin continues at page 11, "The concept of shifting evidentiary responsibilities applies in this dispute. The Union presented a prima facie case when it proved that a benefit of employment was removed by the Joplin Postmaster's sudden abandonment of a twenty-year practice - - a practice that was formed to settle a 1963 grievance. The Union's evidence confirmed that the practice continued in an unbroken pattern spanning several collective bargaining agreements. The Union also stated without refutation that no accidents occurred because of the practice and, although the Arbitrator recognizes that this argument is a logical fallacy, he finds it compelling nevertheless. It is particularly persuasive in view of the fact that the Joplin Postmaster held his position for ten years before he questioned the safety of the practice."

Jonathon Dworkin in case number C4C-4A-C1805 the arbitrator discussed past practice with bulletin boards. Management unilaterally removed three APWU bulletin boards and placed them in different locations throughout the Chicago Bulk Mail Center. The actions of the Maintenance Manager, was not malicious or intended to harm the Union. Its purposes were to eliminate eye-sores and create orderliness in what seemed to be chaotic and poorly maintained bulletin boards scattered throughout the work place. The arbitrator states as page 8, 'The arbitrator finds that the Union's claim is supported by a binding practice. The three bulletin boards had been assigned to the APWU for a long time and were always recognized as belonging to the Union. The practice did not conflict with anything in the National Agreement. The bulletin boards were located in a work area inaccessible to the public; they did not interfere with management's authority to preserve a sound business relationship with postal customers. There is absolutely no evidence that the bulletin boards impeded safety or diminished efficiency. The grievance will be sustained on the finding that management overreached its authority by changing an established binding past practice. It is important to note that the practice constituted a mutual understanding between the Union and Bulk Mail Center Supervision on how the silent portion of Article 22 would be interpreted for that facility. It filled in the contractual gap, prescribing the number of APWU bulletin boards required by Article 22 for that particular facility. Supervision was not at liberty to change the practice without bargaining on the subject.

In case S4C-3U-C24483 Ernest Marlatt, the evidence indicates as far back as anyone could remember, manual distribution clerks were allowed to pick up drinks during their breaks or before clocking in and carry the drinks to their work stations and consume them there. In a joint labor-management meeting the Union was advised that "coffee and cokes are creating a problem in work areas. If not properly treated, will be eliminated from workroom floor." Arbitrator Ernest Marlatt talks about past practice and states at page 3; "An unwritten practice which has existed for a substantial period and which is a benefit to the employees becomes a part of the National Agreement itself and cannot unilaterally be changed by the employer during the life of the contract, unless some change in operations make the practice impossible unsafe or inefficient...a violation of the practice is a violation of the agreement." And the arbitrator continues "The postal service made no attempt to deny that there was a long-standing practice at the Pasadena Post Office allowing manual distribution clerks to bring drinks to their cases and consume them there. The employees were only allowed to pick up their drinks during breaks, so there was no evidence of any loss of productive time. Nor is there any evidence of changed conditions at the Post Office which would impact on the continuation of

the privilege."

In case number E00C4EC040185553 AIRS No. 42319 arbitrator Sarad D Jay, at the Fargo main post office, overtime list employees were called in for OT according to the terms of the LMOU. Employees on the list were contacted by telephone and offered overtime opportunities. In 1996 employees asked if they could list a second phone number for call-ins. Most employees used cell phones as a second number, sometime in 1999 employees who belonged to the bowling league listed the bowling alley number as their second number. The Postal Service contacted employees for OT at the bowling alley number on a regular basis. In 2003 management notified the Union during a labor-management meeting of their intent to only list one number for overtime call-ins. The change was made effective October 14, 2004. Arbitrator Sarad D Jay discusses past practice at page7, "The nature of a past practice has been defined by theses parties through their Joint Contract Interpretation Manual (JCIM, Article 5. While other definitions and reference may be available, these parties have agreed that the JCIM is controlling. As to the existence of a past practice, the JCIM adopts the classic definition of Arbitrator Richard Mittenthal,...Summarily stated, Arbitrator Mittenthal wrote that a past practice must have clarity, consistency, longevity and repetition and mutual acceptability. He also wrote that there are different functions of a past practice....implement contract language,...clarify ambiguous language,... implement a separate condition of employment." Arbitrator Sarad discussed that the practice was unequivocal, clearly enunciated & acted upon over a number of years. This practice took place consistently over a reasonable period of time and a showing of longevity.