

REGULAR ARBITRATION PANEL

C#09408

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

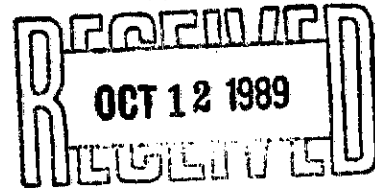
NATIONAL ASSOCIATION OF LETTER
CARRIERS, AFL-CIO

GRIEVANT: Class Action

POST OFFICE: Douglas, GA

CASE NO: SIN-3D-C 38508

NALC



WAYNE E. WHITE, NBA
ATLANTA REGION

BEFORE: James F. Searce, ARBITRATOR

APPEARANCES:

For the U.S. Postal Service: Sam Cruse, Dir/Human Res. Savannah
(Presenting)

For the Union: C. T. Peavy, D. W. Tanner (Witnesses)
C.D. Windham, Reg Adm Asst. (Presenting)
R. J. McClelland, R. D. Osteen (Witnesses)

Place of Hearing:

MPO, Douglas, Georgia

Date of Hearing:

July 11, 1989 (Briefs followed)

AWARD:

The grievance on its merits is properly before the arbitrator. The Service violated an established past practice by withdrawal of the privilege of Letter Carriers to use personal radios in assigned vehicles while on their routes. Reinstatement of such opportunity is ordered, but within certain required guidelines set out in the Discussion and Findings section of this document. This Order shall not be unduly delayed; the arbitrator retains jurisdiction.

Date of Award: October 8, 1989


James F. Searce

BACKGROUND

By date of June 6, 1984 a notice was issued by the Savannah MSC (a "Savann-A-Gram") to be posted and implemented by its various associate offices. It stated, as follows:

"We have received an arbitration award whereby a motor vehicle operator filed a Form 2146 for loss of personal radio used in the vehicle.

The Union argued the Postal Service should be required to pay the claim, as the foreman recommended payment, the use of the radio was reasonable and other employees used radios in their Postal vehicles with no previous objection from any supervisor.

The Postal Service maintained the radio had no reasonable relationship to the employee's job function.

The arbitrator ruled in the employee's favor since most of the employees had radios, which was known by management with no objections.

Personal radios should not be permitted in Postal vehicles."

EMPLOYEE & LABOR RELATIONS

The postmaster at Douglas, Georgia (Peavy) posted the notice and apparently directed the carrier work force at Douglas -- nine (9) letter carriers -- to comply. A grievance was initiated on June 28, 1984 protesting the directive on the basis, inter alia, of an established past practice allowing such use. The grievance was denied up through Step 3. It was scheduled for hearing at arbitration on September 11, 1986, but apparently the Service referred the matter to Step 4 for interpretation. By letter of February 1, 1989 the matter was returned to Step 3 for further review on the basis of conclusion that no national interpretative issue was involved. The grievance was reargued on March 2, 1989, denied by the Service and thereafter rescheduled for arbitration, which is the matter at hand before this tribunal.

POSITION OF THE UNION

It had been an established past practice of at least ten years for employees to be allowed to use personal portable radios in their assigned vehicles. Prior to 1970-73 the Service at Douglas used leased vehicles, which all had radios. No problem with the use of radios arose until Peavy came to the Douglas facility in 1980, at which time he forced a Letter Carrier to remove a radio and antenna he had personally installed in his assigned postal vehicle; however, use of portable radios was not denied until the Savann-A-Gram was issued. The Service raised no claims of safety during issuance of the notice or handling of the grievance and should not be allowed to do so now. Also, no claim of untimely filing was forthcoming in the grievance handling. Other personal items such as lunch boxes and thermos bottles are routinely carried in an assigned vehicle without objection by the Service. The Service should be found to have violated the spirit and intent of the Agreement and the longstanding past practice of the use of portable radios by Letter Carriers at Douglas, Georgia and be directed to reinstate that right; furthermore, since it is obvious that the Service referred this matter to Step 4 in 1986 (rather than test the validity of its position via the arbitration procedure) in order to stall receipt of an adverse decision, punitive damages in the amount of \$250 should be paid to each Letter Carrier denied the right at Douglas, Georgia.

POSITION OF THE SERVICE

The Union should be denied the opportunity to have this case considered on its merits because it cited the wrong provision of the Agreement -- Article 15 instead of Article 5 -- at Step 2. It was also untimely in that a notice was posted on the bulletin board dated May 4, 1984 instructing Letter Carriers to keep postal vehicles free of personal items. Moreover, a Postal Bulletin issued June 11, 1981 included the order that "Drivers must keep vehicles free of personal items...." In any case, the Letter Carriers were already aware that the postmaster was opposed to such use by his actions in 1980 or 1981 shortly after arrival at the facility when he had a personal radio and antenna removed that had been installed in a postal vehicle. Radios were being used for matters other than work-related, such as listening to football games, and thus had no official purpose. The Union must show a violation of the Agreement; it cannot do so, and neither can it prove a past practice. The use of radios creates a safety hazard, particularly where the volume is elevated to the point that the Letter Carrier cannot hear surrounding noises. The grievance should be dismissed on procedural errors but, if not, it should be denied for lack of proof.

THE ISSUE

1. Is the matter of the use of personal radios by Letter Carriers on duty, on their routes in assigned postal vehicles properly before this arbitrator?
2. If the answer to Issue 1 is in the affirmative, did the Union demonstrate a violation of the Agreement or an established past practice relative to such use; if so, what is the appropriate remedy?

DISCUSSION AND FINDINGS

The Service asserts the presence of procedural errors which it contends bars consideration of this case on its merits; as such, it bears the burden of proof that such flaws exist and, if so, that they are fatal to consideration of the merits portion of this dispute. Such contentions must be addressed first, and only if they can be found wanting will Issue 2 be considered.

At the outset, the Service asserts that the claim is invalid because the Union cited Article 15 (Grievance-Arbitration Procedure) of the Agreement in the grievance rather than Article 5 (Prohibition of Unilateral Action) relative to an asserted established past practice for use of personal radios. While I am not persuaded that such citation (Article 5) even needed to be made for a deemed past practice, I point out that the prologue in the Standard Grievance Form states "including, but not limited to..." where reference to the Agreement is concerned. It is well-established that past practices are, by definition, not contractual provisions and are not even normally reduced to writing. It is noteworthy that the Union specifically stated in the "Other Grounds" of alleged violation section of this Form, "Past practice of management to allow portable radios to be carried and used by both regular and part-time flexible carriers of Douglas PO for 10 to 15 years." (Jt Ex 2) No further consideration of this aspect of the Service's affirmative defense needs be made to conclude that it is not a bar to the merits aspect of this case.

The Service also raises the procedural defense that the Union has not borne the burden of proof that an established past

practice supporting the use of personal radios in postal vehicles existed at the Douglas facility. The arbitrator is fully aware of the accepted "tests" for a past practice (longstanding in existence, mutually acceptable, consistently used and clearly understood), but concludes that no need exists to evaluate any such assertions by the Union in this case because the postmaster, in his Step 2 answer on July 12, 1984 verified such status:

"My position is to not allow radios in postal vehicles and deny the grievance based on the following:

1. Management Rights as outlined in Article 3 of the National Agreement.
2. Instructions received from MSC Savannah.
3. You were advised that the past practice of personal radios in postal vehicles would not be allowed.
4. The decision is not unfair, not burdensome, and not punitive."

(Jt Ex 2. Underlining ours for emphasis.)

The Service also offers, as an exhibit, a notice issued by the Manager of the Atlanta District (A.Cayard) dated May 4, 1984 which contained a reference to Postal Bulletin 21302 and a change thereto that "Drivers and carriers [must] keep postal vehicles free of personal items." (Ser Ex 1) The Service contends that such notice was posted at the Douglas facility (although the hearing record indicates that this document was forthcoming to Union witnesses on cross-examination during its case-in-chief and was not affirmed as a posted notice by the Service witness on direct); the Union witnesses denied having seen it. The Service also argued (but did not establish) that Postal Bulletin 21302, Page 5 (6-11-81 Issue) had been posted at the facility,

wherein a reference to keeping postal vehicles free of "personal items" was made. Even if such postings had been affirmed, such circumstance would have to be weighed in the light of the past practice of use of personal radios -- conceded by the postmaster in the Step 2 decision -- and the fact that the Service admitted that carriers were allowed to carry lunch boxes and thermos bottles in assigned vehicles which, while arguably more important than a radio, were "personal items", nonetheless. There is no dispute that the postmaster in 1980-81 required a carrier to remove an antenna and radio from an assigned vehicle (which the carrier had personally installed) and with proper cause: the carrier had no authority to alter a postal vehicle. Such action, however, cannot be automatically taken as a directive against the use of radios in general and, as already indicated, the postmaster's Step 2 response in 1984 indicated recognition of a past practice of use of portable radios.

In summary, I find no basis to dismiss consideration of the merits of this grievance as the Service requests due to procedural arguments it has advanced. It is readily apparent that this dispute arose out of the posting of the Savann-A-Gram in June of 1984 (set out at Page 2 herein) apparently in reaction to an adverse arbitration decision over the liability of loss of a personal radio. While the undersigned is not familiar with the case cited in the 1984 notice, I can appreciate the Service's concern and I do not subscribe to the conclusion of responsibility apparently found in such dispute. Nonetheless, I am satisfied that the case before me substantiates the existence

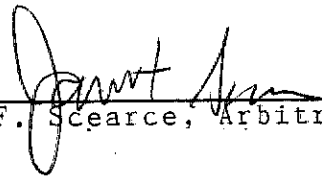
of an established past practice at the Douglas facility -- at least until 1984; the fact that five years have since passed does not alter that fact, given the obvious circumstance that the Service's adverse action then has been in the grievance process since ~~that~~ time. I shall direct that the carriers be allowed the option of personal radios on their routes, but under certain specific limitations, as follows:

- the radios involved shall be small, of the "pocket radio" type; no "boom boxes."
- volume levels are to be kept at an audible level just high enough to be easily heard by their user; volume is to be reduced when the carrier dismounts.
- such radios are to be kept down at the seat level out of line of sight.
- the responsibility for loss of such radios will not be borne by the Service, even if the postal vehicle is properly secured. The use of such radios is not a right; it is a privilege and the carrier must assume the obligation to purchase, maintain and replace such item if lost or stolen.

The Union demands that the Service compensate the affected group for the loss of the opportunity to use such radios. Such demand is rejected; it is an improper attempt to expand the scope of the remedy and also assumes denial of a right, which is in error.

AWARD

The grievance on its merits is properly before the arbitrator. The Service violated an established past practice by withdrawal of the privilege of Letter Carriers to use personal radios in assigned vehicles while on their routes. Reinstatement of such opportunity is ordered, but within certain required guidelines set out in the Discussion and Findings Section of this document. This Order shall not be unduly delayed; the arbitrator retains jurisdiction.


James F. Searce, Arbitrator

Atlanta, Georgia
October 8, 1989