C# 11176

IN THE MATTER OF ARBITRATION)
)
BETWEEN)
)
AMERICAN POSTAL WORKERS UNION)
)
AND)
)
UNITED STATES POSTAL SERVICE)
(Grievance No. W1C-5G-C 11272))
(Smoking Policy Grievance))

ANALYSIS AND AWARD

Carlton J. Snow
Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from July 21, 1981 through July 20, 1984. The parties met for a hearing on September 1, 1985 in the main conference room of the Simi Valley Post Office located at 2551 North Galena Street in Simi Valley, California. Mr. John Ruben of the Reich, Adell and Cross law firm represented the American Postal Workers Union. Mr. J. Carson Moore, Employe and Labor Relations Executive, represented the United States Postal Service.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses and to argue the matter. The arbitrator tape-recorded the proceeding as an extension of his personal notes. The advocates fully and fairly represented their respective parties. All witnesses testified under oath.

The parties stipulated that there were no issues of substantive arbitrability to be resolved. The Employer,

however, contested the procedural arbitrability of the dispute on the ground that the grievance had been filed in an untimely manner. The parties authorized the arbitrator to retain jurisdiction of the dispute for ninety days after issuance of a report.

The parties elected to submit post-hearing briefs. The arbitrator officially closed the hearing on November 19, 1985 after receipt of the final brief in this matter. The parties withdrew Grievance No. W1C-5G-C 28753 which also was scheduled for hearing on the same date.

II. STATEMENT OF THE ISSUE

The issues before the arbitrator are as follows:

(1) Is the grievance procedurally arbitrable?

(2) If so, did the Employer violate the national agreement when management instituted and maintained a policy on smoking? If so, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

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 2. Grievance Procedure--Steps

Step 1: (a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. The employee, if he or she so desires may be accompanied and represented by the employee's steward or a Union representative. The Union also may initiate a grievance at Step 1 within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance. In such case the participation of an individual grievant is not required. A Step 1 Union grievance may involve a complaint affecting more than one employee in the office.

Section 3. Grievance Procedure--General

(b) The failure of the employee or the Union in Step 1, or the Union thereafter to meet the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance. However, if the Employer fails to raise the issue of timeliness at Step 2, or at the step at which the employee or Union failed to meet the prescribed time limits, whichever is later, such objection to the processing of the grievance is waived.

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. Unless otherwise provided in this Article, all costs, fees and expenses charged by an arbitrator will be shared equally by the parties.

ARTICLE 19 - HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21 Timekeeper's Instructions.

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least sixty (60) days prior to issuance. At the request of the Unions, the parties shall meet concerning such changes. If the Unions, after the meeting, believe the proposed changes violate the National Agreement (including this Article), they may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours, or working conditions, as they apply to employees covered by this Agreement shall be furnished the Unions upon issuance.

IV. STATEMENT OF FACTS

This grievance resulted after the Employer implemented a new smoking policy March 10, 1982. On March 19, 1982, the Union filed a grievance alleging that the Employer had violated the collective bargaining agreement by unilaterally altering the smoking policy. It is the objective of the Union to require the Employer immediately to begin bargaining in order to find a compromise smoking policy which will be acceptable to both parties. There were several months of negotiation during which time the parties were unable to reach agreement on the smoking policy. As a consequence, the Union filed another grievance on September 22, 1982, in which it asked that the Employer rescind the smoking policy and re-implement the policy of March 10, 1982.

The grievance proceeded to Step 2 of the grievance procedure. In its Step 2 response, the Employer denied the grievance on the ground that it had been filed in an untimely manner. (See, Employer's Exhibit No. 2). The Union, then, appealed the grievance to Step 3 from which the question was remanded back to Step 2 for further consideration and negotiation. (See, Union's Exhibit No. 7). On February 8, 1983, the Employer again denied the grievance, this time on the ground of employe support for the smoking policy as well as the need to protect the comfort of nonsmokers. (See, Employer's Exhibit No. 9).

When the parties were unable to resolve their differences, the matter proceeded to arbitration. In arbitration, the

Employer again challenged the timeliness of the grievance.

V. POSITION OF THE PARTIES

A. The Employer:

It is the contention of the Employer that the grievance should be dismissed because the Union did not file it in a timely manner. The language of Article 15 clearly requires that all grievances be filed no later than fourteen days after an alleged violation of the agreement takes place. In this case, the Employer contends that the grievance had been filed over six months after the cause of action arose. As a consequence, the Employer contends that the grievance was untimely.

Additionally, the Employer has rejected the Union's claim that there was a waiver of the right to dispute the grievance on the ground of timeliness. The Employer maintains that it stated in its Step 2 response of October 12 that the grievance had not been filed in a timely fashion. (See, Employer's Exhibit No. 2). In view of this fact, the Employer maintains that it has reserved its right under Article 15 of the National Agreement to deny the grievance on the basis of timeliness.

B. The Union:

The Union contends that, despite the fact that the present grievance was filed on September 22, 1982 (over six months after implementation of the smoking policy), the dispute, nevertheless, is procedurally arbitrable. The Union has based its claim of arbitrability on three arguments. First, the Union contends that time limits set forth in the National Agreement should not toll while the parties, by mutual agreement, are bargaining about the subject matter of the grievance. Between March 17 and September 22, the parties attempted to negotiate a resolution of their dispute. Because negotiations were proceeding during this time, the Union maintains that time restrictions in the agreement were not applicable to the present grievance.

The Union also claims that the grievance of September 22 came within the time limits of the agreement because it merely was an amendment to the March 19 grievance which had been filed within the time limits of Article 15. The Union has drawn an analogy between the second grievance and an amended complaint, stating that neither should be barred by time limitations if the parties were on notice regarding the issues involved in the dispute. In this case, the subject matter of the grievances was identical. The only difference, according to the Union, was that the first grievance asked for negotiation and a compromise smoking policy, while the second grievance insisted on a rescission of the new rule. Because the issues were identical, the Union maintains that the late

filing of the final grievance did not unfairly surprise the Employer.

Second, the Union contends that maintenance of the smoking policy constituted a continuing violation of the National Agreement. In view of the fact that the Employer allegedly is continuing to violate the agreement of the parties, the Union maintains that time limits in Article 15 do not bar the grievance.

Third, the Union contends that the Employer waived its right to contest the procedural arbitrability of the dispute. According to the Union, the Employer failed to object to the timeliness of the dispute at a Step 2 meeting on February 8, 1983 and had an obligation to do so according to Article 15 of the parties' agreement. According to the terms of the agreement, the failure to object allegedly resulted in the Employer's losing its right to contest timeliness at a later stage of the proceeding.

VI. ANALYSIS

A. The Matter of Procedural Arbitrability:

The Employer initiated a no smoking policy on March 10, 1982. On March 19, 1982, the Union filed a complaint about the policy. Then the parties began negotiating about the policy in an effort to find a compromise solution. When those efforts proved to be unsuccessful, the Union filed a new

grievance on September 22, 1982 regarding the same dispute. The Employer has contended that the matter has not been grieved in a timely manner.

There are several bases for concluding that the grievance is procedurally arbitrable. First, the alleged violation of the agreement, if proven, would constitute a continuing violation of the collective bargaining contract. Each day of the new smoking policy, if it violated the agreement of the parties, would constitute a new contractual infraction and would make timely the second complaint filed by the Union. (See, for example, Pacific Mills, 14 LA 387 (1950)). Since the alleged violation, if established as contrary to the parties' agreement, would have imposed a continuing infringement on rights of the grievant, it is reasonable to conclude that the complaint constituted a continuing grievance and that filing deadlines recommenced each day a new violation occurred. As a consequence, the grievance filed by the Union was not untimely. (See, for example, Kerr-McGee Oil Industries, Inc., 44 LA 71 (1965); and Sargent Engineering Corp., 43 LA 1165 (1964)).

A far more substantial basis for finding the grievance to be procedurally arbitrable is rooted in a well established principle of the common law. The law and arbitrators favor settlement by the parties of disputed claims. This principle is based on sound public policy because encouraging settlement reduces discord between the parties and promotes certainty.

The law imputes to the parties the expectation that they have attempted to compromise dispute claims in good faith.

(See, for example, Montgomery v. Grenier, 136 N.W. 9 (1912); Duncan v. Black, 324 S.W.2d 483 (1959); and Hooff v. Paine, 2 S.E.2d 313 (1931)).

It is clear in this case that there was a bona fide dispute. The parties asserted their conflicting interpretations in good faith. Neither position of the parties was inherently unfounded.

Only nine days after the new policy had been implemented, the Union asked the Employer to negotiate regarding the regulation on smoking. Those negotiations continued until September 17 when the Employer issued a memorandum stating that the new policy would remain unchanged. Then on September 22, the Union renewed its grievance which was based on an alleged violation of the agreement that occurred on March 10. In light of the initial grievance and the protracted negotiations, there is no basis for concluding that the grievance of September 22 surprised the Employer.

To conclude that the grievance in this case is untimely would conflict strongly with the policy promoting settlement of claims. Such a finding would encourage grievance arbitration and discourage efforts to compromise disputes. Such a system is not in the best interests of the parties, and it is reasonable to conclude that they never intended their agreement to be construed in a way that would cause the parties to be apprehensive about entering into negotiations to settle grievances. Arbitrators long have been inclined to conclude that grievances have been filed in a timely manner when a

complaint has been filed after the parties have been engaged in prolonged negotiations from the time of the alleged infraction and filing the complaint. (See, for example, Grace Lines, 39 LA 633 (1962); and Montgomery Ward & Company, 48 LA 1171).

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the grievance is procedurally arbitrable and that there is jurisdiction to proceed to the merits of the dispute. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow

CARLTON J. SNOW
Professor of Law

Date: 1-6-86

B. Merits of the Case

1. The Factual Setting of the Dispute:

The merits of the case must raise a question regarding whether or not the Employer violated the parties' agreement when it initiated a more restrictive smoking policy. In August of 1981, the Employer combined three smaller postal facilities to form the Simi Valley Post Office. At two of the former locations, employes had been permitted to smoke at their work stations. At one of the facilities, the Santa Susanna facility, smoking had not been allowed on the working floor. From the time the new Simi Valley facility opened in March of 1982, management allowed employes to smoke on the work room floor at their stations, except when they were working with sacks of mail. The Employer conceded that employes had been permitted to smoke at various locations and even provided clip on ash trays to employes who smoked while working.

During this time period, the Employer received a number of complaints concerning smoking on the work room floor. Some employes, including Union President Joseph Barini, maintained that there was improper ventilation in the work area and signed a petition asking that the ventilation be improved. (See, Employer's Exhibit No. 6). In response to such complaints, the Employer initiated a new smoking policy on March 10, 1982. The new policy allowed employes to smoke in certain specified areas. (See, Joint Exhibit No. 2). In sharp contrast to the previous policy, management now prohibited smoking on the work room floor.

The Union has taken the position that the Employer violated Article 5 of the National Agreement by making a unilateral change in working conditions when the Employer instituted the new smoking policy. According to the Union, the old smoking policy had achieved the status of a past practice. Additionally, the Union has contended that the Employer has failed to bargain in good faith about changing the policy because management rejected Union proposals without giving them serious consideration and without making counter proposals.

The Union also has contended that the new smoking policy was improper because of its inequitable impact on smokers. According to the Union, the policy is harsh in that smokers may only smoke in the restroom or while on break. The policy is viewed as unfair by smokers because clerks who spend a majority of their time in the work room area may not smoke even though carriers who spend most of the day away from the work room may smoke.

It is the position of the Union that there is no justification for imposing such severe restrictions on smokers. The problems with ventilation, which allegedly caused many employees originally to complain about smoke, have been corrected. Nor does the Union believe that the employe polls necessarily show support for the smoking policy because some of the signatures on petitions allegedly are unclear. It is also the contention of the Union that the polls never allowed for a vote on an alternative to management's smoking policies.

The Union believes that the parties should be compelled to return to the smoking rules in existence prior to March 10, 1982 or, in the alternative, to be compelled to bargain about the matter.

The Employer, on the other hand, does not believe that a violation of the National Agreement has been established. It is the position of the Employer that its policy on smoking is reasonable because it successfully has balanced rights of smokers and nonsmokers in the work force. In support of its conclusion, the Employer has relied on a poll conducted on May 21, 1984 showing the sizeable majority of employes in favor of the new smoking policy. (See, Employer's Exhibit No. 10). Since smokers have been permitted to smoke in a substantial number of areas on the premises, the Employer is of the opinion that rights of smokers adequately have been protected. The Employer vigorously has disagreed with a conclusion that a past practice of allowing smoking has been established.

2. Regulations in March of 1982:

The ELM as written in March of 1982 did not prohibit the Employer from implementing a new policy on smoking. The ELM, of course, had been incorporated into the National Agreement pursuant to Article 19 of the collective bargaining agreement. Among subjects covered in the ELM is smoking. At the time management implemented the new smoking policy, Section 854 of the regulations stated:

854.1 Allowed.

Smoking areas must be clearly designated, equipped with ash trays and located within view of supervisory personnel.

854.2 Prohibited.

Smoking is prohibited:

a. At service windows and counters.
b. While receiving mail from the public.
c. While collecting mail from letter boxes.
d. While loading or unloading mail.
e. While chuting the mail into pouches, sacks, or mail containers.
f. Near drop holes of conveyor areas.
g. Near areas with flammable or combustible materials.
h. In storage areas or other unattended areas.
i. In elevators.
j. In mail storage cars and trailers.

The parties have disagreed regarding whether 854.2 of the regulation set forth an exclusive list of areas in which smoking was to be prohibited. Arbitrator Cohen has argued that management had been precluded under the ELM from prohibiting smoking on the work room floor. (See, Union's Exhibit No. 8, Case No. C8C-4C-C 3815 (1981)). That analysis has been critiqued by Arbitrator Bernstein who concluded that the provision, read in its entirety, showed that management retained the option to set forth certain areas as nonsmoking areas even though they had not been listed in Section 854.2 of the regulation. (See, Case No. C1C-4J-C 1354 (1983)).

Arbitrator Bernstein has been persuasive in his interpretation. Although the provision was ambiguous, the first subsection did not clearly mandate that the Employer reserved particular areas of a postal facility for smoking. Instead,

the provision only required that smoking areas had to be designated as such areas. The function of subsection 2 in the regulation was to establish that there were certain areas about which management had no choice but to designate them as nonsmoking areas. As a consequence, the provision required the Employer to prevent smoking in certain locations but did not limit no smoking areas to those locations.

The Union has also contended that the subsequent addition of Subsection k to Section 854.2 of the regulation, an addition that prohibits smoking in areas the installation head so designated, indicated that the Employer previously lacked authority to take such action prior to the amendment. This argument proved not to be persuasive because there is no evidence that this explanation was, in fact, the reason for changing the regulation. An equally plausible explanation for the amendment was that the parties recognized a need to remove the ambiguity in the provision. Second, the provision seems designed to give the Employer explicit power to alter past practices regarding smoking, a subject to be discussed later in this report.

3. The Past Practice of Allowing Smoking:

A major question in this dispute involves whether or not the Employer violated Article V of the parties' agreement by unilaterally altering the terms of the agreement. There was no provision in the National Agreement prohibiting more restrictive smoking policies. At the same time, past practices of the parties long have been recognized as a source of contractual obligations when the agreement is silent or ambiguous.

Evidence submitted by the parties in this proceeding makes it reasonable to conclude that the prior smoking policy constituted a past practice. As is clearly understood, to demonstrate that a past practice exists, it is necessary to show that the policy in question is (1) clearly enunciated and acted upon; (2) unequivocal; and (3) readily ascertainable and accepted by the parties over a reasonable period of time. (See, Celanese Corp. of America, 24 LA 168 (1954)). The employer in this case clearly established that employes had permission to smoke in the work room. Management even provided ash trays for employes who smoked, indicating that the policy had been accepted by the parties. There was no deviation from the policy from August, 1981 to March, 1982, demonstrating that the policy had enjoyed longevity over a reasonable period of time.

The past practice regarding smoking was binding on the Employer. Arbitrators have characterized smoking privileges as a "benefit" which cannot unilaterally be removed. (See, for example, Dental Command, 83 LA 529 (1984); and NALC, Case

W1N-5F-C 7876 (1984)).

Past practice, however, is not necessarily unalterable once it has been established. Arbitrators generally have recognized that an employer may alter a past practice unilaterally if there is clear and compelling evidence that conditions on which the past practice had been based have changed. (See, Port Royal, 34 LA 9 (1959)). Whether sufficient evidence exists to demonstrate a sufficient change in the circumstances varies from case to case. In smoking regulation cases, however, bad ventilation or serious health and safety problems are indicative that circumstances have rendered a former smoking policy alterable, but nonsmokers' mere dislike of cigarettes is not. (See, for example, NALC, Case No. C8N-4H-C 3151, p. 16 (1983); and NALC, Case No. W1N-5F-C 7876, pp. 10-11 (1984)).

While research on the impact of smoking on nonsmokers has been occurring for many years, it is only recently that the general public has taken note of such research. A study in 1978 concluded that "passive smoking causes anginal pain to develop sooner after exercise." (See, Arano, "Effects of Passive Smoking on Angina Pectoris," 299 New Eng. Jour. of Med., 21, 23 (1978). A study in 1980 focused on the effect of second-hand tobacco smoke in the workplace and concluded that non-smokers exposed to smoke in the workplace experienced as much risk to dysfunction of the lungs as light smokers. (See, White, & Frobe "Small Airways Dysfunction in Nonsmokers Chronically Exposed to Tobacco Smoke," 302 New Eng. J. Med. 720, 723 (1980)). A final study over a period of fourteen

years studied 91,540 nonsmoking spouses and suggested that such exposure significantly increased the mortality rate for lung cancer in nonsmoking spouses. (See, Hiiayama, "Non-smoking Wives of Heavy Smokers Have a Higher Risk of Lung Cancer," 282 Brit. Med. J. 183, 185 (1981)). Despite such studies, a number of judicial opinions have reached a different conclusion regarding the pernicious effects attributed to secondhand smoking tobacco. (See, for example, Hurley v. Miller Transporters, Inc., and Teamsters Local 891, 113 LRRM 2686 (1981); and Gordon v. Raven Systems and Research, E., 462 A.2d 10 (1983)).

As such research has become a part of the public consciousness, it has provided a basis for reevaluating past smoking policies. In this particular grievance, poor ventilation initially was one of the reasons for the no smoking policy. Both the Union and the Employer agreed that the ventilation system in the facility was not functioning properly at the time the new smoking policy went into effect. The Union, in fact, supported a petition asking that the Employer repair the ventilation system and stating that cigarette smoke and poor ventilation were causing employes to suffer nausea and headaches. (See, Employer's Exhibit No. 5). The point is that conditions on which the former smoking policy had been based had changed sufficiently to justify the Employer's unilateral alteration of the past practice. Likewise, relevant research had become more public.

4. The Employer's Right to Maintain the No Smoking Policy:

Even if the new no smoking policy constituted a violation of the past practice, the subsequent amendment of the ELM granted the Employer considerably more discretion to maintain the new no smoking regulation. In 1983, management renumbered Section 854.2 of the ELM as 855.2 and amended the section. The amendment consisted of adding Subsection k. It stated:

> 855.2 Prohibited:
> Smoking is prohibited:
>
> a. At service windows and counters.
>
> . . . .
>
> k. In other areas as designated by the installation head.
> (See, Employer's Exhibit No. 4, emphasis added).

The new subsection is clear and unambiguous. It reserved to the Employer the right to designate areas where employes may smoke. With the addition of this subsection, the agreement between the parties is no longer silent or ambiguous regarding management's authority to designate certain areas as smoking or nonsmoking areas. The point is that any argument to the effect that a binding past practice prevents the Employer from maintaining the new smoking policy is no longer persuasive.

On the other hand, simply because the agreement grants the Employer discretion to set smoking policies, it does not logically follow that the Employer enjoys unlimited power to take such steps. The parties' agreement makes clear that the Employer may make changes in work rules which are fair, equitable and reasonable. (See, Joint Exhibit No. 1 Article 19, p. 71). This contractual provision is consistent with general

principles in labor arbitration providing that safety and health rules, such as smoking regulations, must be reasonably related to safety objectives. (See, Bethlehem Steel Company, 41 LA 211 (1963); Babcock and Wilcox, 73 LA 443 (1969)). For example, in Schnadig Corp. and Upholsterers' International Union of North America, an arbitrator concluded that the employer properly discontinued the practice of permitting employes to smoke in restrooms, even though the restroom formerly had been a permissible smoking area. (See, 83-1 ARB 8267 (1983)). The employer changed the rule out of concern for the safety of its employes. In Social Security Administration and AFGE, an arbitrator concluded that smoking had to be banned on the entire work room floor in deference to safety concerns. (See, 82-1 ARB 8206 (1982)).

5. The New Policy Has Met the Test of Being Fair, Equitable, and Reasonable:

The new smoking restrictions have satisfied the requirements of fairness, equity and reasonableness demanded by the parties' collective bargaining agreement. First, the subject of smoking was a matter of considerable concern prior to implementation of the smoking policy for March of 1982. The Employer established without contradiction that it had received complaints from employes who desired to see an elimination of smoking from the work room. (See, Employer's Exhibit No 8). In light of the substantial concern of a number of postal employes, it was reasonable for management to place restrictions

on smoking in the work area.

Second, a test of the regulation's reasonableness is to be found in the support most of the employes have given the new policy. The Employer conducted a poll in 1984 in which a sizeable majority of the employes favored the new, more restrictive smoking policy. (See, Employer's Exhibit No. 10). The Union has argued that many of the signatures are not clear and that alternative policies had not been proposed at the time of the poll. In spite of this argument, an examination of the poll has established that there was substantial support for the policy among employes. Third, the new policy, although broad, does not appear to extend beyond the scope of the harm that the new policy had been designed to correct. A critical test in determining whether a health and safety rule is reasonable is to decide whether the scope of the rule is limited to overcoming the problem to be corrected. The new smoking policy in this case dealt with the source of the difficulty, problems with smoke in the work room. The new policy did not extend beyond the work room to areas in which smoking had not been shown to be a problem.

Fourth, the policy was not unfair or inequitable to rights of smokers. Management faced pressures from smoking and non-smoking employes and attempted to reach an accommodation between them. The Employer found itself in agreement with a court facing a different sort of problem where it concluded that "freedom ends where the other man's nose begins." (See, Kansas City v. O'Connor, 510 S.W.2d 689, 698 (1974)).

Balancing the interests of the two groups of employes, the Employer decided to prevent smoking on the work room floor while allowing smoking in certain designated areas. That was not an unfair resolution of the problem for either smokers or nonsmokers. Nor did it unfairly discriminate against clerks. While the rule affected carriers less because they spend less time in the work room, the rule is logical because the problem with smoking occurred on the work room floor. To have made the restriction cover employes outside the work room might well have undermined its reasonableness.

The reasonableness of the rule also must be evaluated in terms of societal concerns about the toxic effects of secondary smoke. That concern has manifested itself in a number of legal rulings in California where this dispute arose. California is among the handful of states with legislation restricting smoking in public places, including the work place. The California Clean Air Act of 1976 covers areas of observation by the general public. The law even specifies the percentage of area allowed for smoking and nonsmoking. In November of 1983, San Francisco voters approved Proposition P which gave employes the right to insist on working in a smokefree environment. The City of Palo Alto, California passed an ordinance which permitted employes to designate their immediate work areas as nonsmoking areas and to grant nonsmokers greater rights in any dispute arising under an employer's no smoking policy. In Hentzel v. Singer Company, the California Court of Appeals protected employment rights of an employe

who complained about working in a smoke polluted area. (See, 188 Cal. Rptr. 159 (1982)). In Alexander v. California Unemployment Insurance Appeals Board, a person allergic to tobacco smoke who quit her job because the employer failed to enforce its smoking policy was allowed to collect unemployment compensation. (See, 163 Cal. Rptr. 411 (1980)).

In addition to those developments in its own jurisdiction, there were similar developments in other states. For example, in Shimp v. New Jersey Bell Telephone Company, a court concluded that the employer had an obligation to provide a safe working environment, including a work area free from cigarette smoke. (See, 368 A.2d 408 (1976)). Similarly, in Smith v. Western Electric Company, a court required the employer to provide a work environment free from the hazards of smoke. (See, 643 S.W.2d 10 (1982)). Likewise, arbitrators asked whether safety rules about smoking included designated smoking and nonsmoking areas. (See, for example, Nicolet Industries, Inc. and Amalgamated Clothing and Textile Workers Union, 79-2 ARB 8398 (1978)).

To be added to this mixture is S. 1440, a bill under consideration by the United States Senate which would require operators of federal buildings to make reasonable accommodations for the needs of smokers and nonsmokers who use the building. It would apply to employes as well as members of the public who have occasion to enter the building.
All these developments are merely manifestations of the environment from which the employer had to craft the policy.

6. Management's Failure to Consider Union Proposals:

The Union has claimed that the new no smoking policy should be held to be invalid because there were alternative smoking policies available which better would have served the interests of all employes. The argument, however, is insufficiently persuasive to justify overturning the current smoking policy. The Employer retained the right in its discretion to make policies regarding smoking to the extent that those policies were fair, equitable, and reasonable. That was the requirement of Article 19 in the parties' agreement. The collective bargaining agreement did not require the Employer to choose the option which the Union, or even the arbitrator, believed in their independent judgment to be the best possible course of action. The rule change rather had to be consistent with the agreement and fair, reasonable and equitable. The Employer's no smoking policy has met this contractual test even though some alternative policy may have been preferable.

The Union also has contended that the Employer violated the parties' agreement by altering the smoking policy without first bargaining to impasse with the Union. The Employer, however, retained in Article 3 of the parties' collective bargaining agreement the right to make reasonable work rules, and there was no requirement that such rules be bargained into existence. Nor is such a requirement contained in Article 19 of the agreement. The Employer has retained the right to designate smoking and nonsmoking areas. The arbitrator has

received no evidence that the parties imposed on the Employer a concurrent obligation to bargain to impasse before exercising its right to alter the smoking policy.

AWARD

Having carefully considered all evidence concerning this matter, it is reasonable to conclude that the Employer did not violate the National Agreement between the parties when management instituted and maintained a policy on smoking. The Employer acted within the scope of its authority when it enacted a restricted smoking policy on March 10, 1982. Even if the Employer violated the agreement at the time, it would be inconsistent with the new amendment in the ELM to order rescission of the policy. Consequently, the grievance is denied. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow

CARLTON J. SNOW
Professor of Law

Date: 1-6-86