

28435

REGULAR ARBITRATION PANEL

In the Matter of Arbitration)

between)

United States Postal Service)

and)

National Association of
Letter Carriers, AFL-CIO)

Grievant: Class Action

Post Office: Warwick, RI

Case No: B06N4BC09175879

Union No: CA-707

ART # 14-129459

Before: EILEEN A. CENCI

Appearances:

For United States Postal Service: Thomas Caiazzo

For National Association of Letter Carriers: Ronald Augustus

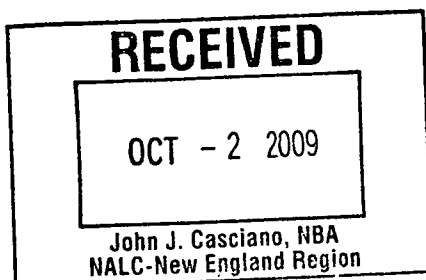
Place of Hearing: Warwick, Rhode Island

Date of Hearing: July 30, 2009

AWARD SUMMARY: Management violated Article 5 of the National Agreement when it notified the Union on March 17, 2009 that carriers would be required to remove all personal items hanging at carrier cases. Management unilaterally changed the past practice without giving the Union adequate prior notice and without engaging in good faith bargaining over the impact of the change. The clean case policy is to be rescinded and the practice of permitting carriers to keep personal items at their cases is to be reinstated.

Date of Award: October 1, 2009

Regular Regional Arbitration Panel



Eileen A. Cenci
RECEIVED Eileen A. Cenci

OCT 7 2009
VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS

OPINION

STATEMENT OF PROCEEDINGS:

This matter was arbitrated pursuant to the grievance and arbitration provisions of a collective bargaining agreement (National Agreement) between the United States Postal Service (Service) and the National Association of Letter Carriers (NALC or Union). A hearing was held before me on July 30, 2009 in Warwick, Rhode Island. The parties appeared and presented evidence concerning three cases involving the elimination of claimed past practices at the Warwick Post Office. They requested three separate decisions. At the conclusion of the testimony the Service made an oral closing argument. The Union requested time to file a post-hearing brief, which was received by the arbitrator on August 17, 2009. The record was closed at that time. The arbitrator was subsequently granted an extension until October 2, 2009 to render the Opinion and Award.

ISSUE:

The parties agreed to the following issue statement, which was taken from the Step B decision:

Did management violate Articles 3, 15 and/or 30 of the National Agreement when on March 17, 2009 the union was notified that carriers would be required to remove all personal items hanging at carrier cases?

If so, what is the appropriate remedy?

FACTS:

Carriers at the Warwick Post Office have long been permitted to keep personal items at their cases. Management attempted to change the practice one time prior to the change that gave rise to the current case. On January 22, 2008 carriers were ordered to remove all personal items hanging from the carrier cases. The Union filed a grievance which was resolved by the parties at Step B on

February 29, 2008. The Dispute Resolution Team (DRT) determined that management had violated the National Agreement, as well as a binding past practice of 25 years' duration, when carriers were ordered to remove personal items from their cases and ordered management to rescind the January 22, 2008 order. The practice was reinstated and remained in place until 2009.

David dosSantos became Officer in Charge (OIC) of the Warwick Post Office on March 7, 2009. He had previously worked in New Bedford for approximately seven (7) years. When he arrived at the Warwick office Mr. dos Santos noticed a lot of disorganization, noise and clutter at the facility. He observed that carriers kept personal items including large college towels, flags, fans and radios at their cases. Some had cases of water. In some cases items were hanging from wires or sitting on top of the work area.

After making observations at the Warwick Post Office for his first few days in his new assignment Mr. dosSantos met with the NALC at a labor-management meeting on March 13, 2009. No agenda was published in advance of the meeting. Union officials were under the impression that the meeting would be nothing more than an opportunity to meet the new OIC. At the outset of the meeting Mr. dosSantos presented the Union with a list of his concerns, based upon his observations. There were thirty-six items on the list, including "canteen/coffee truck", "eating/drinking at case", "personal/extraneous matter at cases" and "lockers attached to carrier cases." The meeting lasted about an hour and a half. Mr. dosSantos testified at arbitration that he went through items on the list and explained his concerns, based upon his observations. According to Union witnesses some items on the list were discussed and others were not. The discussion kept jumping from one topic to another. Mr. dosSantos also testified that the Union refused to discuss the issue of personal items being kept at cases, taking the position that it had won a previous decision permitting the practice. Union witnesses dispute that account, claiming that the only issues they said should not be discussed were annual leave and delivery in the dark because those had been negotiated in the local agreement and could only be reopened in the next round of negotiations. They did point out to Mr. dosSantos that a Step B decision had concluded that there was a past practice of permitting carriers to keep personal items at their cases, and that the B Team had ordered the practice reinstated after management had unilaterally changed it.

Mr. dosSantos sent Brian Campbell a certified letter on March 17, 2009, notifying him that he had considered "...all the information that was provided to me when we met to discuss the

possibility of eliminating the past practices cited above.” He had decided to eliminate a number of practices as being inefficient, posing an unnecessary financial burden and in some cases posing a threat to employee safety. One of the items listed in the letter was, “Letter carriers not in compliance with the clean case policy.” A clean case policy was also promulgated. It included a number of items including, “Do not leave any extraneous matter at this case.” The new policy permitted carriers to maintain some small personal items, such as family photographs and calendars, at their cases.

Mr. dos Santos and Mr. Campbell met again on March 19, 2009 and Mr. Campbell said he was unhappy about the March 17 letter because he felt they had never discussed the issues. Mr. dos Santos offered to discuss the issues at that time but Mr. Campbell made it clear that the Union would file a grievance and discuss the practices only in the grievance process. Following their meeting Mr. dosSantos wrote a letter to Mr. Campbell reiterating his position that management had discussed the past practices with the Union leadership, but offering the opportunity to further discuss them. Vice-President Monahan responded to that letter, stating that he would meet with Mr. dosSantos regarding several of the items listed in his letter. The clean case policy was not one of the items he offered to discuss.

Management made additional offers to negotiate after March 19, 2009 and before the new policy was implemented but the Union was unwilling to negotiate. The Union filed a grievance alleging that management had unilaterally changed a binding past practice and asking that the practice be reinstated. The matter was not resolved at the lower levels of the grievance process and was appealed by the Union to arbitration.

CONTRACT:

Article 3 Management Rights

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

- A. To direct employees of the Employer in the performance of official duties;
- B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;
- C. To maintain the efficiency of the operations entrusted to it;
- D. To determine the methods, means, and personnel by which such operations are to be conducted;

...

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.

Joint Contract Administration Manual (JCAM)

Changing Past Practices that Implement Separate Conditions of Employment

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. If the parties are unable to agree, the union may grieve the change.

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 first of these has rarely arisen in Postal Service cases involving its numerous bargaining units.

A change in local union leadership or the arrival of a new postmaster or supervisor is not, in itself, sufficient justification to change or terminate a binding past practice, as noted in the previous paragraph.

LOCAL MEMORANDUM OF UNDERSTANDING (LMOU)

Section 5

Joint Labor/Management Committee meetings shall be scheduled in all offices in accordance with the following criteria, providing agenda items are submitted: In offices with a complement of 100 to 299 employees, meetings will be held bi-monthly, in the months of January, March, July, September and November. Agenda items must be exchanged at least 72 hours prior to such meetings. The meeting shall be held on the last Thursday of the appropriate month unless the parties agree to another date. Where agenda items do not warrant a regularly scheduled meeting, discussions may take place by mutual agreement in lieu thereof. Items not placed on such agenda shall be discussed only by mutual consent of the parties.

POSITIONS OF THE PARTIES:

NATIONAL ASSOCIATION OF LETTER CARRIERS

The Union claims that management unilaterally eliminated a long-standing past practice in violation of Article 5. A Step B decision previously concluded that there was a past practice at the Warwick Post Office of permitting carriers to keep personal items at their cases. The practice did

not present a safety hazard or result in inefficiency.

Management did not negotiate with the Union in good faith prior to implementing the unilateral change. The Union was not properly notified of the March 13, 2009 meeting since OIC dosSantos did not provide the Union with any agenda in advance of the meeting. Article 17, section 5 of the local MOU requires both parties to submit agenda items 72 hours in advance of labor-management meetings. Where the Union was not even informed in advance of the items management intended to discuss at the March 13, 2009 meeting, that meeting cannot be considered a negotiation.

The March 17, 2009 letter sent by management to the Union contained no offer to negotiate with the Union. Instead, it informed the Union that a decision to eliminate the practice had been made. Although management later tried to correct its error by offering to negotiate, it is clear that the decision had been made and negotiation would have been pointless. The Union was within its rights to grieve the unilateral change rather than enter into pointless negotiations after management had made a decision to eliminate the practice.

The Union asks that the grievance be sustained and that management be ordered to reinstate the past practice of allowing carriers at the Warwick Post Office to keep personal items at their cases.

UNITED STATES POSTAL SERVICE

Management argues that there was a need to change the practice of allowing carriers to keep personal items at their cases because of the overall problem of clutter in the work area. This is a matter of housekeeping and is important since mail can be lost in cluttered work areas. Allowing items on top of cases is also a safety issue. The new policy is a reasonable compromise that allows carriers to keep some personal items at their cases but requires the removal of large items.

Management gave the Union the opportunity to bargain over the proposed change but the Union refused to negotiate, despite repeated offers by management. The Union made it clear that it would not compromise on the issue of maintaining personal items at carrier cases, believing that management could not change the practice because the Union had previously won a Step B decision. This is a misreading of Article 5, however. Management is not prohibited from changing a past practice if it provides the Union with advance notice and an opportunity to bargain over the change.

Those conditions were met in this case and the grievance should be denied.

DISCUSSION:

The Union has established in this case that a past practice of permitting carriers to keep personal items at their cases existed at the Warwick Post Office. The Service does not dispute that the tests of a past practice have been met, and indeed cannot do so in this case since a B Team decision established the existence of the practice.

Even where a past practice exists, however, it is not necessarily frozen in place for all time. Management may alter or abolish a past practice if it gives the Union advance notice of the proposed change and bargains in good faith over the impact of the change on the bargaining unit. Practices may also be changed by management when the nature of the business changes or when they are no longer efficient or economical.

Management failed in this case to bargain with the Union in good faith over the proposed change prior to implementing it. The March 13, 2009 meeting at which the union and management discussed the personal items at the cases and other issues cannot be considered a bargaining session. The Union was not given notice in advance of the meeting that management wanted to change the past practice. The Union did not even receive an agenda prior to the meeting although there is a requirement that the agenda of labor-management meetings be exchanged at least 72 hours in advance. Mr. dosSantos had been working as OIC at the Warwick Post Office for only five days prior to the meeting and the Union was unaware that the March 13, 2009 meeting was anything more than an opportunity to get to know the new OIC. Yet at the outset of the meeting they were handed a list of thirty-six matters the new OIC wanted to change, based upon his observations in the first few days he had been at the facility. Good faith bargaining involves more than off-the-cuff discussion at a meeting where there has been no advance notice of the topics to be discussed, no development of proposals and no exchange of proposals. The March 13, 2009 meeting did not constitute a good faith bargaining session.

There remains a question as to whether management offered to bargain in good faith after the March 13, 2009 meeting but prior to implementing the change. According to management, the Union made it clear at the March 13 meeting that it would not bargain or compromise at all on the question of allowing carriers to keep personal items at their cases. The Union disputes that account

and maintains that it never refused to bargain over the issue although it did point out that the practice had been upheld by the B Team. Even if the Union refused to discuss the issue at the March 13, 2009 meeting, it was within its rights to do so. Under section 5 of the LMOU neither party is required to discuss any item at a labor-management meeting if the item did not appear on an agenda exchanged at least 72 hours in advance of the meeting. As previously noted, that requirement had not been met.

Management's next offer to bargain over the issue came after the March 17, 2009 letter notifying the Union that the practice would be changed. That letter strongly suggested that from the perspective of management discussion of the issue had been completed and a decision had been made. No meaningful good faith bargaining had taken place before that letter was sent and the letter itself included no offer to bargain. Although management subsequently made offers to bargain I note that the agreed issue in this case is whether management violated the National Agreement when it notified the Union of the change on March 17, 2009. It is unclear that offers to bargain subsequent to that date are within the scope of the issue presented to the arbitrator. I further find that the Union reasonably concluded, based upon the March 13, 2009 meeting with management and the follow-up March 17, 2009 letter, that management had made its decision and that the grievance process was its only recourse.

There is no evidence in this case that the practice was uneconomical or inefficient. There is also a lack of evidence that it constituted a safety violation. If some items maintained by carriers at their cases presented a safety hazard these should have been identified through the processes that are in place to address safety concerns.

For the reasons set forth above, management violated Article 5 of the National Agreement when it notified the Union on March 17, 2009 that carriers would be required to remove all personal items hanging at carrier cases. Management unilaterally changed the past practice without giving the Union adequate prior notice and without engaging in good faith bargaining over the impact of the change.