J. Earl Williams 12/15/84 WON
Art. 5 - Past Practice - Coffee Breaks
AIRS #4314

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REGULAR REGIONAL ARBITRATION PANEL

Arbitration between:

UNITED STATES POSTAL SERVICE Houston, Texas and AMERICAN POSTAL WORKERS UNION	Opinion and Award pertaining to S1C-3U-C-20398 Class Action/Coffee Breaks Hearing: May 15, 1984

Arbitrator: J. Earl Williams

Appearances

For Management: David C. Lamb
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For the Union: Rudy Perez, Jr.
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Background

On August 18, 1982, a memo was posted on the bulletin board in the swing room at the Airmail Facility of the Houston Intercontinental Airport. It was signed by M. Nelson, the Acting Manager. It stated as follows:

> Craft employees are reminded and instructed that coffee breaks are limited to two a day, ten minutes each. Coffee break schedules are posted and must be adhered to. (MX 1)

On January 12, 1983, a grievance was filed which stated the following:

> On 1-11-83 Supv. Flores instructed Tour I employees that breaks are to be limited to 10 minutes. Before this date the breaks were 15 minutes.
>
> For approximately the past 9-10 years employees assigned to the AMF have been allowed two 15 minute breaks. This has been with the knowledge and approval of management. Although there has been no written approval, management fully condoned this practice even to the point of announcing when break time is over only after 15 minutes have elapsed. This announcing of the end of break after 15 minutes was occurring before and since this grievance was filed. (Example: We were allowed 15 minute breaks with management's knowledge as late as yesterday 1-18-83.)
>
> The AMF for years has been allowed the 15 minute breaks because of the arduous duties (including transfer section, priority section and the Express section) as stated on bids and the faster paced workload because of meeting flight schedules.
>
> At this time Tour II and III still are allowed the regular two 15 minute breaks. Tour I is also allowed the same breaks except when Supv. Flores is on duty. (JX 2)

The corrective action requested was that the past practice of two 15-minute breaks for employees at the AMF continue. The Step II decision stated:

> Grievance is denied in that it was filed untimely. However, the statement dated 8-18-82 clearly dictates that breaks will be of 10 minute duration only. (JX 2)

The Step III decision, in relevant part, was as follows:

> Based on information presented and contained in the grievance file, the grievance is denied. The local policy has been 10 minute breaks and is being adhered to. However, management must insure that all tours will adhere to the policy. (JX 2)

Issue

Immediately prior to the start of the hearing, the parties agreed to the following statements of issues:

1. Is the subject grievance arbitrable?

2. Was there past practice of two coffee breaks of more than 10 minutes each at the Airmail Facility in Houston? If so, did Management violate the National Agreement, when it limited coffee breaks to two of 10 minutes each?

THE ARBITRABILITY QUESTION

Management Contentions

Management's basic contention was that the written notice was posted on August 18, 1982. Employees were reminded that coffee breaks were limited to two a day of 10 minutes each. It points to Article XV, Section 2, Step 2b, which indicates that a grievance ". . . must be filed within fourteen days of the date on which the Union or the employee first learned, or may reasonably have been expected to have learned, of its cause." Since the grievance was not filed until January 12, 1983, this was more than four months after the posting of the notice. Consequently,

Management contends that this is a violation of the language referenced above. While Management concedes that there is conflicting testimony in regard to the breaks and that it may be necessary to ascertain what happened after the notice was posted, it concludes, nevertheless, that it is undisputed that the notice was posted at at the time noted. It claims that the grievance should have been filed within fourteen days of the posting. Consequently, it concludes that it is untimely and should be denied.

Union Contentions

Essentially, the Union contends that, not only had the practice been long-standing, but it continued after the posting of the notice. It claims that it was not stopped by any Management official until Supervisor Flores stopped it on his tour on January 11, 1983. It filed the grievance the very next day. In fact, it contends that the other two tours still were being allowed to take their regular two 15-minute breaks. Also, the Union contends that there was no mention of untimeliness of the grievance at Step I or Step III. The only mention was in the Step II decision.

Discussion

More often than not, it is necessary to analyze evidence related to the merits of a case before a conclusion can be reached in regard to arbitrability. This is true in the subject case. Despite

the Union contention, Management had the right to raise the question. It did in Step II, at the least, and it could have at the hearing for the first time. In the latter case, a continuance is sometimes necessary in order to give the other party time to prepare for the issue. However, the Union should have been well aware of the issue in the subject case. Consequently, the practice of the parties becomes significant. This relates to both before and after the posting of the August 18, 1982 notice. If there had been a practice up to that date, and Management stopped it completely from that date forward, the Union should have been aware of the grievance within fourteen days of that date. If, on the other hand, the practice was not stopped until some later period, then the awareness might relate from that period. However, as the Elkouris pointed out in How Arbitration Works, ". . . doubts as to the interpretation of contractual time limits or as to whether they have been met should be resolved against forfeiture of the right to process the grievance." (p. 149) Further, they note that many violations give rise to "continuing" grievances, in that the act complained of is repeated every day--thus, there is a new occurrence each day. (pp. 152-3) Nevertheless, the Arbitrator will look at the practice evidence presented by the parties before arriving at a conclusion re arbitrability.

A. <u>What has been the practice of the parties</u>?

Most of the contentions of the parties re the merits of the case were centered around practice. Management essentially

contended that there was no proof of an established practice, either before or after the posting of the notice. It based this largely upon some arbitral standards of the Elkouris as utilized by Postal Arbitrator Holly. The Union, to the contrary, contended that there had been a practice from at least 1974 and continuing up to January 1983, when the grievance was filed. A practice generally is defined as a constant response to an ever-recurring set of circumstances. This is similar to some of the Elkouri standards, in that it must be enunciated clearly and readily ascertainable over a reasonable period of time. However, Arbitrator Holly, in the case referenced by Management, is correct, in that two necessary ingredients are continuity and mutuality.

While Management contends that there has been a policy of two 10-minute breaks from the 1960s, there is nothing in the LMU regarding same, and there never has been anything in writing until the announcement was posted on August 18, 1982. Consequently, the specific evidence re practice is determinant. There was a great deal of specific Union evidence, most of which related to a period running from 1974 up to at least January 1983. For example, the steward, who initiated the case, gave first-hand testimony of a continuous practice of two 15-minute breaks from 1974 up to a week after the grievance was filed. He said they were taken with the full knowledge of Management. Not only were they aware, he said,

but the supervisors regularly took breaks with the bargaining unit employees. Always, it was 15 minutes. In fact, he stated that, over those years, no supervisor had enforced two 10-minute breaks until Supervisor Flores did in January 1983. In addition, he indicated that, on occasion, Management would announce over the loudspeaker that a break was over. It was always after 15 minutes. Management did not even attempt to refute the testimony re supervisors going on 15-minute breaks with the bargaining unit employees or the loudspeaker announcements. A registry clerk had been in and out of the AMF over a period of years and had worked all three tours. He testified that eight or ten employees would go together and that Management would go with them. He stated that, especially in 1975-6, all three tour supervisors were aware of the practice. Another clerk testified that all of Tour II took two 15-minute breaks, as she did, from 1974 on. More importantly, the Union presented twenty-six statements of employees from all three tours at the AMF. It had tried to present them at Step II, but Management had indicated that they were not acceptable, for it considered the whole issue not to be arbitrable. The Union suggested that it could have had testimony or statements from all the employees at the facility and the result would be the same. That result, based upon the twenty-six statements, is that, regardless of whether an employee had worked at the AMF for ten years or as little as six months, or whether an employee had worked there for a continuous

period or had been in and out two or more times, all employees got 15 minutes twice a day throughout the period.

Very little of the testimony given by Management witnesses related to the period in question up to August 1982. For example, Witness Kerr was assigned to the AMF as Manager just three weeks before the notice was posted in 1982. He indicated that he was in the hospital two of those three weeks and was trying to find out what was going on in the other week. Other than that, he indicated that he was a supervisor of the AMF for six months in 1973, and the policy was for two breaks of 10 minutes each. While he did not indicate any specifics of the policy or its enforcement, it would not help Management's case, even if it had been fully known and adhered to. Primarily, this is due to the fact that the Union testimony relates largely to 1974 forward, and the witness has no knowledge of this period up to the posting of the alleged policy in 1982. Supervisor Flores was another very candid and excellent witness. However, he acknowledged that he became a Tour Supervisor just three or four weeks before the policy was posted. During this time and even afterward, he acknowledged that, on occasions, he took 15 minutes with the bargaining unit employees and even played dominoes with them.

The only Management witness, who even suggested that there was a contrary policy during the period up to August 1982, was Supervisor Molly Nelson, who posted the 10-minute notice on

August 18, 1982. She suggested that, when she was in the bargaining unit from 1969 up to the time that she became a supervisor in 1974, the policy was two 10-minute breaks. Of course, this is before the time in question. Further, she gave no evidence to prove enforcement of such a policy. Furthermore, on cross-examination, she conceded that, as a member of the bargaining unit, she took 15-minute breaks, probably with some of the Union witnesses. Given the fact that some of the Union witnesses talked of the standard of two 15-minute breaks even before 1974, as well as some who signed statements, it is clear that, going into the period starting with 1974, the practice re breaks, if there was one, was to take two 15-minute breaks. Also, given Supervisor Nelson's contention of a policy of 10 minutes while she, herself, was taking 15 prior to 1974, it is difficult to place much credence in her suggestion that there has been a policy since 1974 which she has enforced. In fact, on cross-examination, she stated that she no longer took 15-minute breaks with the bargaining unit. She did not define the time period, but it appeared that she continued to do so, on occasion, up to the time that she posted the 1982 notice. While she claims to have enforced the policy, there was no supporting evidence. Written instructions were suggested, but the only evidence was the August 1982 posting. The personal contact appeared to be in the form of safety meetings, and it was not clear if any of them was before August 1982. In short, there is no evidence that Supervisor Nelson

stopped a single employee from taking 15-minute breaks up to August 1982. Yet, it is evident that it was a widespread practice, of which Management was aware, could see the breaks being taken, and even joined in with the bargaining unit. There clearly was continuity. If there was not mutuality, there was, at the least, acquiescence. This, too, becomes a binding past practice. Thus, the remaining question is what happened after the memo was posted.

Union testimony and statements claim that the practice of two 15-minute breaks continued unabated after the memo was posted until Supervisor Flores stopped it on his tour on January 11, 1983. However, even though he stopped it on Tour I, the Union indicated that they still were getting two 15-minute breaks on Tours II and III, and on Tour I when Supervisor Flores was not on duty, even when the grievance was filed a week after Flores stopped the 15-minute breaks. This was not refuted by Management. In fact, Union testimony was that Flores continued to take 15-minute breaks with the bargaining unit for a period of time after the August memo. Flores was not called to rebut this. Former Manager Kerr stated that there was no break schedule when he checked for one shortly after the posting of the memo in August. Apparently, he reminded some of the supervisors of the posting. In fact, he reported to Flores that employees in the swing room on his tour were taking longer than 10 minutes. This may have led to Flores' becoming the

first to enforce the policy by stopping 15-minute breaks. Supervisor Nelson says she posted the policy because employees on one tour were taking more than 10 minutes. She stated that she did not think any supervisor was allowing more than 10 minutes after that, and she had no knowledge of anyone's taking more than 10 minutes. Yet, five of those, who served as witnesses or signed statements related to the continuing policy up to January 1983, were on her tour. Her answer was that, if she had known, she would have stopped them. It is difficult to understand how she could not have known of the widespread practice. In fact, Flores indicated that he called the memo to the attention of some employees (who were not named) and that they may have taken less than 10 minutes for a short while. However, he stated that it went back to 15 minutes.

In summary, if there was a practice prior to 1974, it was to take two 15-minute breaks. During 1974-82, there is strong evidence of a continuing practice of two 15-minute breaks, known by and participated in by Management. In fact, the only suggestion of any enforcement of a policy of two 10-minute breaks was a simple statement by one supervisor that she enforced such a policy during her schedule on her tour. Yet, there was no specific evidence of a single employee's being restricted to 10-minute breaks on her tour, or any other tour, during this period.

Despite this historical practice, there is a plausible explanation for Supervisor Kelly's posting of a policy memo on August 18, 1982. On July 21, 1978, the NALC had signed a National Memo of Understanding, which agreed to two breaks of 10 minutes each. For several years afterwards, memos were posted, and a policy of 10-minute breaks was enunciated re the carriers. After a large number of arbitrations, administrative actions by Management, and grievance settlements, it was determined that established practices of breaks longer than 10 minutes could continue. However, the battle was still being waged in August 1982. As a result, it appears that Postal Management at the Sectional Center level was pushing for examination of break policy and, where possible, to enunciate a policy of 10-minute breaks across the board, including the Clerk Craft. This is understandable, for Management has an obligation to be as cost efficient as possible. Thus, it appears that such efforts may have caused Supervisor Nelson to post the memo of August 18, 1982, when she was Acting Manager for a 2-3 week period. She conceded that the Manager had not told her to post it, and he had not told her that the policy was for 10-minute breaks. In fact, he had not discussed the policy with her at all. Thus, she took action on her own, with probable encouragement from the Sectional Center level.

It is clear the employee reaction to her memo was that it was a violation of a binding practice. So, it was ignored.

She apparently mentioned a policy of two 10-minute breaks in some safety meetings. However, the only evidence of a policy was her own memo. Thus, there is no evidence of any adherence to such a policy resulting from the safety meetings. In fact, the only thing close to specific evidence in the post-August 18, 1982 period was a suggestion by Flores that some unnamed employees dropped to 10 minutes when he suggested it, but then went right back to 15. This is not an example of loose administration of a firm policy such as existed in an arbitration referenced by Management. It is, in effect, an attempt to repudiate a long-term practice of two 15-minute breaks. Thus, if a few employees dropped to 10 minutes for a few times, it is not evidence of a firm policy of 10 minutes. The surprising thing is that large numbers did not respond to the memo. However, the fact that the practice of two 15-minute breaks continued almost without exception after August 18, and even up to one week later (when the grievance was filed) on Tours II and III, and on Tour I except when Supervisor Flores was on duty, remains unrefuted.

B. <u>The grievance was timely filed</u>.

Given the fact of the practice, which existed at the time of the posting of the grievance, it was a violation of a continuing nature. This means that a violation could be taking place each day, and the time limits for filing a grievance would begin to toll from the day a violation was spelled out in the grievance.

More important, however, is the arbitral standard that it is not the day of the posting of a rule, order, policy, etc., which begins the tolling of time limits for filing a grievance. It is only when the policy is clearly put into effect, and the Union has been made aware of it, that the time limits begin to toll. In the subject case, the only specific evidence of any enforcement of a 10-minute break policy over a period of more than ten years was when Supervisor Flores enforced such a policy on January 11, 1983. The Union reacted immediately, and a Step I hearing was held on January 12, 1983.

Award

The subject grievance is arbitrable.

THE ISSUE ON ITS MERITS

Discussion

The case on the merits was largely settled in the above discussion of the practice. The contentions of the parties re the merits centered upon whether or not a practice of 10 or 15 minutes existed. However, as the above analysis pointed out, there was a well-established policy covering a period of at least ten years which was known by and participated in by Management. Management, essentially, had three general contentions in opposition to this conclusion. One, it indicated that two Union witnesses admitted

that a policy of 10-minute breaks had been brought out in some safety meetings. However, the second contention was related, in that the two witnesses indicated they continued to take 15-minute breaks, despite the safety meeting discussion. Thus, Management contended that there is a difference between receiving 15 minutes and taking 15 minutes. This would be a meaningful point, if there was a clearly-established and enforced policy of 10-minute breaks, and a few employees, on their own, took 15 minutes. However, it is evident that the opposite has been the case, with no evidence of enforcement until January 11, 1983. Given the widespread practice, if the employees really were taking 15 minutes on a continous basis without the approval of Management, there surely would have been oral or written warnings, or more. Yet, there was no evidence of any discipline for taking 15-minute breaks throughout a period of ten years or more. This is understandable, when the supervisor, who ultimately enforced the purported policy, was still playing dominoes with bargaining unit employees during 15-minute breaks--even after the August 18, 1982 memo was posted. Not only was there continuity of the practice, but there clearly was mutuality as well. This meets the requirements of an established practice as spelled out in a third general contention of Management.

In summary, what the August 18, 1982 memo reflected was not a reminder of an established policy of 10-minute breaks. Rather, it was an attempt to repudiate an established practice of 15-minute

breaks. There is a procedure for repudiation of past practice which meets arbitral standards. However, the posting of a memo is not the way. A well-established past practice takes on the mantle of contract language. Thus, a violation of the practice is a violation of the Agreement. The contractual significance of practice has been recognized within the Houston Sectional Center by Step III agreements mutually arrived at by Advocate Hyatt for the Service and Advocate Neill for the APWU. For example, a July 29, 1982 agreement reinstated 15-minute breaks at the Sharpstown Finance Unit based upon statements from employees that they had been taking same for six years. A similar reinstatement came from a January 11, 1982 agreement related to Spring, Texas. It is obvious that the Arbitrator must reinstate the 15-minute policy at the Airmail Facility in Houston.

Award

Management violated the Agreement, when it limited coffee breaks at the Airmail Facility in Houston to two of 10 minutes each. The practice of two 15-minute coffee breaks will be reinstated immediately.

J. Earl Williams

J. Earl Williams, Arbitrator

Atlanta, Georgia

December 15, 1984