

C# 11195

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

In The Matter of Arbitration
Between:

THE UNITED STATES POSTAL SERVICE
Omaha, Nebraska

-and-

THE AMERICAN POSTAL WORKERS UNION
AFL-CIO
Omaha Area Local

Case No. C1C-4H-C 32988

Decision Issued
January 4, 1986

APPEARANCES

FOR THE EMPLOYER

Ray F. Waters
Timothy R. Muldoon
Edward J. Teets

Labor Relations Representative
Labor Relations Assistant
Manager, Stations & Branches

FOR THE UNION

Bill Wells
Gavin Jensen
Gerry Perrotta
Charles L. Wredt

National Business Agent
Local President
Steward
Steward

ISSUE: Claim that Employer's removal of makeshift break area violated rights established by binding past practice.

Jonathan Dworkin, Regional Arbitrator
16828 Chagrin Boulevard
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THE GRIEVANCE

In 1979, the Central Forwarding System (CFS) in the Omaha, Nebraska Post Office was located on a floor of the facility which did not contain a break room. In order to accommodate the employees, a table and chairs were placed in the hallway outside the CFS unit. The area was used for breaks, lunches, and Union meetings. The table and chairs were in the hall for five years.

In 1984, the hallways outside the CFS office were redecorated. Walls were painted and flooring was replaced. The project necessitated removing the table and chairs, eliminating the makeshift break area. This meant that CFS employees had to go to swing rooms upstairs or downstairs from their unit, and travel time reduced the length of the ten-minute rest periods. The Union grieved for an extension of break time. The relief requested in that grievance was not unprecedented. According to the evidence, machine operators were already receiving fifteen-minute rest periods. That dispute was settled when Management agreed to increase CFS break time from ten to twelve minutes.

The employees expected their table and chairs to be returned when redecoration was complete. The Postal Service apparently had other plans. It elected not to restore the break area for several reasons. It regarded the former use of the hallway as inappropriate.

ate because it was unsightly and constituted a safety hazard. There were occasional housekeeping problems when employees ate at the table. Food was sometimes left out and, giving the hall a messy appearance. A more critical reason was that the area is a designated tornado shelter. Management believed the table and chairs would dangerously obstruct passage in time of emergency. Moreover, the Postal Service viewed the right to designate where employees could take breaks as a reserved prerogative of Management which was not limited by the Agreement.

The Union protested elimination of the break area by commencing a class grievance. The grievance demands alternative relief -- that Management be required either to restore the table and chairs or add two minutes to break time for CFS employees. The Union contends that the current time allotted is insufficient to encompass travel time. It points out that increasing CFS breaks to fourteen minutes will still fall short of the fifteen minutes provided machine operators.

The grievance was not resolved in preliminary steps and was appealed to arbitration. It was heard in Omaha, Nebraska on July 15, 1985. At the outset, the parties stipulated that the appeal was procedurally correct and that the Arbitrator was authorized to hear the dispute on its merits. However, the Postal Service did not concede the Arbitrator's right to grant an increase in break time. It contended that such remedy is beyond arbitral jurisdiction as defined in Article 15, Section 4 A(6) of the Agreement:

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.

DISCUSSION AND OPINION

The Postal Service's contention that the Arbitrator has no authority to increase break time is debatable. It is arguable that arbitral jurisdiction is sufficiently broad to permit development of appropriate remedies for disparate application of benefits. In this dispute, however, it is unnecessary to resolve the theoretical question of remedial jurisdiction. The evidence confirms that two minutes are adequate for CPS Employees to travel to and from break areas nearest the unit and to enjoy their full ten-minute break allowance. Assuming that the Arbitrator was authorized to grant the Union's demand for two more minutes, the grievance would still fail on that score due to lack of demonstrated proof of need.

The Union is on firmer ground in demanding restoration of the table and chairs to the hallway. The evidence demonstrates that this benefit was a binding past practice. It existed for five years with Management's knowledge and consent. The continuity of the benefit was broken temporarily when the table and chairs were

removed to permit installation of a new floor. However, that in itself did not constitute an abandonment. It was reasonable for the employees to assume the interruption was temporary.

A binding practice cannot be unilaterally altered or amended so long as conditions supporting it do not change. If conditions do change to the extent that a practice is no longer appropriate, Management has the right to abandon it. A practice is inextricably connected to conditions which engender it. Therefore, material changes in the workplace will dissolve the foundation of some practices and justify the Employer to disregard them.

A practice may also be disregarded if it violates specific contractual language. Whenever there is an inconsistency between a negotiated agreement and a practice, the Agreement prevails. In such instance, the practice may exist for a prolonged period but it is not binding.

If circumstances supporting a binding practice remain intact and the practice is not inconsistent with the Agreement, unilateral abandonment is prohibited. Article 5 of the Agreement touches on the subject. It states:

PROHIBITION OF UNILATERAL ACTION

The Employer will not take any actions affecting . . . 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 Postal Service's arguments imply that the practice at issue was not binding because it impaired Management's right to keep the hallway clean and presentable and, further, because it created a safety hazard which violated Article 14 of the Agreement. Article 14 commits both the Employer and the Union to maintaining the workplace safe and sanitary.

With respect to the contention regarding cleanliness, the Arbitrator agrees that the Employer does not need to tolerate a dirty, unkempt area, nor would any practice legitimately require it to do so. However, the evidence fails to establish that messiness was characteristic of the hallway break area. To the contrary, the Postal Service witness who testified on the matter prefaced his remarks with the word, "occasionally." It is obvious that employees were not routinely messy or normally disrespectful of the area. Moreover, Management had other tools to correct abuses. It could have controlled use of the hallway through rule-making and discipline. The fact that poor housekeeping occasionally occurred did not warrant eliminating the five-year binding past practice.

The safety claim is one that justifies thorough consideration. It is axiomatic that open access to a tornado shelter is crucial and, if a practice materially interferes, it violates Article 14 and is not binding. However, the Postal Service offered no firm, convincing evidence that the table and chairs caused a mate-

real hazard. There was no indication of when the hall outside the CFS unit became a tornado shelter. If the designation was recent, certainly Management's argument would be well taken, even though the area is wide and permits a seven-foot passageway when the table and chairs are in place. However, there is nothing in the record establishing that the shelter is newly established. It is likely that this has always been a shelter; that it was a shelter during the five years the practice was followed and perhaps even before that, when Management used the hallway for storage. The Arbitrator needed hard evidence to sustain the position that the practice unacceptably affected safety. No such evidence was submitted.

Binding practices can be eliminated through negotiations. As stated, when the table and chairs were removed, a grievance over travel time was settled. The Postal Service granted CFS employees two additional minutes to their breaks. Was this settlement a negotiated abandonment of the practice? It might have been. It seems unreasonable that the Employees should be granted both the extra two minutes and their break area. However, the written settlement (if it was written) was not offered into evidence. The Arbitrator cannot speculate as to the scope of the settlement, except to assume that if it had been intended to resolve this grievance as well as the earlier one, the Employer certainly would have introduced it. Because of this lack of evidence, it can only be concluded that this grievance was meant to stand on its own.

The Arbitrator finds that he has no basis for determining whether the prior addition to break time was negotiated in exchange for permanently removing the break area or whether the employees are entitled to continue receiving twelve-minute break periods if the table and chairs are restored. The parties are better left to their own bargaining responsibilities on these matters.

The final question is whether an award based on binding past practice is legitimate under the grievance. The original grievance premised the Union's protest on the contention that Management's action violated Article 14 of the Agreement. According to the Postal Service, the issue of past practice was not raised in pre-arbitration levels, and the Postal Service was not prepared to respond to it. The Arbitrator finds this representation unconvincing. The Step 2 Grievance Appeal Form clearly contends violations of, "Art. 14 and all other articles, Memos, L/M minutes, past practices, policies pertaining to this grievance." Moreover, the Union's Step 2A Correction Letter implicitly sets forth the Union's reliance on practice:

Employees had a break area outside the CFS section. This area was unilaterally dismantled. Prior to the dismantling of the break area it was optional if an employee went to another floor for break. Now it is mandatory to go to another floor or sit on the floor in the hallway.

It is concluded that the grievance contains sufficient reference to past practice to make that concept a legitimate foundation for an award. When Management eliminated the table and chairs in the hallway outside the CFS unit, it unilaterally violated a binding past practice. The practice is not inconsistent with the Agreement, and the circumstances supporting it have not changed to any material degree. Accordingly, the grievance will be sustained. The Employer will be directed to restore the table and chairs to the hallway adjacent to the CFS unit.

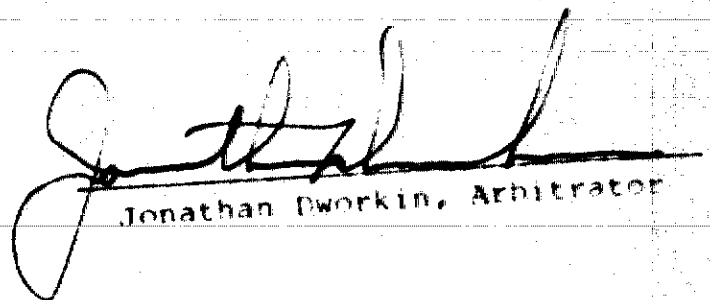
AWARD

The grievance is sustained in part. The Postal Service is directed to restore the table and chairs which formed a break area outside the CFS unit of the Omaha, Nebraska Post Office.

The Union's request for additional break time is denied.

Decision Issued:

January 4, 1986


Jonathan Dworkin, Arbitrator