C-23557

REGULAR ARBITRATION PANEL

In the Matter of Arbitration	)	
	)	
between	)	
	)	Grievant: Class Action
UNITED STATES POSTAL SERVICE	)	Post Office: Oxnard, California
	)	
and	)	Case Nos.: F98N-4F-C 01056324
	)	
NATIONAL ASSOCIATION OF LETTER CARRIERS	)	

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the Employer: Mr. Tom Cloonan

For the Union: Mr. Manuel L. Peralta, Jr.

PLACE OF HEARING: Oxnard, California

DATES OF HEARING: April 30, 2002

CONTRACT YEAR: 1998-2001

POST-HEARING BRIEFS: June 13, 2002

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer's removal of a telephone from the Union's current business office at the facility violated the parties' National Agreement by unilaterally abrogating a past practice without a legitimate basis for doing so. The Employer is ordered immediately to replace a functioning telephone in the Union's office.

The arbitrator shall retain jurisdiction in this matter for 90 days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date 7-12-02

REGULAR ARBITRATION PANEL

IN THE MATTER OF ARBITRATION BETWEEN UNITED STATES POSTAL SERVICE AND NATIONAL ASSOCIATION OF LETTER CARRIERS (Class Action Grievance) (Case No.: F98N-4F-C 01056324)	)	ANALYSIS AND AWARD Carlton J. Snow Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to the 1998-2001 collective bargaining agreement between the parties. A hearing occurred on April 30, 2002 in a conference room of the postal facility located at 1961 North "C" Street in Oxnard, California. Mr. Tom Cloonan, Labor Relations Specialist, represented the United States Postal Service. Mr. Manuel L. Peralta, Jr., Regional Administrative Assistant, represented the National Association of Letter Carriers.

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. All witnesses testified under oath as administered by the arbitrator. The arbitrator tape-recorded the proceeding as an extension of his personal notes. The advocates fully and fairly represented their respective parties.

There were no challenges to the substantive or procedural arbitrability of the matter, and the parties stipulated that it was properly before the arbitrator. The parties authorized the arbitrator to retain jurisdiction in the matter for 90 days after a decision has been rendered, and they submitted the matter on the basis of evidence presented at the hearing as well as post-hearing briefs. The arbitrator officially closed the hearing on June 13, 2002 after receipt of the final brief in the matter.

II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

> Did the Employer violate the National Agreement by removing a telephone from the Union's office? If so, what is an appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 41 - LETTER CARRIER CRAFT

Section 3. Miscellaneous Provisions

H. The Postal Service recognizes that representatives of the NALC should be permitted to use available telephones. Accordingly, the Employer at the local level shall establish a reasonable policy regarding the use of telephones by authorized Union officials and stewards for calls relating to the administration of the National Agreement. The policy will be made known to the President of the NALC Branch.

ARTICLE V, Section 6 of the LOCAL MEMORANDUM OF UNDERSTANDING.

Sect. 6. Representatives of the local branch shall have the right to the use of the Post Office telephone (for non-toll calls) in the Post Office or any station for the purpose of performing and engaging in the official Union duties and business related to the National Agreement and local Memorandum of Understanding.

IV. STATEMENT OF FACTS

In this case, the Union challenged the decision of the Employer to remove a telephone from the Union's new office in the Oxnard postal facility. In 1994, the Union conducted business from an office in the postal facility that housed two desks, a conference table, chairs, and a telephone. The telephone is the focal point of the dispute. The Employer knew there was a telephone in the Union's office. When the Union moved to a new office in the facility, it also included a telephone. But it was packed in a "775" container. Union official Minster testified that, prior to beginning his use of the telephone, he never sought permission from management to do so. It is this telephone that triggered the current dispute.

After the Union had occupied the new office for at least several weeks, the Employer ordered the Union to discontinue using its telephone and to remove it from the office. That managerial decision allegedly violated the National Agreement between the parties, and the Union sought resolution in the grievance procedure. When the parties were unable to resolve their differences, the matter proceeded to arbitration; and this decision is the culmination of that process.

V. POSITION OF THE PARTIES

A. The Union

The Union argues that the Employer unilaterally removed the telephone from the Union's office. In doing so, management allegedly violated the parties' National Agreement by ignoring a past practice. It is the position of the Union that the telephone always had been in the Union's office and that management had no just cause or reasonable basis to remove it. Hence, it seeks a continuation of the established practice between the parties.

The Union contends that the telephone in the Union office was never abused and that the office door remained closed and locked when union business was not being conducted there. The Union also maintains that a telephone in the office is necessary so that Union officials may make confidential calls. It is the belief of the Union that management's sole purpose for removing the telephone is to harass the exclusive representative of the bargaining unit. Thus, the Union concludes that the grievance in this case must be sustained.

B. The Employer

It is the position of the Employer that no contractual violation occurred in this case. According to management, the telephone in the Union office was removed prior to the time the Union occupied the office so that, by removing a telephone, the Employer merely continued the status quo. It is the theory of the Employer that, since there was no telephone in the office when the Union first occupied it, a Union official must have retrieved the telephone from some place in the postal facility and placed it in the office without management's prior approval. Hence, the Employer allegedly had a right to remove the telephone from the office.

It is the position of the Employer that management never provided a telephone to the Union. Moreover, the Employer contends that, if the Union had requested a telephone in its office, management would have denied the request. According to the Employer, the telephone was removed as soon as management discovered it in the office.

Management contends the Local Memorandum of Understanding between the parties addresses the topic of telephone use by Union officials, but there is no contractual requirement that management provide the Union with a private telephone. Nor, in the opinion of the Employer, has a past practice arisen according to which the Union is provided

with a private telephone in its office. Hence, the Employer concludes that there is no past practice in existence for it to violate. Since neither contract nor practice has been violated, the Employer concludes that the grievance must be denied.

VI. ANALYSIS

A. Placing the Dispute in Context

During the 1994-96 time period, the Union shared an office with Ms. Denise Hatchett for approximately six months. Throughout that six month period, the Union had use of a private telephone in its office. The evidence was persuasive that no effort was made to hide the telephone and that its existence in the office was common knowledge. Although the Union shared the office, it did not share the telephone with Ms. Hatchett because she had no telephone duties as a part of her work assignment.

While sharing the "Hatchett" office, however, the Union did share the telephone with Ms. Margaret Wayne. She monitored the "ride-share" program. Ms. Wayne used the office telephone for most of the time period that the Union and she were in the office together. Her duties required her to come and go, and for that reason there was no lock on the door of the office. Another employee who had a private office but no telephone also used the telephone in the Union's office for official business. The evidence was clear and convincing that the Union had use of a private telephone in that office for several years to transact union business.

The evidence was compelling that telephone abuse took place while the Union was in the first office, but no evidence established that the

Union was the abuser. Due to the work assignment of Ms. Wayne, the Union was unable to lock the office door; and a Union official was not always present in the office. Unauthorized individuals began entering the office and using the telephone. Management never accused any union official of nor disciplined any employee for abuse of the private telephone. In the Union's current office, there is a lock on the door which Union officials use.

According to Ms. Mattes, president of the Union in 1996, management never reported any problems of telephone abuse to Union officials. In February of 1996, the parties negotiated a Local Memorandum of Understanding; and the evidence was unrebutted that management never discussed any concerns about or problems with the Union's use of the private telephone in its office. The topic never arose at the local bargaining table.

Several months into the somewhat contentious negotiations for the Local Memorandum of Understanding, the Employer in July of 1996 moved the Union's office to the loading docks. It was unrebutted that the Employer gave the Union no advance notice of the move and that Union officials had no opportunity to move equipment out of the office. Shop Steward Minster testified without rebuttal that he reported for work one morning and found all the Union's office equipment and files removed from

the old office to the loading dock. The Employer provided no telephone to the Union while its office was located on the loading dock.

The Employer, then, moved the Union's office into an open area on the workroom floor. Until December of 2000, the Union conducted its business from an "office" on the workroom floor. The "office" consisted of partitioned walls that were four and a half to five feet tall. It was unrebutted that the Employer and employees were able to look into the office area and to make eye contact with grievants as personnel moved about the area. There was persuasive evidence that on at least one occasion a Letter Carrier and a supervisor between whom there was considerable "bad blood" engaged in a staring contest as the Letter Carrier discussed Union business with a grievance officer; and the supervisor even "made faces" at the employee.

Such incendiary elements led to a grievance over the location of the Union office. The dispute ultimately was scheduled for arbitration, but the parties reached a pre-arbitration Settlement Agreement. The Settlement Agreement called for the Employer to provide the Union with private office space, and management complied.

It will be helpful to contextualize the dispute by providing a short history of the Union's access to a telephone after it lost its old office. There was no telephone in the Union's work space while it conducted

business on the loading dock or the workroom floor, and the Union never grieved the absence of a telephone but only the lack of a truly private workspace for the Union. The wrangling between the parties about an appropriate office space for the Union continued for approximately three and a half years. Shop Steward Minster testified that the Union never filed a separate grievance over the absence of a telephone because a general grievance had been filed covering the topic of a Union office and also because there was no telephone outlet on the loading dock or in the immediate partitioned space used by the Union on the workroom floor. Throughout this time, the Union sought permission when it needed to use a telephone. Since the Union "office" was located on the workroom floor, the Union made use of telephones at a supervisor's desk in the vicinity.

In the latter part of 2000, the Union obtained its new office pursuant to the Settlement Agreement. At first, the telephone in the new office was not plugged into the telephone system. The telephone was packed in a "775" tub-like container. Even when it was finally plugged into the system, the telephone sat on a desk in the office for approximately three months before it began functioning. The Union did not use the telephone for incoming calls because no Union official knew the extension number.

According to Shop Steward Leighton, Union officials used the telephone primarily to call officials at the branch office of the Union.

On December 8, 2000, Supervisor Russ Partee ordered the telephone removed from the Union office. Supervisor Partee testified that he asked Shop Steward Leighton to remove the telephone because the Employer needs to know when employees are using a telephone, and management needs for union officials to seek permission to use the telephone so that the Employer can monitor where employees are and what they are doing. Supervisor Partee was not employed at the Oxnard facility when the Union's office was housed in its first location and prior to the time it was located on the loading dock and the workroom floor. He never saw the Union have immediate access to a private telephone. According to Supervisor Partee, all postal employees must ask permission before using a telephone. Hence, he ordered the telephone removed, and this grievance ensued.

B. The Doctrine of Past Practice

The Union asserted that the Employer violated the parties' National Agreement because it unilaterally altered a past practice by removing a telephone from the Union's office on December 8, 2000. The

Employer responded that no contractual violation occurred because no past practice existed of the sort described by the Union. In the absence of any such past practice, the Employer concluded that it was well within its managerial prerogative to remove the telephone from the Union office.

Arbitrators have established a reasonably high degree of consensus with regard to the doctrine of past practice in labor arbitration, and it would ignore scholarly reality to attempt to discuss fundamental principles of past practice without reference to seminal research done on the topic by Richard Mittenthal, past president of the National Academy of Arbitrators and a long-time national arbitrator of the United States Postal Service. (*See* Mittenthal, 14 NAA 30 (1961).) Virtually all modern cases involving past practice owe a heavy debt to the work of Arbitrator Mittenthal. The parties, themselves, recognized the importance of Arbitrator Mittenthal's scholarly work by codifying it in Article V of the Joint Contract Administration Manual. The JCAM makes clear that its explanation of the elements of past practice "is not exhaustive and is intended to provide the local parties general guidance on the subject." (*See* Joint Exhibit No. 4, p. 5-1.)

The parties have incorporated into the Joint Contract Administration Manual factors enunciated by Arbitrator Mittenthal over four decades ago. The parties and an arbitrator test the validity of a past practice

by asking whether the asserted practice has "clarity and consistency; longevity and repetition; acceptability and mutuality;" and reasonably unchanged underlying circumstances that gave rise to the initial past practice. (*See* Joint Exhibit No. 4, p. 5-2.) The Mittenthal elements are ones the parties have agreed should be used to evaluate activity in order to determine whether it rises to the level of a "past practice," and the facts of the case have been measured against these criteria.

C. Application of the Mittenthal Elements

In 1994, the Union used a business office in the postal facility with a private telephone. The Employer knew the Union used the telephone. When after a grievance the Union, ultimately, occupied its new office, the second office also contained a telephone. The Union used the telephone in the old office for approximately two years.

In order to obtain its new office, the Union in 1996 filed a grievance over union work space. As a consequence of the grievance, management agreed to provide the Union with a private office. In the struggle that led to the new office, management along the way moved the

Union's office to the loading dock and, then, to the workroom floor. The Union operated from the workroom floor until 2000, at which time management gave the Union a private office in response to the 1996 grievance.

During the interim when the Union conducted business from the workroom floor, it did not have a private telephone and sought permission to use a supervisor's telephone to conduct its business. As the "office space" dispute gradually moved through the grievance process, the Union had no use of a private telephone for several years. During this time, the Union never filed a grievance about the inconvenience of not having a private telephone. It is on this foundation the Employer builds its theory of the case that no past practice exists of the Union's having access to a private telephone. Because the Union had no use of a private telephone while the system digested the "office space" grievance, management argues that no past practice exists of the Union having immediate access to a private telephone.

The Union, however, was not compelled to file a separate grievance over the absence of a private telephone when it already had filed a grievance over the fact that its office was on the loading dock and the workroom floor. From 1996, the Union was awaiting a private office, which management did not provide until December of 2000. While awaiting final

resolution of the 1996 grievance over a private office, it was not unreasonable for the Union to tolerate the status quo and not to grieve the absence of a private telephone. What the Union sought in its 1996 grievance was a return to the status quo of a private office, and its private office had contained a private telephone.

The fight over a private telephone was subsumed in the larger grievance over locating the Union's office on the loading dock and the workroom floor. There was no way the Union could have known that management would remove the private telephone from its new office. Moreover, for the two years it had its old office, it had a private telephone.

Even if one were totally to ignore the fact that the old office of the Union contained a private telephone, the telephone in the new office rose to the level of a past practice. The presence of the telephone was activity that was both clear and consistent. No evidence established that the Union made any effort to hide the telephone from management's view. It, likewise, met the requirement of longevity and repetition. There was a telephone in both Union offices the entire time the Union operated in those offices, and the Union regularly has used the telephone to conduct Union business.

The Employer responded that, even if these first Mittenthal factors were met, no past practice arose because the activity was not

acceptable to both parties. Any alleged past practice is impaled on a lack of acceptability, according to management. The Employer contended that it never approved the use of a private telephone in the new office and that, if the Union had requested one, it would have been denied. The Employer went so far as to accuse Union officials of removing the telephone from some other location in the postal facility and themselves placing it in the Union office. No evidence submitted to the arbitrator, however, supported the accusation. Unrebutted testimony from employees who used the new office prior to or at the same time as the Union established that there had been a telephone in the office and that the telephone had been left behind when the former occupants departed. The Employer provided the office for the Union, and management knew or had reason to know that the telephone was located in the office.

Although there is no evidence of express permission having been granted by the Employer to the Union for use of a telephone, permission, and also acceptability, impliedly existed. Article V of the Joint Contract Administration Manual states that:

> Acceptability may frequently be implied from long acquiescence in a known course of conduct. (*See* Joint Exhibit No. 2, p. 5-2.)

Management had reason to know of the telephone in the new Union office. The Employer supplied the office to the Union and also furnished it. The

arbitrator received unrebutted evidence that supervisors had been in the office with the telephone in plain view. Until December 8, 2000 and the order from Supervisor Partee, no one threatened or attempted to remove the telephone. During the time the telephone was in the office, Union officials did not seek management's permission to use it. Even if one ignored all the other indicia of past practice, the Employer's failure to act during the two year period of the old office and supplying a telephone in the new office showed the Employer's acquiescence to the existence of a private telephone in the Union's new office.

Nor must the teaching of Article V, Section 6 in the Local Memorandum of Understanding be diluted. The parties agreed that:

> Representatives of the local branch shall have the right to the use of the Post Office telephone. . . . (*See* Joint Exhibit No. 2, p. 17.)

By using the mandatory "shall," the local parties negotiated a limitation on the discretion of management to deny Union officials the use of telephones for legitimate Union business. In other words, the parties agreed in contract negotiation that a Union official using a telephone for legitimate union business is not required to ask permission to use the telephone. Such permission has been previously negotiated in the Local Memorandum of Understanding. If challenged by management, a Union official could be

required to prove the telephone had been used for proper business; but absent evidence of abuse, the parties have agreed that local Union officials "shall" have the right to use a telephone for "performing and engaging in the official Union duties and business related to the National Agreement and local Memorandum of Understanding." (*See* Joint Exhibit No. 2, p. 17.)

The Employer removed the private telephone from the Union's new office reasonably soon after the Union occupied the office. But the Union previously had use of a private telephone for approximately two years in another office location. The Employer removed the telephone from the new office in conjunction with a long period of dispute between the parties. It did so without evidence of abuse or misuse of the telephone by union officials at any time. Accordingly, it must be concluded that the Employer acted unilaterally and attempted to terminate a past practice without a legitimate basis for doing so.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer's removal of a telephone from the Union's current business office at the facility violated the parties' National Agreement by unilaterally abrogating a past practice without a legitimate basis for doing so. The Employer is ordered immediately to replace a functioning telephone in the Union's office.

The arbitrator shall retain jurisdiction in this matter for 90 days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date 7-12-02