

C-23279

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration)
 between) Grievant: Class Action
UNITED STATES POSTAL SERVICE) USPS Case No: C94N-4C-C 99044602
 and) LOCAL #: 385-97-369
NATIONAL ASSOCIATION OF) NALC GTS No.: 18321
LETTER CARRIERS, AFL-CIO) Post Office: Youngstown, Ohio

BEFORE: Arbitrator Mark I. Lurie

APPEARANCES:

For the U.S. Postal Service:
 For the N.A.L.C:

John Dyce
 William R. Pagan

Place of Hearing: Youngstown, Ohio Post Office

Date of Hearing: 04/17/02

Date of Award: 04/22/02

Relevant Contract Provision: Article 14.7, past practice

Contract Year: 1994-1998

Type of Grievance: contract

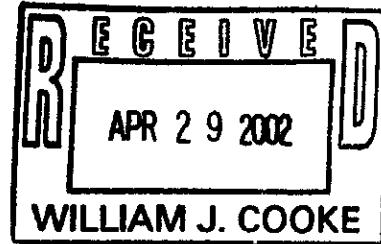
Award Summary:

The Arbitrator, finds that a contractually-binding past practice had arisen pursuant to which the NALC member of the Safety and Health Committee was afforded one hour of official time with which to prepare an agenda for the quarterly Committee meeting. The practice implemented a condition of employment about which the Agreement was silent and, as such, under the JCAM, it was necessary for Management to engage in good faith bargaining with the Union over the impact of rescission on the bargaining unit. The grievance is sustained. The violation has been a continuing one. The Postal Service is directed to pay the NALC Committee member one hour at the straight-time rate for each Committee meeting for which he submitted an agenda, beginning with the October 1997 meeting.

Mark I. Lurie
 Mark I. Lurie, Arbitrator

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 N.A.L.C. HQRTRS., WASHINGTON, D.C.

ISSUE

The issue, as defined by the Arbitrator, is whether the Postal Service violated Article 14.7 of the Agreement or a contractually binding past practice by declining to pay the Union's Safety and Health Committee representative for time spent preparing an agenda for the quarterly Committee meeting.

FACTS

Article 14.7 of the Agreement provides for the holding of quarterly Safety and Health Committee meetings, and for each Committee member to prepare an agenda and submit it to the Secretary of the Committee 3 days prior to the meeting:

"The Safety and Health Committee shall meet at least quarterly and at such other times as requested by a Committee member and approved by the Chair in order to discuss significant problems or items. The meeting shall be on official time. Each Committee member shall submit agenda items to the Secretary at least three (3) days prior to the meeting."

The parties to this grievance stipulated that, prior to October 1997 and for an undetermined number of years, the Union member of the Committee was afforded time on the clock to prepare his agenda. (Testimony established that the practice had existed since at least 1990.) The practice was unilaterally terminated by Management on October 22, 1997, when the NALC Committee member, Shop Steward John Fire, requested official time to prepare an agenda and his request was denied by his immediate supervisor, Beverly Babik. Steward Fire testified that, for several Committee meetings thereafter, he did not prepare agendas, but that he resumed doing so in mid 1998 because of the importance of the Committee's work. The Committee is comprised of representatives of each of the unions representing Postal workers in Youngstown, Ohio; no other Committee representative, other than the NALC steward, had been paid for time spent preparing an agenda.

The Union grieved Management's refusal to pay for the NALC Committee member's time spent preparing an agenda and sought, as remedy, the payment of 1 hour for that purpose. The grievance cited violations of Articles 3, 5, 14, 19 and 34, and charged that Management was "obligated to pay employees for all work performed." At Step 2, Management responded that Article 14.7 made no provision for the agenda to be prepared while on the clock. In its Step 3 appeal, the Union requested, as remedy, that the Service "continue with past practice and pay NALC Safety representative one hour on the clock to prepare an agenda." And in its Step 3 decision, Management reiterated that, under Article 14, "there is no contractual requirement for management to grant the remuneration requested by the union." In the Arbitration hearing, the

Union cited, for the first time in the processing of this grievance, Article 41.3.K. of the Agreement: "Supervisors shall not require, nor permit, employees to work off the clock."

The Union's Position

While Article 41 was not previously cited by the Union, it can provide guidance in interpreting Article 14.7, because provisions of the Agreement are not to be read in isolation but rather within the context of the entirety of the document. Article 14.7 requires each Committee member to submit an agenda. Preparation of the agenda takes time; the NALC Committee member must survey the various branches in the Youngstown installation, to determine what in-station and vehicular risks might need correction. Article 41.3.K. prohibits Management from permitting employees to work off the clock. Article 41.3.K. thereby clarifies the silence of Article 14.7 regarding payment for time spent preparing a Committee agenda. Furthermore, the past practice of the parties – the payment to the NALC Committee member for time spent preparing his agenda – gave rise to a binding contractual right to such payments.

The Service's Position

Article 15 of the Agreement calls for a full and detailed statement at Step 2 of the contractual provisions relied upon by the Union, and that, at Step 3, all relevant contentions have been developed and considered. The reason is set forth in Article 15.3: "settlement or withdrawal of [the grievance]... at the lowest possible step..." The Union's reference to Article 41 in the arbitration hearing constitutes new argument that, having not been raised at Steps 2 or 3 of the grievance process, should not now be considered. Article 14.7 provides that attendance at the Committee hearing will be on official time; it makes no comparable statement for the time spent preparing agendas. The explicit provision compensating attendance is evidence that the parties addressed the issue of official time for Committee work, and affirmatively decided that only attendance would be on the clock. Had they intended to extend the benefit to preparing the agendas, they would have said so.

Even if a contractually binding past practice had arisen, Management had the right to unilaterally cease the practice provided it gave advance notice to the Union. Manager Babik gave such advance notice to Steward Fire, and with that notice, the practice ceased.

Decision

Article 14.7 is silent on the subject of the payment of Committee members for time spent researching conditions and preparing their agendas. Since Article 14.7 expressly compensated Committee members for attendance at meetings and also expressly made reference to members' obligations to prepare agendas without providing for compensation, the Arbitrator finds that the silence of the Article regarding the latter expressed the parties' intention to exclude compensation for agenda preparation.

The parties submitted, as a joint exhibit, an extract from the NALC-USPS Joint Contract Administration Manual (or "JCAM") setting forth "the national parties' general agreement on the subject of past practice," and acknowledged that "Article 5 [prohibition against unilateral action] may... limit the employer's ability to take a unilateral action where a valid past practice exists." The Arbitrator finds that, under the criteria of the JCAM [and under the general principles governing past practice in the labor-management context], a contractually binding past practice arose that the NALC Committee member would be paid for time preparing his agenda: the practice was clear, repeated, consistent, and existed over a long period of time. It came to be recognized and accepted by both parties as a condition of employment. The JCAM further prescribed the manner in which a past practice could be changed:

- If the practice clarified or implemented a contract provision, it became an unwritten part of the provision changeable only through collective bargaining over the written contract provision. [In other words, if the past practice gave meaning to the parties' intent as expressed in the written provision, then it was integral to that provision, and amendment required negotiation.]
- If the practice implemented a condition of employment concerning an area in which the contract was silent, it was to be handled differently. [Arbitrators differ on whether the literal CBA is definitive, or whether the CBA incorporates existing practices. Here, the parties have resolved that dilemma.] The JCAM provides, in relevant 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. [Underlining added.]

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...

...the arrival of a new Postmaster or supervisor is not, in itself, sufficient justification to change or terminate a binding past practice..."

The Arbitrator, having found that a contractually-binding past practice had arisen, further finds that the practice constituted the implementation of a condition of employment about which the Agreement was silent and that, as such, under the JCAM, it was necessary for Management to engage in good faith bargaining with the Union over the impact of rescission on the bargaining unit. Management failed to do so.

The Arbitrator agrees with the Service that the Article 41 argument raised by the Union, while potentially persuasive, was new argument. Article 14.7 does not provide for the payment of time spent by a Committee member preparing an agenda; it is not ambiguous; it does not require clarification by means of reference to other provisions of the Agreement. The Article 41 claim made by the Union, to the extent that it has merit, resides entirely within that Article and not as an interpretation of Article 14.7. And, because the argument was made untimely, it cannot be considered.

Award

The grievance is sustained. The violation has been a continuing one. The Postal Service is directed to pay the NALC Committee member one hour at the straight-time rate for each Committee meeting for which he submitted an agenda, beginning with the October 1997 meeting.