REGULAR LABOR ARBITRATION PANEL

C# 10827

IN THE MATTER OF THE ARBITRATION

BETWEEN

UNITED STATES POSTAL SERVICE
("SERVICE" or "EMPLOYER")

AND

AMERICAN POSTAL WORKERS UNION,
AFL-CIO ("UNION")

GRIEVANT

DONALD BONDICK

POST OFFICE
Rockford, Illinois 6115

USPS Case No.
C7C-4A-C 21728

Arb. No. 90/079

OPINION AND AWARD

BEFORE: ELLIOTT H. GOLDSTEIN, ARBITRATOR

APPEARANCES:

On Behalf of the U.S. Postal Service:

Leo F. Stoltz, Labor Relations Programs Analyst, Senior

On Behalf of the Union:

John R. Clark, National Business Agent

DATE OF HEARING: Thursday, September 13, 1990

PLACE OF HEARING: Main Post Office
5225 Harrison Avenue
Rockford, Illinois 61125

DATE OF AWARD: Friday, September 28, 1990

AWARD: For the reasons stated in the attached Opinion and Award, incorporated herein as if fully rewritten, the grievance is sustained in its entirety.

Elliott H. Goldstein

ELLIOTT H. GOLDSTEIN
Arbitrator

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I. PERTINENT CONTRACT AND HANDBOOK AND MANUAL PROVISIONS

ARTICLE 1
UNION RECOGNITION

Section 1. Unions

The Employer recognizes each of the Unions designated below as the exclusive bargaining representative of all employees in the bargaining unit for which each has been recognized and certified at the national level:

* * * *

American Postal Workers Union, AFL-CIO - Postal Clerks

* * * *

ARTICLE 5
PROHIBITION OF UNILATERAL ACTION

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

* * * *

ARTICLE 15
GRIEVANCE-ARBITRATION PROCEDURE

Section 1. Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Unions which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

Section 2. Grievance Procedure-Steps

Step 1:

* * * *

(b) In any such discussion the supervision shall have authority to settle the grievance. The steward or other Union representative likewise shall have authority to settle or withdraw the grievance in whole or in part. No

resolution reached as a result of such discussion shall be a precedent for any purpose.

* * * *

Step 2:

* * * *

(e) Any settlement or withdrawal of a grievance in Step 2 shall be in writing or shall be noted on the standard grievance form but shall not be a precedent for any purpose, unless the parties specifically so agree or develop an agreement to dispose of future similar or related problems.

* * * *

Step 3:

(b) The grievant shall be represented at the Employer's Regional Level by a Union's Regional representative, or designee. The Step 3 meeting of the parties' representatives to discuss the grievance shall be held within fifteen (15) days after it has been appealed to Step 3. Each party's representative shall be responsible for making certain that all relevant facts and contentions have been developed and considered. The Union representative shall have authority to settle or withdraw the grievance in whole or in part. The Employer's representative likewise shall have authority to grant the grievance in whole or in part. In any case where the parties' representatives mutually conclude that the relevant facts or contentions were not developed adequately in Step 1, they shall have authority to return the grievance to the Step 2 level for full development of all facts and further consideration at that level. In such event, the parties' representatives at Step 2 shall meet within seven (7) days after the grievance is returned to Step 2. Thereafter, the time limits and procedures applicable to step 2 grievances shall apply.

* * * *

(d) The Union may appeal in adverse decision directly to arbitration at the Regional level within twenty-one (21) days after the receipt of the Employer's Step 3 decision in accordance with the procedure hereinafter set forth; provided the Employer's Step 3 decision states that no interpretive issued under the National Agreement or some supplement thereto which may be of general application is involved in the case.

* * * *

(f) Where grievances appealed to Step 3 involve the same, or substantially similar issues or facts, one such grievance to be selected by the Union representative shall be designated the 'representative' grievance. If not resolved at Step 3, the 'representative' grievance may be appealed to Step 4 of the grievance procedure or to arbitration in accordance with the above. All other grievances which have been mutually agreed to as involving the same, or substantially similar issues or facts as those involved in the 'representative' grievance shall be held at Step 3 pending resolution of the 'representative' grievance, provided they were timely filed at Step 1 and properly appealed to Steps 2 and 3 in accordance with the grievance procedure.

Following resolution of the 'representative' grievance, the parties involved in that grievance shall meet at Step 3 to apply the resolution to the other pending grievances involving the same, or substantially similar issues or facts. Disputes over the applicability of the resolution of the 'representative' grievance shall be resolved through the grievance-arbitration procedures contained in this Article; in the event it is decided that the resolution of the 'representative' grievance is not applicable to a particular grievance, the merits of that grievance shall also be considered.

* * * *

Section 3. Grievance Procedure - General

A. The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end.

* * * *

Section 4. Arbitration

A. General Provisions

* * * *

6. All decisions of an arbitrator will be final and binding. All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator.

* * * *

C. Regional Level Arbitration - Expedited

* * * *

3. The hearing shall be conducted in accordance with the following:

* * * *

f. the arbitrator may issue a bench decision at the hearing but in any event shall render a decision within forty-eight (48) hours after conclusion of the hearing. Such decision shall be based on the record before the arbitrator and may include a brief written explanation of the basis for such conclusion. <u>These decisions will not be cited as a precedent</u>. The arbitrator's decision shall be final and binding. An arbitrator who issues a bench decision shall furnish a written copy of the award to the parties within forty-eight (48) hours of the close of the hearing.

4. <u>No decision by a member of the Expedited Panel in such a case shall be regarded as a precedent or be cited in any future proceeding, but otherwise will be a final and binding decision.</u>

(Emphasis supplied - Jt. Ex. 1)

Also cited as having possible relevance to the resolution of this dispute are parts 511.2 through 511.43 of the Employee and Labor Relations Manual (ELM) (Jt. Ex. 3). These parts deal with the issue of leave and determinations of when absences should or should not be characterized as scheduled or unscheduled. In the interest of brevity, the sections are not set forth in full but merely referenced.

II. STATEMENT OF THE ISSUE

As more fully developed below, the parties sharply disagree as to the precise issue to be presented to me in this case. The Union claims that the issue is "whether the Employer violated the National Agreement and related handbook regulations by recording Grievant Bondick's September 30, 1989 absence as an 'unscheduled absence;' if so, what shall be the remedy?"

The Employer, on the other hand, urges that the issue before the Arbitrator is as follows:

> "Is there a binding past practice by which Step 3 settlements in the U.S.P.S. Central Region are agreed to, using non-precedential non-citeable language, and is the instant case arbitrable on the merits?"

According to the Employer, two further questions must be answered in order to determine the ultimate issue of arbitrability. These are:

> "1. Whether the conduct of the parties prior to arbitration makes the case moot or creates an estoppel of some sort which bars arbitration on the merits; and
>
> 2. Whether it is possible to have differing binding past practices in the different regions of the U.S.P.S. so that the Employer is entitled under the National Agreement to insist that settlements of grievances at Step 3 in the central region, as governed by past practice, include the customary "non-precedent, non-citeable" language unless there is a specific mutual agreement by the Step 3 representatives of each party?"

III. STATEMENT OF THE CASE AND CONTENTIONS OF THE PARTIES

The grievance (Jt. Ex. 2) complains of the Employer's decision to mark the absence of Grievant Donald Bondick on September 30, 1989 as an unscheduled absence as opposed to a scheduled absence. The remedy demand was that the absence be changed from an unscheduled to scheduled absence. The parties stipulated at hearing that local Management changed the absence in question from "unscheduled" to "scheduled" after the receipt of the Step 3 decision in this matter (Jt. Ex. 2, p. 2). Further, the parties stipulated at the arbitration that there is also no dispute over the facts stated in the grievance chain, as will be more fully developed below.

At issue in this case is the impact of the refusal of the Step 3 Union designee, Leo Persails, to agree to and place a signature on the Step 3 settlement agreement proffered and signed by Step 3 Management designee, Alexis Knighton, on January 23, 1990.

On that date, according to the testimony of Knighton, Persails agreed with her that the Employer's offer of a settlement, the terms of which were that the disputed absence would be changed from unscheduled to scheduled, satisfied both the Grievant and the Union on the merits. Persails insisted, however, that the settlement agreement was restrictively conditional in that the written offer of settlement contained the following:

> "As a final and complete settlement of the subject grievance and without prejudice to the position of either party in this or any other case, and with the understanding that this

settlement shall not be cited by either party in any other grievance proceedings or in any other forum, the following management decision has been arrived at: ... "

(Jt. Ex. 2)
(hereinafter the "boiler plate" language)

Persails refused to agree to that provision in this particular case, arguing that a grievance is not finally and completely settled without the mutual agreement of the parties. In this instance, he stated, he would not agree that any final or complete settlement of the subject grievance would be without prejudice to either party nor that it should be non-citeable by either party in any other grievance proceeding or in any other forum.

Employer witness Knighton testified she believed that Persails was required by past practice to accept this "boiler plate" language used in an extremely high percentage of Step 3 Settlements in the central region of the U.S.P.S. Accordingly, the settlement was issued by her using the language quoted above in the written Step 3 decision. Management has construed the written document (Jt. Ex. 2, p. 2) as a settlement agreement, even without the Union's signature. The original remedy requested, that is the demand that the absence be changed from unscheduled to schedule, was, as noted above, granted and implemented. However, APWU business agent Persails appealed the grievance to arbitration, insisting that no settlement had been mutually agreed to and that a final and binding award on the merits was both proper and required.

Both prior to and at this arbitration hearing, the Union insisted that the "Employer's conditional Step 3 decision" and

its agreement to change the absence in question to a scheduled absence constituted a tacit acknowledgment of violation of the National Agreement at the time local Management made the decision to mark the Grievant's absence on September 30, 1989 as an unscheduled absence. The Union argues that Grievant provided adequate notice to the Service about his inability to work overtime on that Saturday, September 30, 1989, a non-scheduled day, on the day before and supervision accepted his excuse at that point and approved the absence before the fact. That should have satisfied the Employer, and, in compliance with the applicable sections of the ELM referenced above, the absence should have been considered "pre-approved" or scheduled.

The Union forthrightly indicated that it was seeking an arbitration of the current dispute to establish that it was under no obligation in any grievance to agree at Step 3 to what Management claims is binding "boiler plate language." It does not concede that by past practice, "the boiler plate" has become a part of Step 3 settlements in the central region. The Union insists that the Employer is attempting to limit the scope of the remedy requested at Step 3 by unilaterally insisting upon two conditions: (1) that all central region Step 3 decisions and settlements be issued "without prejudice to the position of either party in this or any other case;" and (2) that these decisions "should not be cited by either party in any other grievance proceedings or in any other forum."

The Union points out that it did not agree to these two limiting conditions at Step 3 in this case. There is no

justification, therefore, for Management's argument that the case is settled or that it can unilaterally impose terms of a settlement not mutually agreed upon based on any claim of past practice. Since the so-called settlement agreement was void and of no effect, this case was never settled, and it was appropriate for the Union to appeal the case to arbitration, it urges. It is obvious, argues the APWU, that the case is not moot; the unilateral issuance of the Step 3 decision under the limiting conditions outlined above certainly constitutes an adverse decision which was timely and directly appealed to arbitration at the appropriate level pursuant to Article 15.2, Step 3 (d), it concludes.

The Postal Service argues that it has the right to rely on a past practice which has existed for many years in the central region of using the boiler plate language set forth above. This established past practice is enforceable and binding on the parties, Management insists. Under Article 15 of the National Agreement, there is no language spelling out whether Step 3 settlements are citeable or have precedential value, concedes the Service. However, the Employer argued, the parties have adopted an interpretation for the central region that the "boiler plate" language will be used in all Step 3 settlement agreements unless it is mutually agreed to delete that paragraph from the Step 3 central region settlement form.

The Service points to a prior decision at the National level (Case No. N8-NAT-0006, July 10, 1979, Richard Mittenthal, Arbitrator) as precedent for regional past practices under the

National Agreement. In that case, Arbitrator Mittenthal concluded that the parties to the National Agreement may be bound by practices with respect to Step 3 meetings as they develop in each of the five regions of the U.S.P.S.

The Employer thus contends in this dispute that all the requirements of a binding past practice are present with regard to the use of the "boiler plate" language on Step 3 settlements for the central region and that it had a right to rely on the practice in this particular case. See also Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements" Proceedings of the 14th Annual Meeting of the National Academy of Arbitrators (Washington BNA Books, 1961). Accordingly, pursuant to the binding past practice, the settlement by Step 3 Management Designee Knighton was appropriate and the remedy granted and implemented pursuant to it concluded the case as a matter of fact. The grievance should be dismissed.

The Postal Service therefore also argues that the case before me is moot, since the remedy demanded at Step 1 and Step 2 was fully granted pursuant to the Step 3 decision. It is to be remembered, Management emphasizes, that the only remedy requested at both Steps 1 and 2 was the simple change of the September 30, 1989 absence from "unscheduled" to "scheduled". Under the National Agreement, the Union could only appeal to arbitration "an adverse decision at Step 3." There was no adverse decision since the sole remedy at issue has been fully implemented. That fact is not altered by the Union's unilateral refusal to sign the settlement agreement in the form dictated and required by past practice.

It should further be noted, Management stressed, that the Employer proceeded to this arbitration under protest and has not waived the claim of mootness. On the merits, once there was an agreement to change the categorization of the absence from "unscheduled" to "scheduled", the case was settled. The Service also strongly suggested that, since the Union cannot add to its demands for a remedy beyond the Step 2 stage of the proceedings, the entire claim regarding the scope of the settlement agreement is not properly before me, and is effectively new argument and a new demand for a remedy in violation of the contractual requirements. The Employment additionally alleges bad faith on the Union's part, since both parties are under a contractual obligation to settle cases at the lowest possible level and the Union violated that responsibility by attempting to appeal a mooted case, properly settled at Step 3 pursuant to the binding practice, to Arbitration.

Therefore, Management prays that the grievance be dismissed.

IV. FACTUAL BACKGROUND

The sole witness presented at hearing was Alexis Knighton, Labor Relations Specialist for the Employer. Knighton testified regarding two primary points: her discussions with National Business Agent Persails at the Step 3 meeting and also her knowledge of the scope and duration of the past practice claimed by Management to exist at the central region of the U.S.P.S. regarding the use of the "boiler plate" language provision quoted above for Step 3 central region settlements.

With reference to the specific case before me, Knighton specifically testified that she and National Business Agent Persails discussed the matter at issue on the merits and came to an agreement that the absence at issue should be changed from "unscheduled" to "scheduled". However, according to Knighton, Persails disagreed with the use of the "boiler plate" language in this particular case. Knighton further stated that Persails and two other national business agents have, since late 1989, refused in certain cases to follow the binding practice when confronted with the settlement agreement which contain the "non-citeable, non-precedential language". She asserts that there are now approximately 200 cases in the system, to her knowledge, where these three APWU national business agents have refused to agree to "boiler plate"; have accordingly refused to accept settlements; and have appealed to arbitration these cases which Management believes have been properly and finally settled at Step 3.

While Knighton acknowledged during cross-examination that prior to 1989 there were cases settled in the central region without the use of the disputed language quoted above, she testified that these were "rare exceptions based upon specific and mutual agreement of the parties to delete the normal language contained in the third step settlement form." See Union Exhibits 2 and 3. Knighton indicated in her testimony that these "exceptional" cases often involve reoccurring grievances at the same facility, though when pressed by the advocate for the Union as to other possible reasons for a mutual agreement to delete the

"non-citeable, non-prejudicial" language, Knighton stated that she could not recall the specifics in any of the documents presented in Union Exhibits 2 and 3.

Most of the rest of Knighton's testimony related to the scope and extent of the claimed practice under discussion. Employer witness Knighton indicated that she had worked for the labor relations section at central region for a total of seventeen years, starting as a secretary/stenographer. She has been a labor relations specialist for nine years, and has been a Step 3 Management Designee for that entire time. Over the nine years in which she handled Step 3 discussions in some capacity, Knighton testified that she has handled thousands of cases. She stated that when she joined the central region labor relations staff in 1973, the Step 3 decisions and settlements already had the same "boiler plate language" under discussion in this case. That was under the 1971-1973 National Agreement, Knighton testified.

It was the further testimony of Employer witness Knighton that all the national business agents from the NALC and APWU who met with her as Union Step 3 Designees for the last nine years followed the practice of using the boiler plate language for most settlement agreements, as a normal and routine matter. She named several representatives of both the APWU and NALC who adhered to this practice. She also explained that the language at issue is used in pre-prepared forms, and that these forms have existed since she joined labor relations at the central regions seventeen years ago as a secretary.

The Employer introduced through Knighton Employer Exhibit 1, an "office profile" of the central region giving a breakdown of the numbers and kinds of cases appealed to Step 3 in this region during the bulk of the term of the current collective bargaining agreement, that is from July 21, 1987 through September 12, 1990. According to Knighton, as verified by Employer Exhibit 1, there were 24,104 contract appeals taken to Step 3. 8,542 of these contract grievances were settled at Step 3. It was the testimony of Knighton that roughly 8,300 of these cases were settled using the standard, routine boiler plate language quoted above. She also suggested that three APWU national business agents began to reject the "boiler plate" in late 1989, as national business agent Persails did in this case. To Knighton, however, the non-citeable, non-precedential terms of the standard form are now part of the Step 3 process, by the practice of the parties. Persails had no right to reject the settlement offer without her express agreement, she insisted.

To illustrate further the extent of the claimed practice, the Employer had marked for identification Employer Exhibit 2, a box of "boiler plate settlements" used for demonstrative purposes at the hearing. The settlements contained in that box were divided into four piles, three of which contained the "boiler plate" settlement forms, by year. The fourth pile -- obviously much the smallest -- contained a sample of the 200 cases where three APWU national business agents refused to use the form settlement language, Knighton claimed. To both Knighton and the

advocate for the Postal Service, the visual disparity between the various piles clearly illustrates the scope of the claimed practice, that is, that in virtually all Step 3 settlements, the boiler plate language has been accepted by the APWU and NALC as a routine part of the process. 1/

The last Employer exhibit proffered into the record through Employer witness Knighton was Employer Exhibit 3, the standard APWU withdrawal form, which includes verbiage indicating that the use of the form to withdraw a case by the Union was with the reservation that such withdrawal was "without establishing precedent and without prejudice to the position of the American Postal Workers Union in this or any other case ...." According to Knighton, that form is just as much a part of the routine

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1/ Although the APWU advocate objected strongly to the use of any documents contained in Employer Exhibit 2 as evidence for demonstrative items, I permitted the use of these settlement agreements solely for the purpose the Employer indicated. The basis of the Union objection was that the "non-citeable, non precedential" language on each precluded any use whatsoever of the pieces of paper in an arbitration case. The Union effectively argued that for purposes of this case, documents that had been made "non-citeable" could not be deemed to exist. However, Management responded that the documents were not being offered to prove anything about any individual case, but only as a general matter to prove the scope and wide-spread nature of the use of the forms at issue as the method to effectuate Step 3 settlements. On that basis, I permitted their use solely for demonstrative purposes.

However, as will be more fully developed below, I now agree with the Union that the 1000s of individual contracts of settlement were made non-citeable and precluded from use both individually and in the aggregate by the express agreements of these parties contained in each settlement. Therefore, the claim of a "past practice" based on the existence of these documents is in many ways a logical impossibility. That is the fatal defect in the Employer's theory of this case. I so find.

system of settlement within the grievance procedure as the Step 3 management settlement form containing the "boiler plate language" at issue. A Management rejection of that form would likewise violate past practice, and was not something Knighton believed Management could do, she testified.

As noted above, the Union did not present any witnesses at the hearing of this case. However, it did proffer into the record fifteen Union exhibits which were admitted into evidence by me. Union Exhibit 1 was a Management Instruction dated October 1, 1983 regarding attendance control. That document related to the merits of the underlying dispute. Union Exhibits 2 and 3, as discussed above, were group exhibits reflecting Step 3 settlements in the central region where "boiler plate" language was not used.

Union Exhibit 4 reflected ten additional settlements at Step 3 in the central region without the provision containing the "non-precedent" language, although these additional settlements involved business agents reporting to the "western region" of the APWU. As both parties agreed, one geographic area of the U.S.P.S. central region which was for a number of years formerly included in its western region is still administered by APWU national business agents reporting to the western region of the APWU. According to the APWU, the western region does not use the "boiler plate" language and national business agents from that region have <u>never</u> been required to do so since the area was transferred to the central region. Management does not dispute that assertion.

Union Exhibits 5a through e reflect excerpted portions of the 1975 through 1987 National Agreements. The Union emphasized that the 1978 National Agreement contained a substantial revision in the grievance procedure (Article XV), including making actions at Step 1 and Step 2 have no precedent value. Other changes in 1978 were the requirement that the nature of the claimed violation and remedy demand had to be fully set out at Step 2 and that there was to be no additions or changes permitted after that point in the process, as the Employer emphasized with regard to its mootness argument.

Union Exhibit 6 is Management's labor relations reporter dated September 20, 1979 discussing the 1978 Agreement. In that document, according to the Union, it is expressly set out that a Step 3 decision "can be used" as a precedent for resolving other grievances. The Union argues this indicates Management's express acknowledgment that a Step 3 decision is a binding precedent, despite the lack of a particular provision to that effect in Article 15, Step 3 Sections 2(b) and (c), the contract clauses involved in this case.

Union Exhibits 7 through 9 are group exhibits from the southern, eastern and northwestern regions reflecting Step 3 settlements without the boiler plate language under discussion. The parties stipulated these regions do not use the "boiler plate" language in Step 3 settlements.

Union Exhibit 10 is a central region "Step 3 precedent" settlement dated April 22, 1985 which changes the absence from unscheduled to scheduled absence on an overtime schedule for an

employee on the overtime desired list, argues the Union. This should be dispositive of the dispute on the merits, the Union urges. The Union argues this is an example of an enforceable and mutually agreed Step 3 settlement such as is demanded for this current case, and that Union Ex. 10 should be admitted as evidence in the current case on the merits.

The Employer, on the other hand, contends that the introduction of Union Exhibit 10, out of context and without the file which should accompany it, is the very basis for the development and use of a form containing the "non-citeable, non-precedential" language for Step 3 settlement adopted in the central region. It should not be admitted by me or given any weight.

Union Exhibits 11, 14 and 15 are precedent arbitration awards formally presented into the record by the Union. Union Exhibit 11 contains four arbitration decisions relating to the scheduled and non-scheduled absence issue. Union Exhibit 14 contains five awards dealing with issues of arbitrability, mootness and the use of Step 3 settlements as precedent. Union Exhibit 15 includes four awards, each containing a discussion of the meaning and application of a past practice which the Union argues shows the Employer's claim of a binding practice regarding the "boiler plate" language to be wrong.

Last, the Union presented into evidence Union Exhibit 12, an excerpted portion of Black's Law Dictionary, 5th Ed. (1979) and Union 13, an excerpted portion of Elkouri & Elkouri, How Arbitration Works (4th Ed. 1985). Union Exhibit 12 contains a

dictionary definition of the term "moot". Union Exhibit 13 contains portions of Chapters 5, 9 and 12 of the Elkouris' treatise dealing respectively with the grievance procedure, standards for interpreting contract language, and custom and practice. The Union contends these exhibits further support it in its claims that the case is not moot and that there is no practice of using the "boiler plate" language form, as the Employer has argued.

Although not entered as formal exhibits by Management, the Employer proffered to the Arbitrator six precedent arbitration awards, including the National Interpretative award in Case No. NA-NAT-0006, Richard Mittenthal, Arbitrator, cited above. These awards dealt in broad terms with the nature of past practice, the ability of a particular postal region to develop a past practice regarding Step 3 procedures, the contractual requirement that all remedies sought be finalized at Step 2 and not later expanded upon, and the legal doctrine of mootness. In line with Management's contentions, these awards do indicate that settlements at Step 3 do not necessarily carry any implication of an admission of a violation (Case No. C7C-7C-4J-C 10092, James P. Martin Arbitrator); and that, by Step 3, there is "required a full statement of facts and remedy sought" at the prior step, permitting no later expansion beyond Step 2 (Case No. SIN-3P-C 16591, Robert W. Foster, Arbitrator).

It was upon these facts that the instant case came before this Arbitrator for final and binding resolution.

V. DISCUSSION AND FINDINGS

This is a complex and difficult case. This Opinion and Award does not purport to recite in full all the arguments submitted by the advocates for each party and the many sources or authorities to which reference has been made. This is a troublesome case to me and I understand its importance to the parties. I have been helped by the able advocacy of the representatives of each party. The omission of reference to any argument should not be construed as a lack of due consideration but only as an acceptance of the fact that certain arguments have greater direct pertinence to my final decision in this case.

After careful consideration, I find for the Union on both crucial points that are really the basis for the current dispute. First, I conclude that the case is not moot because of a binding settlement nor is it moot because the only remedy requested at Step 2 was fully granted and implemented by the Step 3 decision/settlement (Jt. Ex. 2, p. 2).

I also conclude that the Employer is incorrect in its claim that there is an established and binding past practice requiring the inclusion of the "boiler plate" language in the normal settlement agreement form at Step 3 in the central region, absent mutual agreement to do so. My reasons are as follows.

A. THE MOOTNESS QUESTION AND THE ABILITY OF THE UNION TO APPEAL DESPITE THE IMPLEMENTATION OF THE ORIGINAL REMEDY REQUESTED.

The Postal Service is correct in pointing out that under Article 15, the parties have committed themselves at Step 2 to developing a full and detailed statement of facts relied upon by both sides, the contractual provisions involved, and remedy sought. It is important for everyone involved in the administration of the grievance procedure under the National Agreement to understand what this provision represents. As I see it, this provision presents a clear commitment that no new facts, theories or amendments or changes in the remedy can be presented after the opportunity for corrections or additions at the conclusion of Step 2 has elapsed. See Article 15, Section 2; see also Case No. SIN-3P-C 16591, Robert W. Foster, Arbitrator and Case No. C8N-4A-C 12232, William Haber, Arbitrator.

According to Management, it was the Union who added a demand for a new remedy, much broader in scope than what was presented at the lower levels, during the third step discussions testified to by Employer witness Knighton. It was also the Union that refused the settlement, when the full remedy actually requested at Step 2 was granted and then actually implemented, the Service argues. Once that remedy was offered as the basis for a full and complete settlement, and Management proceeded to implement it after the Union's refusal to sign off on the Step 3 settlement, there was a final resolution on the merits, the Service insists. Consequently, there is nothing left of the grievance which requires any arbitrator to make a judgment, given the procedural

posture of the case. This is a classic case requiring the application of the mootness doctrine, the Employer strongly argues.

I find that if the Union were required to make a demand for a remedy that it could not achieve at Steps 1 or 2 in order to preserve the demand for later in the grievance process, a real impediment to settlement in the manner the parties intended would be created. This is especially true when the demand for remedy made by the Union relates and should relate to the merits of the underlying dispute. The implications of the act of the parties in settling at any point in the grievance process are analytically separate and apart from the merits of the claim. The question of whether a settlement can be used as a precedent relates to an interpretation of the contract that is distinct from the specific merits of the dispute. It is a question of interpretation of the contract not related at all to the merits of this case.

That obvious fact, of course, causes the Employer to contend that the Union acted improperly in appealing the instant case to arbitration over the issue of the propriety of the form of settlement Management offered at Step 3. To the Employer, since what is involved is really a question of contract interpretation distinct from the actual grievance, a separate grievance was required to be filed to press the claim that what Management and the Union had done over at least seventeen years in the central region was not in full compliance with the National Agreement.

That is another source of the claim that the case is moot or not appropriately before me for resolution.

The problem, of course, is that it is the Employer that is adding the conditions for settlement at Step 3. In a sense, Management is presuming the correctness of its argument that a binding past practice exists in the first instance and controls this case. To the Employer, it is not the party who is adding anything new at Step 3, of course. All that is happening is that it is proffering a Step 3 form containing the same provisions as it always has. The Union is apparently acting to expand the remedy, to raise a contractual issue having nothing to do with the merits and not properly preserved during the prior steps, it urges. In order to agree with that logic, however, I must conclude that there is a binding past practice making the language used in the "routine" form a mandatory part of the process. In a sense, then, the Employer is inextricably intermixing the merits of the past practice claim and its assertion that the mootness doctrine applies. Its reasoning is circular.

I believe such an analysis is simply inappropriate. It is to be remembered that the Union has added nothing in writing to its remedy request, as I understand this case. The APWU demands that the remedy be to change "unscheduled" to "scheduled" at some point in the process. By application of the contract, if the change had been made at Step 1 or Step 2, the settlement agreement or change would have no precedent value, except, at Step 2, if the parties specifically mutually agreed to make it a

precedent. That much should not be subject to dispute. Whatever would happen at Step 3, absent the "boiler plate" language in the settlement, would also be by operation of the National Agreement, the APWU argues. It has not added a thing to its demand for a remedy.

I find the Employer, not the Union, is the active party demanding something beyond what the contract requires and is "adding" to the process at Step 3. It wants the effect of this Step 3 settlement spelled out in writing, after all. The Employer, in a sense, has not "added" to the remedy, but instead seeks to narrow and condition it by a separate contract of settlement, I find. Still, it is the party which seeks to condition the impact of the remedy and define beyond what the contract has to say what the remedy itself means. I so find.

Therefore, quite separate and distinct from the Employer's implementation of the remedy on the merits, I find the Union had a right to appeal the case for a resolution by an arbitrator. It was not the party asking for anything extra unless past practice required the form's use. It merely demanded compliance with the proposed remedy as set out at Step 1 and Step 2, without conditions for a limitation beyond whatever the contract provided for of any Step 3 settlement. There is no basis to find any improper expansion of the remedy by the Union on these facts. I so hold.

Second, does the fact that the remedy requested at Step 1 was fully implemented after the alleged settlement "moot" this case, as the Service also asserts. I think not. It is to be

remembered that the Employer never formally granted the grievance. It based the implementation of the change from unscheduled to scheduled directly on the Step 3 "settlement" and decision. It continued to assert that the Step 3 "settlement" was made with the "boiler plate" language setting two crucial conditions. Therefore, it views the "settlement" and the remedy to effectuate that settlement as not a precedent and not citeable.

Mutuality is always an essential element under this contract for any settlement, unless the operation of some other factor, such as a binding past practice, mandates a finding of constructive mutuality. That is what the Employer's theory of the case in fact presupposes. The issue of whether that claim is correct or not is thus not moot. The granting by Management of the specific remedy, with the conditions asserted by the Service, did not satisfy the doctrine of mootness, since therefore there still were "live issues" subject to argument and controversy and not mere "pretend" disagreements as to the meaning of the remedy implemented. The Union could appeal Management's Step 3 decision as void and improper. See U. Ex. 12, the definition of "moot" in Black's Law Dictionary. I so hold.

B. THE QUESTION OF THE EXISTENCE OF A BINDING PAST PRACTICE.

By definition, a past practice is a method or course of conduct of the parties that is (1) unequivocal; (2) clearly enunciated and acted upon; and (3) the conduct was accepted or

passively condoned by a lack of protest by the parties over the years. See Gibson Refrigerator Co., 17 LA 313, 381 (Platt, 1951); Celanese Corp., 24 LA 168, 172 (Justin, 1954). See especially Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements" Proceedings of the 14th Annual Meeting of the National Academy of Arbitrators (Washington BNA Books, 1961), supra. For published discussion of my adherence to Mittenthal's interpretation of the past practice doctrine; see Barber-Greene Co., 80-1 Arb. § 1822; City of Cincinnati, 76 LA 40:, 408 (1981); Mead Corp., 79 LA 493, 504 (1982) and Copley Press, 91 LA 1324, 1329 (1988). In Copley Press, I specifically found that "mutuality is of course an essential requirement in the establishing of a binding past practice." Id at 91 LA 1329. However, I also determined in Copley Press that actions, rather than statements of either party, can prove an acquiescence in a past practice so long as actual or constructive knowledge of the course of conduct is proved. That is what the Employer argues happened over the years as regards the "boiler plate" form.

However, it is to be remembered that Dean Shulman's famous dictum that "a past practice is not a mere present way of doing things," but a mutually-agreed to prescribed manner of functioning articulates the essence of the past practice doctrine. See Ford Motor Co., 19 LA 237, 241-242 (1952) and especially Western Paper and Mfg. Co., 76 LA 1273, 1276-77 (Bowles, 1981). (Approval of Arbitrator Mittenthal's analysis of the past practice doctrine; discussion of the scope and limitations of the doctrine).

In this case, the Service has requested me to find a binding practice based on what it believes to be virtually overwhelming evidence that the "boiler plate language" has become a separate, enforceable condition of employment in the central region with regard to Step 3 settlements. It stresses that there has been: (1) clarity and consistency; (2) longevity and repetition; and (3) acceptability not only by the APWU national business agents, but by the equivalent representatives of the NALC, as well, for at least seventeen years.

Moreover, according to Management, the practical requirement to make Step 3 decisions not citeable or available as precedent is illustrated by Union Exhibit 10, which purports to be a binding settlement at Step 3 of the scheduled versus unscheduled dispute, as it relates to refusals to work overtime. The Employer stressed that it cannot be determined from Union Exhibit 10 the circumstances which caused the settlement; the need or reason for compromise; and the context of the dispute. There is, insists the Service, the lack of the file or other pertinent information when a Step 3 settlement decision is "plopped" into the record, as was done in this case. See Case No. C7C-4J-C 10092, James T. Martin, Arbitrator.

Here, my primary concern is whether the doctrine of past practice applies at all. There is no doubt in my mind that each and every one of the settlement agreements referenced in Employer's Exhibit 2, and the examples brought in to illustrate the scope of the practice contained in that Exhibit, constituted separate and independent settlement contracts. I have already

concluded in a case between these parties (Case No. C7C-4Q-V 15236) that a voluntary Merit Systems Protection Board (MSPB) settlement is a separate contract, apart from the National Agreement and enforceable by its terms. In my discussion in that case, Grievant Michael Beelek had agreed to a "last chance" reinstatement as a part of an MSPB settlement, which included waiver of rights to appeal a summary separation to grievance arbitration if the discharge was caused by a violation of the settlement agreement. I concluded that this separate contract precluded Grievant from filing a grievance in the first instance, and dismissed the grievance, based on the waiver included in the settlement contract.

Similarly, I find here that the settlement agreements in this case also constitute separate contracts, standing apart from the National Agreement as a whole. Each settlement agreement was in writing and was a "bilateral" contract, since certain promises were made by the Union and Employer to obtain the settlement. Both parties were required to agree to all the terms and conditions of each individual settlement made at Step 3. Mutual agreement was specifically reflected by the signatures of the Step 3 designees who were at that point in the process authorized to enter into such agreements. There was mutuality of obligation and a sufficiency of a promise as consideration for a promise in each case. See Simpson on Contracts (West Hornbook Series, 1965 at pp. 88-98.)

If the terms of each contract preclude the use of the settlement as a precedent and make it non-citeable in any other

arbitration forum, that term must be respected, whether the claimed use of the settlements is for an individual case, or in the aggregate. None of the Step 3 settlements may properly be used to prove a practice, under these circumstances. I so hold.

Second, the parties do not dispute that the "boiler plate" form was routinely used to settle cases at Step 3. The Union suggests, however, that in some cases that form was not used at all, and full and complete settlements were made on a different form, where paragraph 2 did not conditionally restrict the use of the settlement as precedent or the ability to cite the case in other instances. See U. Exs. 3-4. Employer witness Knighton, it is to be remembered, testified that she was aware of such cases and indeed had entered into some of these agreements herself. At no time, however, did she do so without specific mutual agreement with the Union, she also acknowledged. Therefore, unlike Management, I believe that the cases where the "boiler plate language" were not utilized were not examples of exceptions to the general rule, based on mutual agreement by the parties, but instead merely reflected different contracts with a slight variation in terms about possible future use of the particular settlement.

The only way a practice could have been developed over the years is if the parties had not used a written contract form to condition each settlement and make it nonciteable or usable. In that event, the lack of use of all these settlements -- 1000s in number -- as precedent in other cases, if that indeed were the case, coupled with the fact the National Agreement does not

expressly state whether Step 3s can be used as precedent or not, would create a classic instance of what the parties have done in practice disclosing what they intended under the contract. It would be a perfect situation for a finding of a binding past practice, as supplementing an ambiguous contract clause.

In other words, if, over the years, the parties had actually had a mutually agreed prescribed manner of functioning as if the settlements at Step 3 had no precedent value, without a specific term in the settlement agreement itself to make such conduct a requirement of that separate contract, a past practice certainly would be established. That is not at all the case in the instant matter, where individual contracts have been agreed to conditioning the use of each settlement. Consequently, no course of action or conduct developed over the years independent of each mutual agreement by the Step 3 designees, tacit or express, to use the "boiler plate" form in any individual case. By choice of the form, the parties prevented a binding practice by conduct from ever developing.

I must therefore conclude that in the absence of such a course of conduct, and bearing in mind that, instead, each separate settlement contract specifically included the "boiler plate" language requiring that the particular agreement be nonciteable and not a precedent in any forum, the doctrine of past practice does not apply at all. I so hold.

Based on this determination, the fact that the alleged "practice" existed only in the central region, rather than throughout the entire U.S.P.S., is not of great importance. I

therefore do not reach the issue of whether there can be a "central region" practice under these facts, as being unnecessary to my decision.

Accordingly, I do not find a basis for Management's interpretation under either the National Agreement, which is concededly silent on the point, or in good labor relations or contract law, both of which may be used to defend the limits of the past practice doctrine. The numerous decisions of the arbitrators cited to me as to the nature and scope of past practice as a doctrine are sound, but are simply inapplicable to this case. The "settlement" entered into only by Knighton as agent for the Service was void. I so find.

Without belaboring the point, since the parties stipulated as to the facts underlying the dispute, and the Employer agreed to the specific remedy requested on the merits, and implemented it, albeit with the two conditions the Union objected to as "extra" terms, i.e., that the "settlement" could not be cited or used as a precedent, I find no reason not to sustain the grievance on the merits. The alleged settlement was void since it was never mutually endorsed, and the Union had every right to appeal the case as "unresolved" to the next step, that is, to this arbitration. The grievance is sustained.

VI. AWARD

For the reasons stated above, incorporated herein as if fully rewritten, the grievance is hereby sustained in its entirety.

ELLIOTT H. GOLDSTEIN
Arbitrator

September 28, 1990
Chicago, Illinois