C-22958

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE and NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	Grievant: CLASS ACTION Post Office: TUCSON, AZ Management Case No: E98N-4E-C 01112793 NALC GTS No: 16901

Before SYLVIA MARKS-BARNETT, ARBITRATOR

Appearances:

For the United States Postal Service - CELINA PHILLIPS

For the National Association of Letter Carriers - DAN VERSLIUS

Place of Hearing: 1501 South Cherrybell Stravenue, Tucson, AZ 85726

Date of Hearing: 6 November 2001

AWARD: The Grievance is sustained. The Postal Service is ordered to cease and desist from refusing to observe the past practice of holding Labor-Management meetings on a monthly and is ordered to hold such meetings each month, continuing to do so until the past practice or the LMOU is changed in accordance with the provisions of the National Agreement.

Date of Award: 2 January 2002

Sylvia Marks-Barnett

SYLVIA MARKS-BARNETT, Arbitrator

STATEMENT OF THE CASE

This case was heard on 6 November, 2001, in Tucson, Arizona. All parties were afforded the opportunity to call and to cross-examine witnesses, to submit documentary evidence and to make opening statement and closing argument. The Arbitrator tape recorded the proceedings to assist in reviewing the record and preparing this Award. The hearing was concluded on said date at 3:50 p.m. Because this case was heard on the regular panel, the parties had the right to and did submit post-hearing briefs, as well as decisions in other cases in support of their respective positions. The briefs were received and exchanged by the Arbitrator on 6 December 2001, and the record was closed at that time.

ISSUE

The Service raised a threshold issue as to arbitrability, but the parties were unable to agree on the concise nature of this issue, leaving it to the Arbitrator to frame. After reviewing the evidence, the Arbitrator finds that a fair statement of the threshold issue is as follows: Whether a resolution of the grievance in question requires the Arbitrator to amend the Local Tucson Memorandum Of Understanding (LMOU). The Arbitrator reserved judgment on this issue and proceeded directly, after hearing argument thereon, to the merits at the hearing.

The parties submitted the following as a joint statement of the issue as to the merits: Whether Management violated Articles 3, 5 and 19 when it discontinued conducting monthly L/M meetings, alleged to be a past practice, and, if so, what is the proper remedy.

DISCUSSION AND OPINION

Facts

Prior to September, 1996, the parties entered into a LMOU, which provided that they agreed to set up joint Labor-Management (L/M) meetings, if requested by either party, on a quarterly basis. The provisions of this LMOU continued as a result of local negotiations, published in December, 2000, or January, 2001.

On 13 February 2001, Alvaro A. Alvarez, Postmaster, requested that the parties begin adhering to the language in the LMOU which provides for quarterly meetings (Joint Exhibit, p. 20). On 16 February 2001, Dan Versluis, Union Branch Vice-President, responded to Postmaster Alvarez, protesting the cessation of the practice of monthly L/M meetings since 1995, and requested bargaining on the issue if Management wanted to make a change in that practice (Joint Exhibit, pp. 18-19). In the

absence of a response to Vice-President Versluis' letter of 16 February 2001, Vice-President Versluis, on 27 February 2001, wrote again to Postmaster Alvarez, assumed that the meetings would continue on a monthly basis and that the next meeting would be on 19 March 2001 (Joint Exhibit p. 17). Postmaster Alvarez wrote, on 2 March 2001, that there would be a meeting on 19 March 2001, but that it would be considered to be a quarterly meeting and declared his intention to adhere to the provisions of the LMOU (Joint Exhibit 2, p. 16). To this, Vice-President Versluis answered, on 6 March 2001, that the Union would be at the meeting on 19 March 2001, but that it did not consider this to be a quarterly meeting, that it considered the conduct of Management to constitute unilateral action and declared the Union's intention to file a grievance on this issue (Joint Exhibit 2, p. 15).

Contentions

The contentions of the Union are that (1) there was a past practice of holding monthly L/M meetings, which constituted a distinct and binding condition of employment, (2) the Service's action of discontinuing the monthly meetings constitute an unilateral action, which breached Article 5, (3) by not complying with the prohibitions against unilateral action, contained in Article 5, Management did not recognize the limitations on their management rights, which breached Article 3 and (4) the Union is not asking the Arbitrator to change the language of the LMOU, but merely to enforce a past practice, whereby the grievance is arbitrable.

The Service contended that (1) because the language of the LMOU is clear and unambiguous, evidence of a past practice cannot be used to interpret the LMOU, whereby the grievance is not arbitrable, (2) because the Arbitrator, both by the National Agreement and arbitral decision, does not have the authority to alter, amend or modify the LMOU, whereby the grievance is not arbitrable, (3) Management has not violated the language of the LMOU, whereby it has not engaged in unilateral action, thus there has been no breach of Article 5, (4) for the first time at the hearing, the Union claimed that monthly L/M meetings were a separate entity from the quarterly meetings, which constitutes new argument and should not be considered, (5) for the first time at the hearing, the Union presented the documents which constitute Union Exhibit 1, and are, therefore, new evidence, which should not be considered and, (6) the Union failed to prove that the practice was mutually accepted by the Service as binding.

Pertinent Provisions of the National Agreement

ARTICLE 3 MANAGEMENT RIGHTS

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

A. To direct employees of the Employer in the performance of official duties.

. . .

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 30 LOCAL IMPLEMENTATION

A. Presently effective local memoranda of understanding not inconsistent or in conflict with the 1998 National Agreement shall remain in effect during the term of this Agreement unless changed by mutual agreement pursuant to the local implementation procedure set forth below or, as a result of an arbitration award or settlement arising from either party's impasse of an item from the presently effective local memorandum of understanding.

B. There shall be a 30-day period of local implementation to commence October 2, 2000 on the 22 specific items enumerated below . . .

C. All proposals remaining in dispute may be submitted to final and binding arbitration . . . However, where there is no agreement and the matter is not referred to arbitration, the provisions of the former local memorandum of understanding shall apply, unless inconsistent with or in conflict with the 1998 National Agreement.

MEMORANDUM OF UNDERSTANDING BETWEEN UNITED STATES POSTAL SERVICE, TUCSON, ARIZONA AND NATIONAL ASSOCIATION OF LETTER CARRIERS, CARL J. KENNEDY RANCH 704

The parties to this Memorandum agree to set up a joint Labor/Management meeting, if so requested by either party, within the first two (2) weeks following each calendar quarter. . . .

It is suggested a written agenda be provided so any item(s) needing research can be handled expeditiously.

Suggested attendee's are the Postmaster, Manger of Customer Service Operations, for Management, the Union President, Vice President, and two (2) Union officials for the Union. Others may be present, as each party deems necessary to conduct the business at hand.

Analysis

Whether This Matter Is Arbitrable:

The Service maintains that the Union cannot utilize arbitration to amend the language of the LMOU. This presupposes that the Union's grievance is one which seeks amendment of a LMOU, rather than enforcement of a past practice. The Service relies on a Regional Decision, by Arbitrator Nancy Hutt, in Case No. F94-N-4E-C 99199987(sic), made on July 18, 2001. The grievance in question in that case was one which sought interpretation of the term, "affected week," in a LMOU concerning choice vacations. Although Arbitrator Hutt found the grievance was not arbitrable, there was no claim made in the grievance that relief was being sought on the basis of a past practice. As stated above, the grievance here is one which does seek enforcement of a past practice. The Arbitrator fails to see how this case, even on a persuasive basis, is applicable.

The Service relies on another Regional Decision, by Arbitrator Donald E. Olson, Jr., in Case No. #94N-4E-C 98061559, made on April 17, 1999. This Opinion & Award was so brief that this Arbitrator would have to guess at the contents of the six joint exhibits and four stipulations mentioned therein in order to determine the nature of the grievance and the basis of Arbitrator Olson's conclusions. Therefore, Arbitrator Olson's decision, with all due respect, is not useful.

The Service argues that there are only two ways in which a clear and unambiguous LMOU can be changed, neither of which allow for such change to be made by this Arbitrator. Those two ways are found in Article 30: local negotiation and, in its failure, impasse arbitration. It is submitted by the Service that since the Union failed to implement Article 30 methods for changing the LMOU, it should not be allowed to do in arbitration that which it failed to do under the Agreement. What this argument overlooks is that if there was indeed a past practice, such as the Union alleges, the Union would have felt no need to negotiate any change to the LMOU. Moreover, at the hearing, Manager Lahner testified that the Union was not informed of the Service's decision to stop having monthly L/M meetings until after the conclusion of local negotiations. He stated that if the Union had been informed prior to local negotiations, it would have resulted in impasse arbitration. The Arbitrator finds that the Service deliberately withheld announcement of its decision to cease having monthly L/M meetings until after publication of the LMOU, in order to avoid having to bargain the issue of whether or not to having those meetings on a monthly basis and to avoid having their position tested by impasse arbitration, in the event bargaining failed. Because of this, the Service is in no position to

claim that the Union is trying to accomplish through grievance arbitration what it failed to do through local negotiation.

The Service also claims that the Union cannot use past practice to change clear and unambiguous language of the LMOU. In support, the Service relies on the Regional Decision of Arbitrator Joseph Cannavo, Jr., in Case No. A-94Cl-1A-C, made on December 13, 1997, involving the American Postal Workers Union. In this case, the Union claimed that a past practice and a pre-arbitration settlement agreement allowing the chief steward 40 hours per week of steward duty time, without question or comment, was discontinued by the Service. What, in fact, was discontinued was an agreement to engage in this practice until the next election; but, it is noteworthy that the actual occurrence of the cessation was post-election, as called for by the terms of the agreement. Arbitrator Cannavo declined to enforce the past practice based on the clear language of Article 17(3), of the National Agreement, which provided for steward duty time, subject to the Service's determination of reasonableness. While this Arbitrator agrees with Arbitrator Cannavo's conclusion, she respectfully disagrees with his basis for that conclusion, under the facts of that case.

In arguing that the language of the LMOU must be adhered to, the Service offers the National Decision of Arbitrator Benjamin Aaron, in Case No. NC-E-11359, decided on January 25, 1984. In that case, a defense raised by the Service was that its violation of the MOU (allowing a fixed day off as opposed to a rotating day off as required by the MOU) was due to a consent decree in settlement of a Title VII religious discrimination civil rights law suit. Arbitrator Aaron rejected this argument and ruled that the MOU had to be adhered to; however, he did so on the basis that to consider the argument would have required him to apply external law, which he declined to do. This is not the issue in the case before this Arbitrator.

The Union maintains that this matter is arbitrable, relying on a National Decision by Carlton J. Snow, in Case No. HOC-3N-C 418, decided on October 11, 1993. In this case, the Service claimed that the Union's grievance over ELM 546.21 reemployment was not arbitrable because the Union had not satisfied Article 19 requirements to determine if unilateral changes to handbooks, manuals and published regulations conflicted with the National Agreement or otherwise were not fair, reasonable or equitable. Arbitrator Snow disagreed; he perceived the grievance to not be a challenge to a change in the ELM, but a challenge to the application of the ELM section to the reemployment in question.

This Decision is illustrative of the principle that when considering arbitrability, of critical importance is the answer to the question of what the grievance is about.

In this case, the Service perceives that the grievance seeks alteration, amendment or modification of the LMOU. If this were correct, the matter would not be arbitrable. However, this Arbitrator is of the opinion that the grievance seeks not amendment of the LMOU, but rather enforcement of a past practice. Therefore, this Arbitrator concludes that this matter is arbitrable.

Whether the Contention by the Union that Monthly L/M Meetings were a Separate Entity from Quarterly L/M Meetings Constituted New Argument:

The Service argues that the Union's claim that the monthly L/M meetings existed as a separate entity from the quarterly L/M meetings was raised for the first time at the arbitration hearing, thus constituting new argument. With this, the Arbitrator is in agreement and will not consider such argument.

Whether Union Exhibit 1 Constituted New Evidence

Union Exhibit 1 consisted of correspondence between Officer-In-Charge (OIC) Felix Guerra and the Union President, Paul E. Winger, from September 24, 1996, through December 17, 1996. With more particularity, it provided, in pertinent part:

> September 24, 1996
>
> . . .
>
> Dear Paul:
>
> As the newly installed OIC in the Tucson, AZ Post Office, I propose that we schedule monthly Labor Management meetings. I would like to establish a specific day and time each month. Please advise me of specific days each month that you are not available to meet and I will send you a proposed meeting schedule for FY '97. . . .
>
> I look forward to your response and the opportunity to work together for the benefit of our employees and customers.
>
> S/Felix Guerra
> Felix Guerra
> Officer-In-Charge

October 1, 1996

. . .

Dear Mr. Guerra:

. . .

I would suggest the third Monday of the month. . . .

If you concur with my proposal, please let me know.

. . .

s/Paul E. Winger
Paul E. Winger
President

October 11, 1996

. . .

Dear Mr. Winger,

The third Monday of each month will be our scheduled USPS-NALC Labor Management meeting. I propose that we meet at 110:00 a.m. with the first meeting to occur at Mission Station on October 28, 1996. . ..

Permanent agenda item proposals:

1. DPS Implementation Progress Review.
2. Review of each unit's performance and discussion of unit specific issues.
3. Discussion of city-wide issues, i.e. complement.
4. Labor climate.
5. Other agenda items submitted,

If you agree with this proposal, please notify me of any items that you want discussed under #5, . . .

s/Felix Guerra
Felix Guerra
Officer-In-Charge
Tucson, AZ 85726-9998

(Emphasis is the Arbitrator's)

Union Exhibit 1 was not provided during the grievance procedure. Relying on Arbitrator Aaron, cited above, the Service maintains that this is new evidence and should not have been admitted. The language the Service submits is supportive of this contention is, found at p. 3, as follows:

> It is now well settled that parties to an arbitration under a National Agreement between the Postal Service and a signatory Union are barred from introducing evidence or arguments not presented at preceding steps of the grievance.

However, Arbitrator Aaron discusses the need to not be bound to the letter of the rule, without any exception:

> . . . The spirit of the rule, however, should not be diminished by excessively technical construction. The evidence establishes to my satisfaction that Slavick and the other carriers at the Johnstown Post Office were aware from the outset of the reason for Baich's assignment to a fixed nonwoirk day, contrary to the terms of the MOU. NALC is therefore in no position to claim surprise by the testimony and argument offered by the Postal Service during the arbitration hearing. . . .

In this case, the Union raised past practice at Step A. This contention was not disputed at Step A by the Service. However, in the Step B Decision, it is reflected for the first time, that the Service was disputing the existence of a past practice. There was no evidence that the Union knew of this dispute until the signing of the Step B Decision, whereby it would not have had the opportunity to submit any documentation beyond what it had already provided. In opposition to the claim that the Service was unfairly surprised by the content of Union Exhibit 1, was the testimony provided at the arbitration hearing. Manager Lahner testified that in 1996, DPS had just been implemented and OICs were coming through the Tucson Installation on a yearly basis. The District manager wanted to keep the level of grievances down and, for this purpose, requested monthly L/M meetings to make sure there was a steady stream of dialogue between the parties. Thus, the Unions were so requested. Some said yes; some said no. OIC Guerra's letters themselves reflect that copies were sent to the Manager of Customer Service Operations and to Labor Relations. This evidence "establishes to the satisfaction of this Arbitrator" that the Service was well aware from 1996 of Union Exhibit 1.

The Service also submits the Regional Decision of Arbitrator Thomas F. Levak, in Case No. W4C-5C-D 17344, made on December 11, 1986, as being in accord with Arbitrator Aaron's general

rule. No mention was made of Arbitrator Aaron's exception to this general rule, as noted above; perhaps because a claim of the Service's awareness of the new evidence was not ever made therein by the Union. Furthermore, Arbitrator Levak's Regional Decision is of no effect to overturn the exception carved out by Arbitrator Aaron used to admit new evidence where the objecting party is shown to have pre-hearing awareness of the evidence.

Objection to Union Exhibit 1 was made during the arbitration hearing and was overruled. Nonetheless, the Advocate for the Service raised a new evidence argument in her post-hearing brief and footnoted that the Arbitrator's "belief that current Dispute Resolution Procedures is less stringent' than Article 15 is an improper conclusion." In the mind of the Advocate, that conclusion may well have been incorrect and she is free to argue the same; however, it certainly was not improper. The Arbitrator does have the authority to interpret the provisions of Article 15, or any other provision of the National Agreement, not of general application (See 15.B.5). The MOU re Article 15, addresses the need for a more effective process, a new dispute resolution process, and provides that Article 15 procedures will continue until implementation of the new process and that, once implemented, the procedures and principles of the new process set forth therein are to be followed. The implication is that upon implementation, Article 15 procedures will no longer be followed. Without further negotiated guidance from the parties, citation of Article 15 language, in this case, was not helpful. After considering the arguments made and having considered all the arbitral decisions submitted by the Service, this Arbitrator finds no reason to change the ruling made at the hearing as to the admissibility of Union Exhibit 1.

Whether There was A Past Practice of Holding Monthly L/M
Meetings Which was Mutually Accepted by the Service as Binding:

The only defense made by the Service to the Union's claim of a past practice is that such has not been established with a preponderance of the evidence and a past practice cannot supersede clear contractual language. On the other hand, the evidence was that OIC Guerra proposed a modification to the LMOU for FY 1997, to hold L/M meetings each month and invited Union President Winger's response; that President Winger accepted and proposed that the meetings be held on the third Monday of the month; that OIC Guerra accepted, proposed the date, time and location for the first meeting, as well as permanent agenda items (see emphasized portions of Union Exhibit 1, underlined above).

There was no dispute that meetings were accordingly held until February 13, 2001, the date of the letter of Alvaro A. Alvarez, Postmaster, requesting that the parties begin adhering to the LMOU provision for quarterly meetings.

Richard Mittenthal, in "Past Practice and the Administration of Collective Bargaining Agreements," *Arbitration & Public Policy, Proceedings of the Fourteenth Annual Meeting National Academy of Arbitrators, 1961*, wrote at length about past practice. In the National Decision, Case No. N8-NAT-0006, Arbitrator Mittenthal held:

> Past practice may serve to clarify, implement, and even amend contract language. But these are not its only functions. Sometimes an established practice is regarded as a distinct and binding condition of employment, one which cannot be changed without the mutual consent of the parties. Its binding quality may arise from a contract provision which specifically requires the continuance of existing practices or, absent such a provision, from the theory that long-standing practices which have been accepted by the parties become an integral part of the agreement with just as much force as any of its written provisions.

Arbitrator Mittenthal referred the parties to the cited article for a detailed explanation of the principles concerning past practice. Initially, a course of conduct qualifies as a past practice if the conduct has clarity and consistency, longevity and repetition, acceptability and mutuality. Usually the arbitrator has to look at conduct alone in order to determine whether it satisfies the criteria. In this case, the Arbitrator has the benefit of writings, from which monthly L/M meetings ensued. Note the use of the word "propose", of the word "meetings" in the plural, of the word "each", of the words "first meeting", and "permanent" agenda items. These words constitute an offer and acceptance, the basics of the formation of a contract and expressly call for a continuing course of conduct. Not only was this practice mutually accepted by the Service, it's creation was initiated by the Service. These words clearly establish that the requirements of clarity, acceptability and mutuality were satisfied. The undisputed testimony at the arbitration hearing was that the meetings were not held only if attendees from the Service or the Union were out of town or in a training session and that the quarterly meeting was held according to the schedule agreed upon with additional people in attendance. This demonstrates that consistency, longevity and repetition requirements were met. Based on the foregoing, the Arbitrator concludes that the parties mutually created a past practice effective as a separate, local and enforceable condition of employment.

Whether the Service's Conduct of Stopping the Monthly
L/M Meetings Violated Article 5 of the National Agreement:

Once established, a past practice which is regarded as a distinct and binding condition of employment may not be unilaterally changed during the lifetime of the agreement. Because the holding of L/M meetings on monthly basis was an established practice, the Service had a obligation to not change that during the lifetime of the Agreement. This is part and parcel of Arbitrator Mittenthal's article. Moreover, it is also explicit in Article 5 that the Service may not unilaterally change the practice. In this case, the evidence was that on February 13, 2001, after local negotiations had concluded, Postmaster Alvarez requested of the Union that the parties begin adhering to the LMOU providing for quarterly meetings. The Union's response was a request for bargaining on this issue, which was refused by the Service. Thereafter, the Service stopped having the L/M meetings on a monthly basis. This constituted unilateral action.

The Service argued that the LMOU providing for quarterly L/M meetings is not mandatory, i.e. the Service's obligation to hold a L/M meeting arises only upon request of either party. What the Service overlooks is that the Union was not protesting any cessation of the quarterly meetings; it was protesting cessation of the monthly meetings which were mandatory, pursuant to past practice. The Arbitrator finds that such unilateral action constituted a breach of Article 5.

Whether the Service's Conduct of Stopping the Monthly
L/M Meetings Violated Article 3 of the National Agreement:

Article 3 is known as the Management's Rights Clause. In it is enumerated the right of Management to, among other things, direct the work force and maintain the efficiency of operations. However, the enumerated rights are subject to other provisions of the National Agreement. Because of the language of Article 5, the rights of Management are limited by being prohibited from taking unilateral action such as would violate any of the provisions of the National Agreement. Accordingly, when the Service unilaterally stopped an established past practice, it engaged in conduct in which it did not have a right to do, whereby it violated Article 3 as well.

Matter of the Remedy

With regard to the remedy, the Arbitrator orders that the Service reinstitute the holding of monthly L/M meetings, in accordance with the past practice determined to be established herein. The concomitant of this is that the Service is ordered to cease and desist from holding only quarterly L/M meetings. The monthly L/M meetings are to continue until and unless changed in accordance with the provisions of the National Agreement. The Union also seeks an order requiring the Service to bargain with the Union on all issues affecting hours, wages, or other terms and conditions of employment. This the Arbitrator declines to do. The Service is free to comply with the past practice, to meet and confer on the issue, or engage in local negotiations at the appropriate time, as it chooses.