[redacted]
ART. VIII, 9. - SKELTON,G./CLERK CRAFT
"Wash-up Time - Past Practice
KansasCtyMO - APWU - Cohen,G.- Won- 1/80

C# 166

IN ARBITRATION

UNITED STATES POSTAL SERVICE,)	Case No. 5 KC 153/AC-C-5566;
)	Arbitrator's File 79-71-375;
and)	
)	Date of Hearing:
AMERICAN POSTAL WORKERS UNION,)	October 2, 1979,
G. SKELTON, et al., Grievants.)	Kansas City, Missouri.

O P I N I O N

Issue

Are members of the Clerk Craft in the Kansas City, Missouri, post office entitled to five-minutes' wash-up time before lunch and five-minutes' wash-up time before end of shift?

Facts

Because a large number of grievances have been filed in connection with this issue, the parties have agreed that the instant decision will apply to all members of the Clerk Craft in the Kansas City, Missouri, postal installation.

The Union presented several witnesses who stated that, for as long as they could remember, clerks in the Kansas City, Missouri, post office had been given five minutes to wash up before lunch, and five minutes to wash up before end of shift. Some of these witnesses were retired members of management.

One of the witnesses stated that he had started to work with the Postal Service in February, 1940, and had retired in February, 1977. He had held such positions as Clerk, Clerk in Charge, Foreman, General Foreman, Tour Superintendent, Assistant

General Superintendent of Mail Distribution, and Assistant Director of Operations. He had held supervisory positions from 1952 to 1973.

This witness stated that, during all of the time that he had been employed at the Kansas City post office, through February, 1976, employees had been notified five minutes prior to lunch and five minutes prior to the end of shift that their wash-up period had begun, and they were permitted to wash up. He also testified that, on occasion during the shift, a clerk might get especially dirty, and on those occasions, he would be permitted to take wash-up time as needed.

One employee testified that he was part of the local negotiating team, and a discussion had occurred on wash-up time at the local level. The Local Memorandum of Understanding was introduced, and it contained the following as Item I:

> "On those occasions on which the wash-up time normally provided employees in certain occupations under Article 8, Section 9 is inadequate, Management will allow such additional or longer wash-up periods as it deems necessary under the circumstances."

This witness testified that, in view of the prevailing custom of five minutes of wash-up time prior to lunch and five minutes of wash-up time prior to end of shift, the parties decided to make no change in this language.

Union witnesses also testified that supervisors were at all times aware of the members of the Clerk Craft taking their

wash-up periods. It was done at every tour continuously.

The Postal Service introduced testimony to the effect that the work of the Clerk Craft was not inherently dirty; that on occasion, members of the Clerk Craft would become dirty in handling such things as cancellation machines, date stamps, and the like, and, on those occasions, they were given wash-up time as needed in the amount of time needed, but that there was no blanket need for wash-up time.

The Postal Service witnesses testified that many of the jobs done by members of the Clerk Craft generated little or no dirty conditions. This would be true of persons casing mail, operating LSM machines or ZMT machines, window clerks, and the like.

Postal Service witnesses stated that, as a result of the lack of need for wash-up time, many of the members of the Clerk Craft used wash-up time for other things than washing up, such as visiting with friends, going to their lockers, standing near the time clock to punch out as soon as possible, or just generally to socialize.

On January 30, 1976, the Postmaster issued a directive which stated, in effect, though not in so many words, that the five-minute wash-up period was abolished. In its place, the employees would be granted wash-up time on an as-requested and as-needed basis. Thereupon, the grievances being arbitrated here were filed.

The parties introduced the Local Memorandum of Understanding entered into on September 28, 1973. This Memorandum referred to Article XXX, and thereunder, in Item #1, stated:

> "On those occasions on which the wash-up time normally provided employees in certain occupations under Article 8, Section 9 is inadequate, Management will allow such additional or longer wash-up periods as it deems necessary under the circumstances."

The Postal Service introduced a cost projection on the daily ten minutes of wash-up time sought by the Grievants. According to Postal Service calculations, the cost of the ten minutes' wash-up time for members of the Clerk Craft as of September 25, 1979, came to $911,721.45 per year, based on a pro-ration of the average hourly pay rate of the members of the Clerk Craft.

Discussion and Opinion

The best statement of the Postal Service's position on on the issue is contained in its brief. I quote from Page 3:

> "The evidence indicates that for many years clerks in the Kansas City, Missouri Post Office had been permitted to leave their work location five minutes prior to their lunch and five minutes prior to the end of their shift for the ostensible purpose of washing up. Quite simply, it is the Postal Service's view that this procedure is in direct conflict with the terms of Article VIII, Section 9 of the 1975 National Agreement."

Likewise, the Union fully enunciated its position on the subject on Page 1 of its brief:

> "It is the position of the Union that a long-standing unequivocal past practice of 5 minutes wash-up time twice daily existed at the K.C. Mo.

installation which was clearly enunciated and accepted and acted upon to such a profound degree that it has become binding and elevated to contractual status. The unilateral elimination of the binding practice, which was not altered or eliminated through at least 3 negotiations on new contracts at the local level, constitutes a flagrant violation of the 1975 National and Local Agreements."

The first question which must be determined is whether a past practice of five-minutes' wash-up time twice daily exists.

The Postal Service states first that the Postal Reorganization Act of 1970 changed the relationship of the parties so radically that no conduct prior to 1970 is material. Before that time, there was no contractual relationship between the parties, and hence, no past practice could have arisen because past practice arises only for the purpose of clarifying or otherwise affecting a contractual relationship. Since there was no relationship, there can be no past practice.

I believe that the Postal Service has somewhat overstated the situation regarding actions prior to a contract and whether or not they constitute past practice after the execution of a contract. However, for the purposes of this discussion, I am willing to accept its argument, in view of the very radical change which the Postal Reorganization Act of 1970 had on the relationship of the parties. This change was much more radical than would have been the case were it a question of a company in private industry being organized by a union for the first time. This is especially true because, prior to 1970, the Postal Service was

a part of the Federal Government, whereas after, it became almost (but not totally) a private business. So, to that extent, this situation differs from private industry and might very well justify the argument of the Postal Service.

I will then look to the situation which has existed between the parties since the Postal Reorganization Act of 1970, which gave rise to the first collective bargaining agreement between the parties in 1971.

The evidence is quite clear that even from 1970 on, a practice has existed whereby members of the Clerk Craft have been taking wash-up time of five minutes twice daily. The Postal Service as much as concedes this in the section of its brief previously quoted. But even if it had not been conceded, there is no question in my mind that the practice continued up until the Postmaster's notice in 1976.

The Postal Service dismisses this past practice on the ground that it was not a bargained-for benefit, but was a promulgation by the local management of the Kansas City post office.

There is no evidence in the record to establish that this past practice was a promulgation in the sense that work rules are. Work rules are subject to change at the sole discretion of management. It rather appears that this practice arose as a result of a tacit and unspoken agreement between the parties. There was

never any formal announcement by the Postal Service that would indicate that it was granting to the Clerk Craft members a benefit which it reserved the right to withdraw at any time. It appears more to be a situation where the members of the Clerk Craft undertook a method of work which Postal Service Management agreed to.

In the early period of the relationship of the parties, even that agreement was purely discretionary on the part of the Postal Service. As the Postal Service points out, the first agreement between the parties, which lasted from March 9, 1968, to March 8, 1970, provided in ARTICLE XXVII:

> "However, the installation head shall make the final decision on where and when wash-up time will be permitted, and how much time will be allowed to the employees involved. The matter is not a proper subject for local negotiation."

It would therefore appear that, through March, 1970, the matter became entirely discretionary and subject to change by the local postmaster.

However, as the Postal Service has pointed out, that language was changed in the 1971 National Agreement, so that, under Article VIII, Section 9, the parties entered into a relationship which exists today in largely the same language.

But it should be noted that, according to the evidence, the conduct at the Kansas City post office with regard to wash-up time still continued in the same manner; that is, five minutes

of wash-up time twice daily. From this, I would conclude that it was a recognition by the Kansas City postmaster that the work of the Clerk Craft at the Kansas City post office constituted dirty work or work with toxic materials.

The Postal Service has introduced a number of arbitration decisions - and I am aware of even more of them - that have concluded that postal work is not inherently dirty work. However, Article VIII, Section 9, in no way prohibits the parties from agreeing on what constitutes "dirty work". The cases cited by the Postal Service that deny the existence of dirty work as a blanket matter are in each instance cases in which the union, through impasse arbitration, was seeking the inclusion of a provision that would have required the agreement by a local postmaster that the local's work was dirty work. There is nothing in the National Agreement that requires a local postmaster to either agree or disagree with a union as to what constitutes dirty work in a local post office.

As a matter of fact, the Union introduced one decision dated July 31, 1979, Case No. 11691-0026-79, involving the clerks at the Springfield, Massachusetts, Bulk Mail Center, where the arbitrator found that a five-minute wash-up period before lunch and tour end was reasonable. This would indicate that differences in conditions in different installations are recognized. There is nothing in any of the contractual relations between the parties

to prevent a local postmaster from making a judgment as to the conditions in his own post office. As a matter of fact, that is the basis for a decision as to whether or not there should be a regular wash-up period.

A similar result was reached in a decision rendered with regard to the Chapel Hill, North Carolina, local, rendered on September 2, 1977. There, the arbitrator stated that:

> "The question here is whether or not the bare language of Article VIII, Section 9 is sufficient to protect the Clerks at Chapel Hill. I think not. It is a given condition of work that a significant number of Clerks will continually accumulate undesirable dirt and grime in the course of their workday. Since normal comfort breaks are insufficient to handle the unavoidable accumulation of dirt and filth, a regular wash-up time is in order here.
>
> "The existing conditions mitigate against the efficiency of an individual 'as needed' basis for wash-up time. ...".

Again, this is a recognition by an arbitrator of the existence of different conditions in different post offices. Since an arbitrator may recognize the existence of different conditions, so may a local postmaster. The fact that a postmaster has permitted this wash-up procedure to continue is recognition of the existence of different conditions.

This recognition seems to have been formalized between the parties in their Local Memorandum of Understanding in 1973 and again in 1975. Each Local Memorandum contains the identical language:

> "On those occasions on which the wash-up time normally provided employees in certain occupations under Article 8, Section 9 is inadequate, Management will allow such additional or longer wash-up periods as it deems necessary under the circumstances." (Emphasis added).

The key words in the quote above are "normally provided". I believe this is a recognition by and acceptance of the fact that, under Article VIII, Section 9, the work at the Kansas City post office is dirty. "Normal" wash-up time is provided. The only way to determine what "normal" wash-up time is is to look to the conduct of the parties in the installation since 1971.

It is clear that five minutes twice daily is the wash-up time normally provided, as mentioned in the above quote. It is also clear to me that there is a definite and clear past practice to define the language in the Local Memorandum, which speaks of "normally provided' wash-up time.

The next question to be answered, then, is: Is the action of the parties in conflict with the National Agreement?

The Postal Service argues very forcefully that it is. It points out that Article VIII, Section 9, while couched in mandatory terms such as "shall grant", requires that the grant shall be in a reasonable amount of time, to those employees who perform dirty work or work with toxic materials.

However, I think that the Postal Service argument overlooks the fact that somewhere a determination has to be made as to what is a reasonable amount of wash-up time, and what employees perform dirty work or work with toxic materials. Here, in effect,

the local postmaster, with the agreement of the local union, has determined that the Clerk Craft does perform dirty work, and that five minutes of wash-up time twice daily is a reasonable amount of time.

It is very possible that such a determination and agreement by the local postmaster is unwise. But the fact that a postmaster has made an unwise decision, if such it be, does not therefore render such decision beyond his power to make. Of necessity, the postmaster must make a decision of some sort. The contract does not require that he act wisely - only that he act within his powers. He has acted within his powers in his determination here, since both Article VIII, Section 9, and Article XXX provide for the grant of wash-up time.

A sharp difference between the instant case and all of the citations supplied in both briefs should be noted. In every one of the citations submitted by both parties, impasse arbitration was at issue. The question dealt with in those cases was: Should the bargaining unit be given something that it did not have? In this grievance, however, the question is: Should the bargaining unit be allowed to keep something which it has already been given; i.e., shall the members of the Clerk Craft at the Kansas City post office keep the five minutes' wash-up time, twice daily, that they had already been given?

A decision by a local postmaster on wash-up time cannot

be in conflict with the National Agreement, whatever the choice of the postmaster may be, because the National Agreement provides for wash-up time in two instances: In Article VIII, Section 9, and again in Article XXX.

Those cases cited by the Postal Service to show a conflict between a Local Memorandum of Understanding and the National Agreement should be mentioned because they are illustrative of the differences with this case.

The first is Case No. AC-N-14034, a disciplinary matter involving John R. Napurano, of the New Jersey Eastern Area local, and the New Jersey Post Office. In that case, the grievant claimed that he was disciplined in violation of a Local Memorandum of Understanding which did not permit disciplinary action for any leave that had been documented and approved. The arbitrator held that there was nothing in the National Agreement which permitted the parties to negotiate locally on discipline and attendance. But again, of course, that is not the case here, because the National Agreement does provide for local negotiation of wash-up time in Article XXX, and a mandatory grant of wash-up time in Article VIII, Section 9, which grant is made specifically grievable. Since an individual mandatory grant is available, it can be done on a mass basis if the postmaster decides that the conditions of the individuals are the same. Again, while this might not be wise, it is not beyond the postmaster's authority.

Case No. N-C-4251, between the National Association of Letter Carriers and the Postal Service Central Region, is also illustrative of a Local Memorandum of Understanding violating the National Agreement. In that case, a Local Memorandum of Understanding regulated the assignment of overtime. The arbitrator in that case held that such regulation of overtime was void because nothing is mentioned anywhere in the National Agreement, particularly not in Article VIII, Section 5, which permitted the parties, by agreement, to regulate overtime. Article VIII, Section 5, stated that overtime shall be required. Therefore, it was beyond the power of the parties to limit it in any way. I have likewise held that the regulation of overtime is beyond the power of a Local Memorandum of Understanding to regulate. There is nothing in the National Agreement that gives the parties the right to do so.

Again, such is not the case here with wash-up time. Wash-up time is specifically mentioned in the National Agreement as being the subject of local negotation under Article XXX, and subject to grievance under Article VIII, Section 9, when it is felt that the mandatory grant is improper. The postmaster here attempted to obviate the need for grievances under Article VIII, Section 9, by giving by agreement, through past practice, wash-up time to those whom he has acknowledged do dirty work or work with toxic materials. There is no reason, from a contractual standpoint, why he cannot do this.

The Postal Service has pointed out that granting the wash-up time requested by the Union will cost the local post office approximately $900,000.00 a year. Once again, the fact that a decision may be unwise - assuming that to be true for purpose of this discussion only - does not make it beyond the power of the local postmaster to render. I must repeat that this is not an impasse arbitration, where the grievants are seeking something that they do not have. It is, rather, a request for the preservation of a right which has been bargained for and which they wish to retain. If the matter were being considered in connection with impasse arbitration, then the outcome could very well have been different.

Another consideration must be taken into account: Article V, which states as follows:

"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."

For the purpose of easy reference, the section mentioned in Article V is Title 29 USCA 158(d).

The phrase in Article V prohibiting unilateral action with regard to "terms and conditions of employment" is the one of importance here. The question,then, is: Is wash-up time a term or condition of employment?

In NLRB v. Miller Brewing Co., 408 F.2d 12, the court held that the phrase is broad enough to include safety rules and practices. Following this case, I would conclude that wash-up time is a term and condition of employment, because wash-up time could very well be considered a form of safety practice. Since its inclusion in a Local Memorandum of Understanding is permitted either under Article VIII, Section 9, or Article XXX, its removal cannot occur unilaterally, but only after negotiation. So the action taken by the Kansas City postmaster abolishing the five-minute wash-up periods also contravenes Article V of the National Agreement.

Article V would not prevent unilateral action by the postmaster if the unilateral action concerned a matter which was a violation of the National Agreement or general law. For instance, suppose a Local Memorandum of Understanding granted shift premium pay beyond the pay scale set out by the National Agreement. The postmaster could cancel such excessive pay because such pay violated the National Agreement. However, as has been pointed out here, the postmaster took unilateral action on a subject that did not violate the National Agreement or general law.

The next issue to be determined is what effect the violation of the National Agreement perpetrated here should take. The Postal Service argues that no monetary award should be made.

A monetary award is given when a contract is violated in order to restore a loss by making whole the person who suffered

the loss. A discharge which is set aside for lack of just cause with an award of back pay is an example. The employee is unjustly deprived of wages, and is given back wages to make him whole, with a credit for any earnings which he may have earned in the interim. The right of the employer to use earnings received during discharge to offset back wages is to prevent a windfall to the employee. By being given back wages less earnings, the employee will end up with only that amount which he would have had had he worked as he should.

By the same theory, the Grievants here have suffered no monetary loss. They have been paid for all time spent working. To award them more pay at this point would be to bestow on them a windfall of substantial size. Nothing appears in the record which would justify that.

Had the actions of the postmaster been willful or malicious, or undertaken totally without justification, then, on that account, there might be some justification for some type of monetary award as a form of punitive damages. But such was not the case here. The postmaster was not without some justification for his position. Though I disagree with his actions, they are not indefensible.

The grievance is sustained. The Clerk Craft is entitled to a five-minute wash-up period prior to lunch and at end of tour. There is no monetary award.

The costs are assessed equally.

Dated this 30th day of January, 1980.

GERALD COHEN
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