C#10232

REGULAR ARBITRATION

SOUTHERN REGION

USPS - NALC

In the Matter of Arbitration	)	Case #S7N-3W-C-88030
Between	)	GTS #11720
United States Postal Service	)	E. J. Cannon, Grievant
Bradenton, Florida	)	
and	)	
Bradenton Branch	)	
National of Association of	)	
Letter Carriers	)	Record Closed: April 15, 1990

Before Irvin Sobel, Arbitrator of Record

Appearances:

For the United States Postal Service (Service, Employer, Management)

Angela Ferguson

Labor Relations Representative

Tampa, Florida

For the National Association of Letter Carriers (NALC, Union)

Megan Owen

Local Business Agent

Venice, Florida

Background and Statement of Issue:

The hearing of the enumerated issue was conducted on March 4, 1990 pursuant to the Modified Article 15 (UMPS) procedure. On July 25, 1989 the Union filed a written grievance alleging the Employer violated the party's National Agreement (LMRA) by not calling the grievant in on his Non-Scheduled N/S day on July 22, 1989 to cover the Vehicle Operations Maintenance Assistant (VOMA) assignment. The parties unable to resolve the issue resulting from the Bradenton Management decision assigned tthe matter to final and binding arbitration. The hearing of the above cited matter was conducted by the above cited arbitrator at the Bradenton, Florida Main Post Office on April 4, 1990. At the hearing the parties were accorded full opportunity to present witnesses for direct and cross examination and introduce such other evidence and argumentation each deemed pertinent to the issues under consideration. No issues of arbitrability, timeliness, or defecting form were raised by either party. The parties opted for closing statements but consonant with the agreement between them and the arbitrator to allow the Union additional time to submit relevant arbitral citations, the case file was closed as of April 15, 1990.

This arbitrator would like to thank both parties for the forebearance and tolerance they have displayed in regard to the delay in this and other decisions during the period of my wife's extended illness. He would further like to express his appreciation for the numerous expression of sympathy from the parties and their advocates.

Issue:

The parties mutually stipulated the following issue:

> Did the Employer violate the National Agreement when it did not cover the VOMA position on July 22, 1989? If so, what is the remedy?

Facts in Case:

On July 24,1989 the Union filed the following grievance. Under the rubric of Define the Issue that grievance stated:

> "No one doing VOMA Job on Saturday, July 22, 1989. VOMA work won't be done except repair calls. This is to save overtime for the day Saturday July 22, 1989 (sic). Work or pay for not working Saturday is regular work day reporting and billing day for service stations. Need someone for repair of jeeps and trucks, check oil and batteries at Bradenton River, get gas sheets from stations and send forms to V.M.F.

Mr. Cannon in an addendum argued:

> Regular VOMA work 2 days (sic) while I was on vacation and no one was able to cover VOMA on Saturday.
> Joe was on his vacation and I am taking his place the 4 weeks. Saturday is VOMA not scheduled duty. VOMA Assistant was off and if asked to work as there (sic) is work that has to be done on Saturday by VOMA. . .
> I was told a Supervisor would do the call ups in the a.m. But no one would do the other duties. I could do them all on Monday.

Management's rebuttal was equally pointed. It contended:

> VOMA on Saturday is not an absolute necessary except for the Saturday after the closing of each accounting period when the contract case are closed out. Many times in the past VOMA has been vacate (sic) on Saturday. Supervisors on the units will do their own calling in of repair tags, gas sheets can be done on Friday and Monday is in the past. Mr. Pevy has stated several times this can be done with the present "Budget Crunch", the past practices should not be renewed.

Position of the Parties:

Since the essence of each party's case has been well developed in their respective Statements of Position any lengthy restatement under separate attribution to each party would be superfluous. In addition, since the facts and argumentation deemed by the arbitrator as relevant to his decision will be stated in the body of his Opinion only a brief summary of each party's position is deemed necessary.

The Union's Position:

The Union contended that after John Carraway's sustention of Mr. Cannon's 1982 grievance acknowledging him as the senior qualified applicant for the substitute VOMA assignment, when the incumbent VOMA Mr. Pevy was absent (day's off, sick leave, annual leave) the VOMA position was scheduled on a six-day per week basis. Recognizing that Cannon who was on a rotating schedule would frequently be on his N/S day on Saturday other carriers namely D. E. Voliva and Mike Dana who had the requisite qualifications for the VOMA post were also scheduled to perform that function on Saturdays. Moreover, a whole set of activities normally not performed by the VOMAs on the other days, were left over, with the full knowledge of Management, for Saturdays. Mr. Powell a new Supervisor not only wanted to prove his mettle by imposing changes which would reduce overtime but also was willing to risk, in Mr. Pevy's absence, disregarding an established past practice.

The Employer's Position:

The Employer contended that as of the date of the alleged violation no past practice of a VOMA on duty every Saturday had been established. Moreover on "many occasions" the job was left vacant on that day without the Union grieving or even raising the issue. The so called duties, which according to the Union, could only be performed on Saturday could easily be performed on either Friday or Monday without causing any disruption in the procedures performed by the VOMA. Moreover, in case of necessity the supervisory staff, including Mr. Powell, who had been given VOMA type training were fully capable of performing the job's functions. The grievance is one introduced by a digruntled employee who is trying to get something for nothing.

Opinion and Award:

Essentially, notwithstanding the numerous contentions and counter arguments introduced by the parties the sole issue upon which this case revolves is whether a valid past practice requiring the presence of a VOMA for six work days per week, had been established. The other matters are either collorary or subsidiary to the past practice issue.

In an opinion (S8N-3U-C-35787 issued June 3, 1983) Arbitrator John Caraway, whose 1982 ruling sanctioned Mr. Cannon's position as the replacement VOMA (incumbent Pevy), not only enumerated the status of a past practice in the collective bargaining agreement but also stated its requisites. Arbitrator Caraway, in a case which hinged around the same fundamental issue as this one stated:

> Arbital law recognizes that a custom or past practice can, because of its long duration and acceptance, constitute an

> implied term of a Collective Bargaining Agreement. The required criterion is that the practice has been of long standing and of a repetitive nature, well understood by both the employer and employees and never negated by the terms of the Collective Bargaining Agreement.
>
> In Case No. S8N-3A-C-2733 Arbitrator Earl Williams recognized and applied a past practice between the Postal Service and the National Association of Letter Carriers by a decision dated August 24, 1982. He observed that the Management could not unilaterally abolish a long standing past practice unless there was convincing evidence that it was interferring with normal operations and good housekeeping. In the absence of proof of abuse of the practice, the practice must be followed by Management.

Another justification by arbitrators for a unilateral revocation of a past practice is that the conditions which brought about the practice have been drastically altered by either technological or organizational change.1

The facts surrounding the instant grievance would strongly indicate, with one recent exception which will be discussed subsequently, that the practice involved in the instant grievance has been continuous and repetitive since the grievant's accession to his replacement VOMA position. Until the recent challenges it had been followed by Management and thus by implication acquiesced thereto.

1 The classic case is one of a part practice requiring three workers to man a crane in a steel mill. This practice had existed because due to the extreme heat conditions in the mill the operators in the crane's cab had to be frequently changed. When air conditioning was introduced into the cab the arbitrator sanctioned a reduction in the crane's staffing.

The significance of the very recent challenges by the Employer, notably that of May 27, 1989 to the implied acquiescence doctrine will be discussed. Management challenged that doctrine by arguing in its denial of the instant grievance, that "many times in the past VOMA has been vacate (sic) on Saturday". The "many" in the Employer's statement of denial gave way to a few in SPO Powell's testimony. Powell, who by implication was worried that there might have been a past practice, rationalized his decision on July 22 upon the fact that he had been informed by his predecessor that on three to four occasions no VOMA was present on Saturday and the Union had failed to grieve.

In actuality the able Employer representative was able to document only one instance, namely that of Saturday May 27, 1989 in which no one performed VOMA work. She argued therefore that one instance which the Union failed to grieve proved that no past practice existed since if it had the Union would have grieved it.

Arbitrators, including this one, have contended that a failure by the Union to grieve an Employer action does not constitute condoning that action when the circumstances surrounding that incident are ambiguous or the matter is unknown to the Union. That doctrine dispels the assumption by the Employer that the Union's failure to grieve in the one instance meant it was conceding that a past practice did not exist. That failure to utilize the VOMA on Saturday transpired when Mr. Cannon, who might be regarded as the self proclaimed custodian of VOMA rights, was on vacation. Apparantly after that event in May Ed Pevy, as evidenced by his testimony, immediately took up the matter with his Supervisor and on

the two succeeding Saturdays he was called in on his N/S day. In short, the Union through Pevy disposed of the matter informally rather than formally filing a grievance. If the Union's choice of informal discussion to settle a matter in preference to grieving could be used as a basis for arguing it had conceded any matter the volume of grievances would be proliferated.

Although raised implicitly rather than explicitly Mr. Powell by arguing that the VOMA was not needed on Saturday, since most of the duties could be performed on either Friday or Monday and the Supervisors could perform the VOMA functions, was contending that the past practice was interfering with "normal operations and good housekeeping". Mr. Pevy, who claimed he was misquoted by the Employer in its statement of denial not only dispelled that impression by showing that the shift of the VOMA's function to Monday after the July incident had created problems which interfered with the performance of his functions on the succeeding days but also neither saved time nor improved his ability to function effectively. In fact, given his and the Union's protestations in this regard the VOMA was put back on the clock on Saturdays just two weeks later.

The Employer also pointed out that procedural changes at the Sarasota Vehicle Maintenance Facility (VMF) partially involving the cessation of Saturday work by its mechanics so changed the parameters of the job that under the optimal conditions four hours of Saturday work for the VOMA would be necessary. Unfortunately the parties could not agree on the timing of such changes, and the Employer did not prove that the changes were implemented before July 27, 1989.

For the above cited reasons the Union was able to sustain its burden of proof that a valid past practice of six day per week employment of a VOMA prevailed at the Bradenton, Florida Postal Installation. The grievance will thus be sustained.

This arbitrator is in general agreement with the norm of "no pay for work not performed" and in cases of inadvertent error even when the N/A has been breached would have been reluctant to acceed to the requested remedy in this case namely eight hours of pay at overtime rates. Unfortunately Management's conduct cannot be construed as in the inadvertent area category. Mr. Voliva who normally performed as the VOMA on Saturday was present and Mr. Powell who was well aware of his VOMA status, explicitly chose to utilize him in another capacity. He was well aware that if he chose to use Voliva in another capacity customary behavior would have required him to contact the grievant on his N/S day and only when the grievant was unavailable could he leave the VOMA post vacant. He chose not to call Mr. Cannon on the grounds that most of the work which the VOMA customarily performed on Saturdays could be performed on either Monday or Friday. Powell by his own testimony was attempting to change matters and even though he was aware of the custom regarding the utilization of the VOMA on Saturday he was prepared to challenge it. That challenge failed and thus, despite this arbitrator's normal misgivings regarding such requests, will award the grievant eight hours pay at overtime rates.

Award:

The grievance of Ed Cannon is hereby sustained. The grievant will be granted eight (8) hours of pay at overtime rates for the Employer's failure to cover the VOMA position on July 22, 1989. The grievant will be compensated at his prevailing wage rate as of July 22, 1989.

Tallahassee, Florida
August 23, 1990

This is a certified true copy of Arbitration Award

Irvin Sobel

Irvin Sobel, Arbitrator