28704

REGULAR ARBITRATION PANEL

In the Matter of Arbitration	( )	Grievant:	Class Action
between	( )	Post Office:	Phoenix, AZ
UNITED STATES POSTAL SERVICE	( )	USPS Case No:	E06N-4E-C 09300266
and	( )	NALC Case No:	CO-09-01
NATIONAL ASSOCIATION OF LETTER CARRIERS	( )		

BEFORE:	Jonathan S. Monat, Ph.D., Arbitrator
For the U.S. Postal Service:	Tina Aldana
For the Union:	Lyn Liberty
Place of Hearing:	4949 E. Van Buren, Phoenix, AZ
Date of Hearing:	January 15, 2010
Date of Award:	March 5, 2010
Relevant Contract Provision:	Articles 5, 10, 30 and LMOU
Contract Year:	2006-2010
Type of Grievance:	Class Action

Award Summary:

Management violated the NA when it informed the employees that the Service was changing the past practice regarding annual leave. Management of the Phoenix Post Office is ordered to restore the past practice of that 14% of the complement of PTR Carrier Collectors shall be afforded AL on any workday during the choice period at the GMF. The Union's requested remedy is granted. The remedy is set forth in the award section at the end of this decision. Jurisdiction is retained for sixty (60) days for the sole purpose of assisting with the implementation of the remedy.

Jonathan S. Monat, Ph.D.
Arbitrator

STIPULATIONS

The parties did not agree that the matter was properly before the Arbitrator. This claim was not made until the arbitration hearing. Arbitrability was not an issue at prior steps of the grievance procedure. The Postal Service claimed that the matter was not arbitrable because this Arbitrator ruled on the issue in previous case. This matter is therefore *res judicata*. The Service has requested that the Arbitrator bifurcate the procedural and substantive issues. The Arbitrator will rule on the merits only after deciding if the matter is arbitrable. The Service argued that the matter was properly for interest arbitration.

The parties stipulated to the following facts (J4). The PTR Carrier Collectors were moved from the stations to the GMF in approximately 1993. Management had allowed 14% of Collectors to have annual leave each week during the choice period since about 1993. On May 21, 2009,Supervisor Peggy Kelso notified the PTR Collectors and union steward Julie Perez that management would now only allow two employees annual leave during the choice period. After the announcement on May 21, 2009, several employees requested leave during the choice period and were denied the because two employees were already on the leave board. Finally, the parties agreed that there were no facts in dispute.

All evidence and testimony were taken under oath duly administered by the Arbitrator at the time of witness testimony. The National Agreement and JCAM (NA)(J1), the Moving Papers (1-65)(J2) and the ELM, section 571 (J3), were admitted as joint exhibits. The parties waived oral closing arguments in favor of written post-hearing briefs. The briefs were received by the Arbitrator on February 1, 2010, and the hearing closed.

ISSUES

The following issues are before the Arbitrator for final and binding resolution:

1) Is this grievance arbitrable?

2) If the grievance is arbitrable, did management violate the NA when it informed the employees that the Service was changing the past practice regarding annual leave? If so, what is the appropriate remedy?

BACKGROUND

The stipulated facts as listed in paragraph 1 on page 2 above are the essential facts of this case. The Union filed a grievance stating that there has been a longstanding past practice of the Collectors at the GMF being allowed 14% annual leave in the choice period, thereby complying with LMOU, Section 9A. The practice has been in place for at least sixteen (years), a point Management conceded at Formal Step A. On May 21, 2009, Management notified the collectors and the union steward that now only two employees will be allowed annual leave during the choice period. The union steward learned of the change the day it occurred and the union president after it occurred. The parties met at Informal A on July 22, 2009, and Formal A on September 15, 2009. The case went to Step B on September 30, 2009. The DRT impasse the case on October 10, 2009. The Union elevated the matter to arbitration.

POSITION OF THE NALC

The Union argued that management unilaterally changed a past practice of 16 years plus duration. Management agreed to the stipulation that on May 21, 2009, the collectors and union steward were notified on two employees would be allowed annual leave during the choice period. Postmaster Alvarez testified that management is not obligated to discuss any changes with the Union on this issue, arguing that it did not violate the NA when it informed the employees it was changing the past practice. There are several statements in the Step B decision from managers and supervisors referring to the changing of the past practice. There is no dispute that management unilaterally changed the practice.

Article 30 of the NA is clear that an LMOU cannot override or violate the NA. The Postmaster was not sure if the LMOU could supercede the NA. The practice prior to May 21, 2009, was consistent with the NA percentages (14% and 9%) and no employees had been forced to lose leave benefits. The Arbitrator held in a prior case at this facility that, "Management's proposal could reduce the overall amount of leave available" (J2:42). The Postmaster testified that no one in management had even considered if the new practice could be implemented without violating the NA. Assurance that leave was

available for every employee is an important contractual responsibility. The new practice resulted in too few weeks for every PTR to use earned annual leave, permitting two slots instead of four slots for annual leave during the choice period.

The NA requires that the "annual leave program be administered on an equitable basis for all employees" (ELM511.1). "Care shall be exercised to assure that no employee is required to forfeit any part of such employee's annual leave." The Postmaster admitted no one studied the impact of the new policy, stating, "We just changed it." The Arbitrator's interest arbitration decision reflected the common understanding that 14% during the choice period was the rule. Management failed to call any witnesses other than the Postmaster who claimed not to have full knowledge of leave procedures and how they are managed at the GMF.

The Postmaster contradicted himself on the witness stand. He acknowledged the GMF followed the same 14% leave percentages so he wanted them left alone. However, he later testified that the GMF leave percentages were "creeping up" and it was getting out of hand. He claimed not to know what percentage was being used by the GMF until two (2) months after the negotiations. The Postmaster testified the GMF PTR language in the LMOU was left alone, agreeing the language of 9C was left unchanged. The implication was the new policy of two leave slots was the same as the number of leave slots for PTR collectors prior to the interest arbitration decision. Yet the Arbitrator left the leave percentages the same in the interest arbitration decision and that would be more than two leave slots at 14% of complement.

The Union argued against lowering the annual leave percentage rate to 7%. The Postmaster knew this and so testified at the interest arbitration in which the Arbitrator upheld the leave percentages of 14% and 9%. The rationale for the finding was that management's 7% level would not allow enough slots for everyone to use earned annual leave. The Service's present and past demands to lower the leave percentage is a violation of the NA by not providing sufficient time for employees to use their leave without suffering loss. Management stipulated to the 14% leave rate as the correct percentage yet the Post-

master testified that he was not aware of the stipulation and that leave percentages had been creeping up.

The Arbitrator should confirm the practice of over fourteen (14) years (at the time of the interest arbitration award) and 16 years at the time of the grievance, retaining the mutually agreed upon percentages of leave which provided opportunities for career employees to use annual leave. Management admitted to making the change in leave percentages unilaterally. This is not a matter of *res judicata* based upon the interest arbitration decision. Management did not question the Arbitrator's decision in the interest case. Contrary to Management's argument, it does not have the right to implement any change in order to operate efficiently. The NA agreement is clear that one cannot change a past practice without first discussing the issue with the Union. Changing the leave rate from four to two employees without discussing the matter was arbitrary and without good faith. This violation has caused undue harm to the PTR collectors at the GMF.

Prior arbitration decisions have held that a "custom" is binding where a benefit of peculiar value to the employees was involved (Colleran, N1C-1M-C6141). The NA intended to set up a nationwide leave program to guarantee that employees would get their vacations. Arbitrator Snow (WIN-5D-C 4230) held that to avoid inconsistent findings, arbitrators tend to exercise jurisdiction over the whole chain of related grievances. This is of particular importance in past practice cases. A new postmaster cannot unilaterally place his own interpretation on the meaning of a practice even in difficult economic circumstances. The Postmaster testified that someone on his staff made the new interpretation. But the arbitrator recognized the Postmaster was well aware of the past practice but ignored the practice because "too much annual leave caused inefficiencies." Postmaster Alvarez made the same argument - that the supervisors let the leave usage get out of hand. Yet curtailing AL was in violation of the NA and LMOU.

The Union requests a remedy to cover the two-year period leading the next negotiations period for the LMOU. In addition to sustaining the longstanding past practice, Management should directed to maintain the 14% leave rate for the compliment during the choice period. Employees who provide evi-

dence of denied annual leave should be awarded a selection of their choice, even if it is above complement, if that time/date have passed. If the date has not passed, leave should be approved up to the previously held amounts based upon seniority and date of submission according to past practice.

POSITION OF THE USPS

Management argued that the matter was not arbitrable on the grounds of *res judicata*. The Arbitrator had decided this issue in a previous interest award. Article 9B of the LMOU was eliminated and 9C permits two PTR Carrier Collectors per week annual leave. The language of 9A stated that the December 1st actual complement will be used in determining the 14% of carriers per unit allowed off on any work day. Item 9B stated that each station will permit one PTR Carrier Collector per week annual leave during the choice period. Item 9C was not impassed.

The issue of PTR leave rules has already been decided (Monat, E01N-4E-I 08057939): "PTRs have been consolidated into one unit and their seniority rights are restricted to the GMF unit...the LMOU is applied at the GMF." The Union's proposals for higher leave percentages was denied for lack of hard evidence. To allow the Union to change the clear and unambiguous language of the LMOU would be to disregard the provisions of Article 30. The Mittenthal Award (87-601, 1992) held that the issue of arbitrability may be raised for the first time at arbitration and would "hardly be relevant" at an earlier step of the grievance procedure.

The Union's past practice argument is invalid. Article 5 clearly defines the criteria of a past practice. The JCAM, page 5-1 prohibits management from taking any unilateral action consistent with terms of the existing NA. Management's actions in this case are not inconsistent with the terms of the existing agreement. That prior managers have allowed more than two employees annual leave during the choice period does not preclude management from adhering to the language as it is written. LMOU item 9C is clear and unambiguous. It clearly defines annual leave for PTR Collectors at the GMF. None of the Union witnesses were involved in the local negotiations when this language was created. Without

any evidence of the intent of the language when negotiated, it must be read as it is written. Thus, there was no true past practice and no obligation to negotiate with the Union.

The NA was not violated. The LMOU, Item 9 is specifically for the "determination" of the number of employees who shall receive leave during the choice vacation period." That is defined in 9C as two PTR Collectors per week in the choice period, the minimum number required. Management may permit more than the minimum number to have annual leave without that higher number becoming an entitlement. The Postal Service is facing an economic crisis and must pare down. Old practices are no longer feasible. The Union must raise this issue at the next negotiations. Elkouri and Elkouri (5th ed.) cited several arbitrators who stated that clear and unambiguous language takes precedence over a long past practice.

Union witnesses who testified that they would not get annual leave during the choice period or were not able to get leave during the selection period were speculating. Choice period bidding did not begin until January 15th, after the hearing was held. The employees could only testify to their selections for the non-choice period. Until the bidding for choice period leaves was finished, employees would not know if they were unable to get choice leave. In its Step B appeal, Management stated clearly that the reason for the appeal is Management of Phoenix Collections changed the past practice of allowing 14% of the employees to have AL on any work day during prime time. Non-choice leave was not grieved.

PTR carrier collectors are in a separate category from other craft employees and 9A does not apply to them. If the intent was to have 9A apply to them, 9A and 9C would not be separate items in the LMOU. PTR carrier collectors are addressed separately for a reason. Also, PTR collectors accumulate leave differently from FTR carriers. Calculations in fractions of .5 or greater are not rounded up. Two PTR employees are equivalent to 15 FTR employees.

The Union did not prove its case. The grievance should be denied.

ARBITRATOR'S FINDINGS AND OPINION

Arbitrability

The Postal Service argued that the grievance before the Arbitrator was outside his jurisdiction because the issue was *res judicata* based upon the interest arbitration decision issued in September 2008 involving the same parties. In that case, several items from the LMOU were in dispute including items 9A and 9B. Item 9C was not impassed and the language left as it is without consideration or discussion. The Arbitrator retained the current rates of 14% for choice AL periods and 9% for non-choice AL periods. Item 9B was removed from the LMOU because all PTR Carrier Collectors had been consolidated at the GMF in 1993. Prior to local negotiations in 2008, the LMOU had been continued as written in 1996 (J2:61-63).

The Union argued that Management could not raise the arbitrability issue for the first time one day before the arbitration hearing. However, Arbitrator Mittonthal found the appropriate time to raise an arbitrability challenge is at the arbitration hearing. So Management may raise the challenge. The question is whether the merits were decided by this Arbitrator at the interest arbitration. The answer is that the merits were not decided then. As Arbitrator Snow eloquently stated (F90N-4F-D 95006174), *res judicata* is intended to prevent the re-adjudication of "exactly the same claim as arose in the earlier dispute" or "a slightly different claim (direct estoppel and collateral estoppel).

The award made by this Arbitrator was to eliminate a separate item of the LMOU, an item over which there had been no impasse, discussion or argument. The Postal Service did not meet the criteria for issue preclusion identified by Arbitrator Snow. The elements of issue preclusion include that the issue "(1) was actually litigated; (2) was necessary to the decision; and (3) the party against whom the doctrine is being asserted was a party...to the former action." The first two elements were not met in the instant case. Nor is there an interpretive issue in this case. The matter is arbitrable.

The other argument raised by the Postal Service is that the language of Article 9C is clear and

unambiguous, thereby effectively negating any other argument on the merits. By its actions, the Union is trying to change the language of the LMOU, Item 9C, without negotiation. For reasons which will be discussed below, the Arbitrator respectfully disagrees with the Postal Service.

THE MERITS

The Postal Service raised the defense that there is no past practice because the language of LMOU, Item 9C, is clear and unambiguous. This section clearly defines the annual leave for PTR Carrier Collectors at the GMF. As such, it is not a past practice. Under this theory, Management's actions to limit PTR Collector annual leave (AL) to two PTRs per week would be consistent with the express language of 9C. That prior managers chose to allow more than two employees AL each week did not prevent Management from adhering to the LMOU, or "2 means 2."

It is a well-established principle among arbitral authorities that clear and unambiguous contract language trumps most past practice arguments. The Union argued that this case represents a true past practice irrespective of the clear contract language. The ICAM, 5-2 and 5-3 defines the nature of a past practice, which conforms to the general principles of past practice. To become a valid past practice, the conduct must be clearly and consistently followed. Second, there should be longevity and repetition. A consistent pattern of behavior must emerge over a period of time. Third, there should be acceptability among employees and supervisors alike that the practice is the customary way of handling a situation. Long acquiescence will imply acceptability. Choices made by the employer in the exercise of its managerial discretion may lead to a past practice as is the case herein.

After a careful review of the evidence and testimony on the record, the Arbitrator finds that the Union established beyond a preponderance of evidence the existence of a past practice. The practice in question, allowing 14% of the PTR Carrier Collectors at the GMF to take annual leave during the choice period, was followed consistently for sixteen years. During this period there were at least three Postmasters who served at the Phoenix dating back to the 1996 LMOU. The PTR Carrier Collectors had been

assigned exclusively to the GMF in 1993. Thus, the practice of allowing more than two PTR Collectors to take AL during a given week during the choice period began before the LMOU language was negotiated and continued until May 21, 2009. The arrival of a new postmaster or supervisor is not, in itself, sufficient justification to change or terminated a binding past practice (JCAM).

The critical factor is that both parties recognized and acknowledged the practice. In two statements signed by Supervisor Peggy Kelso (J2:13-14), she acknowledged explicitly that the past practice prior to May 21, 2009, "had been following Item 9A,...in determining the 14% of carriers per unit allowed off on any work day....(J2:13). In a statement dated August 4, 2009, she stated, "When notified by my manager Les Armstrong on 5/21/09 of the change in past practices I informed the union steward Julie Perez... The collections units past practice since approximately 1993 had been LMOU 9A. This (practice) was not in compliance with LMOU 9C which is in reference to specifically the GMF collections unit (J2:14)." She goes on to quote the JCAM on how to change past practices.

To this Arbitrator there is no stronger confirmation of a past practice than multiple statements by supervisors and managers that such a practice exists. Not only was this confirmation made on at least two occasions in writing, Management acknowledged that the practice originated in 1993. The fact that the practice continued after the 1996 LMOU, Item 9 unchanged until the interest arbitration in 2008, was signed off and confirmed in 2000, 2002, and 2007 (J2:61-63). This practice was followed even after Item 9C came into being. In Ms. Kelso's statement are found all the elements of a valid past practice: clarity, consistency, acceptability, mutuality and longevity.

The practice concerned a non-trivial matter for all parties but particularly for the Union and the carriers. The ability to use AL during choice vacation periods in Phoenix is a significant benefit to the carriers as their testimony indicated. All of the carriers called by the Union testified that the ability to use their AL to spend time with their families or tend to other activities was far more important than the money. It was not the simple gratuity that Management made AL out to be. Article 10 of the NA and the

ELM510 set out in great detail the annual leave program and together make up a large part of the NA.

Furthermore, the JCAM charges supervisors to "exercise care to assure that no bargaining-unit employees have to forfeit any part of their annual leave," provided employees submit sufficient leave requests. The evidence (J2:12 and 15-19) and testimony of Union witnesses established that there was material harm to the employees caused by the elimination of the past practice. The primary harm came from the inability to use AL in prime time and, in some cases, at all. Unilaterally changing the past practice to follow 9C inhibited supervisors' abilities to assure employees did not forfeit annual leave.

Once a valid past practice has been established, the JCAM (5-4) specifies how the practice may be changed. In this case, because the practice arose prior to the implementation of the underlying contract language and continued beyond it, the only way to change the practice is through bargaining in this case. Arguendo either the NA or the LMOU was silent on the subject of choice leave usage, a binding past practice could be changed by the Postal Service giving notice to the Union that it was changing the practice and then engaging in good faith bargaining with the Union over the impact on the bargaining unit. In this case, notice was given that the change was being made. However, there was no effort on the part of the Postal Service to engage in good faith bargaining.

The Postal Service argued that the practice is no longer efficient or economical. While it is well known within and outside the Postal Service that the business has suffered severe economic losses and cut its employee count by over 17%, there is no proof in this case that the past practice was inefficient or economically unfeasible. The sole witness for the Service, the Phoenix Postmaster, offered no hard data to show the extent, if any, of the economic cost of the practice. He offered only anecdotal evidence that the percentage of AL usage among PTR Collectors was up but not that it was inefficient or what the leave percentage was in reality. He stated that "no one in management had even thought out whether the new practice would violate employee rights and the NA."

It was suggested by the Postal Service that a ruling in favor of the Union in this case would

reverse his decision in the interest arbitration case. That would not be so. The decision in the prior case was to maintain the status quo ante - 14% in prime time and 7% in non-prime time. No thought was given to 9C because it was not an issue then. In the instant case, Management stipulated and the Postmaster affirmed that 14% AL rate was in use in the GMF since 1993. The prior decision did nothing to change this practice. The Arbitrator had a concern in the interest impasse case that accepting Management's proposal to lower the AL percentages would deny the employees a fair opportunity to use their AL before it was lost. The facts of the instant case underscore that concern. Management has an affirmative obligation under the ELM, NA and LMOU to make a good faith effort to assure that PTR collectors do not lose their important AL benefit. The unilateral termination of the past practice appears to be causing undue harm to the PTR collectors as the Union and employees feared would happen.

AWARD

Thus, after carefully considering the entire record of evidence, documents, testimony, arguments and prior arbitration decisions, whether or not discussed specifically herein, the Arbitrator finds that Management violated the NA when it informed the employees that the Service was changing the past practice regarding annual leave. Management of the Phoenix Post Office is ordered to restore the past practice that 14% of the complement of PTR Carrier Collectors shall be afforded AL on any workday during the choice period at the GMF. The Union's requested remedy is granted. Employees whose requested AL selection was denied shall be awarded, upon proof of denial, a selection of their choice up to complement. If the dates have not past, AL leave shall be approved according to the rules of seniority and date of submission. The Arbitrator retains jurisdiction for sixty (60) days for the sole purpose of assisting with the implementation of the remedy.

March 5, 2010

Jonathan S. Monat, Ph.D.
Arbitrator