ARBITRATION OPINION AND AWARD PURSUANT TO ARTICLE 15 OF THE

NATIONAL AGREEMENT BETWEEN THE PARTIES

Case No. W1C-5D-C 25266
Portland, Oregon
February 26 1986

C # 00155

UNITED STATES POSTAL SERVICE,	
and,	WILLIAM EATON Arbitrator
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,	
CFS Rest Break Change Grievance	

APPEARANCES:

FOR THE POSTAL SERVICE:

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FOR THE UNION:

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ISSUE AND EVIDENCE

This is an arbitration to determine the following issue as stipulated to by the parties:

> Did Management violate Article 5 and/or Article 15 of the National Agreement when they unilaterally changed the rest breaks for the CFS employees from 15 minutes to 10 minutes, and if so what is the appropriate remedy?

Hearing was held in Portland Oregon on February 26 1986. Following presentation of evidence by both parties, the matter was submitted to the Arbitrator for final and binding determination upon oral argument at the close of the hearing.

For a number of years employees in the computerized forwarding unit (CFS) in the Portland Post Office admittedly were accorded a 15 minute break in the morning and afternoon, while all other employees at the Post Office were given a ten minute break, with the exception of LSM Operators whose breaks are governed by provisions of the National Agreement. The Union contends that the CFS break policy was unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. In May of 1984, Management announced that thereafter CFS employees would be allowed only the same ten minute break allowed other employees in the facility.

The Union maintains that this is a violation of past practice principles, while Management contends that it is merely a correction of a lower Management error, and not in violation either of the accepted principles of past practice or of the National Agreement.

Local Break Policy

A communication to all Supervisors from the Portland Postmaster dated July 16 1973 set forth the ten minute break policy at issue. That policy, so far as it relates to the present dispute, is that employees would be allowed one ten minute break in the first four hours of the tour, and one ten minute break in the last four hours of the tour. That policy had been developed, or at least communicated to Union representatives, through a series of labor-management meetings which occurred in 1973.

Labor Relations Representative, Roger Strobel, who was at the time President of the local APWU, testified regarding the 1973 discussions. The purpose, on the part of the then newly appointed Postmaster, was to regularize an irregular and undisciplined break policy. Some units had not been allowed any break, and some had been allowed extensive breaks.

It appears that, even after the initial policy was announced on July 16 1973, irregularities continued to the point where the Union approached Management and requested a uniform ten minute break policy to apply to all employees, including Management employees. By early 1974 the uniform policy was extended to apply to stations and branches, as well as to the Main Post Office.

In August of 1975 the Union requested a 15 minute break, a request which had been made previously as well, and that request was rejected by Management. In 1976 the break policy was extended to include pre-tour work as well. There have

been no negotiations for a change in the ten minute policy since the mid-1970s.

The only exception to the ten minute break policy has been that set forth in Section 430 of the M-54 Manual, according 15 minute breaks to ZMT Operators, an exception which was incorporated in the 1973 break policy at Portland.

Subsequent Practice

When the CFS Unit was established in September of 1980 there appears to have been no discussion as to a break policy applicable to that unit. It is agreed, however, that 15 minute breaks came to be the practice, probably at the inception, or shortly thereafter, of the CFS Unit.

The CFS function, which is now included in deliveries and collections, has been performed at various times by different employees. At one time forwarding was done by Carriers, at another time by Clerks, and within the Clerk Craft by Clerks in various capacities.

The present grievance was initiated after notification by Management, dated May 10 1984, that beginning with the schedule posted for May 12 1984 breaks in the CFS Unit would be ten minutes. The notice indicated that the break schedule had been instructed by the Manager of Deliveries and Collections.

The Postal Service agrees that there was no discussion with the Union concerning the issuance of this notice, it being the position of the Postal Service that it was a simple matter of Supervisors previously not having done their job, and did not represent a policy change.

DISCUSSION

Union Argument

The past practice of 15 minute breaks for the CFS Unit is undisputed, clear, and unequivocal. The change in that practice instituted on May 10 1984 was undertaken without contacting the Union, and violated a binding past practice in the Unit.

Management does not dispute the unbroken practice from 1980 when the CFS Unit was established to the change in break policy in May of 1984. This constitutes a change in a condition of employment, which Management admits.

Management cannot be allowed to rely on a seven year old policy, as it attempts to do, in light of four years of continuous practice to the contrary. No evidence was introduced to dispute the Union's contention in this respect.

Nor can the Employer rely on its contention that it was merely poor supervision which allowed the practice to continue for four years. In a similar case, Arbitrator Thomas M. Levak held that it is "well established that an employer cannot properly modify, alter or discontinue a binding past practice through unilateral action." The Arbitrator noted that rule "has also been expressly codified by the parties in Article V of the National Agreement." Arbitrator Levak therefore held that a rest break, and the length thereof, constitutes "a 'major' working condition

and benefit of the type protected by Articles 5 and 15" of the National Agreement. (Case No. W8C-5G-C 9311)

Similar decisions have been rendered by Arbitrators Jonathan Dworkin (Case No. C1C-4K-C 18134), and Carlton J. Snow (Case No. W1N-5D-C 4592).

For these reasons the Union requests that the Arbitrator order reinstitution of the 15 minute break for the CFS Unit, that he order back pay of 10 minutes per day for all affected employees from May 12 1984 to the date of the Award, and that he retain jurisdiction until the terms of the Award shall have been effected.

Postal Service Argument

The alleged past practice is not truly a past practice. Rather, it involves one Unit in the corner of the fourth floor of the Portland Post Office in which Supervisors failed to comply with a policy which they had no authority to make or alter.

CFS function is not new. The work has always been there, it is only the method which was changed in 1980. The only exception to the ten minutes policy is that provided for ZMT Operators, and no special exceptions for CFS employees were negotiated or agreed to when that Unit was established.

The policy agreed upon in 1973 was a policy for the whole installation, which was modified and clarified on several occasions at Union insistence. When the Employer discovered that its Supervisors in that Unit had been failing to conform to the policy, there was no need for a discussion with the Union, since no condition of employment was being changed.

Rather, Management acted on a bilateral policy which had been agreed to, and some aspects of which had been instituted because of Union requests and complaints.

Subsequent to the institution of the policy in 1973 the Union had requested of Management that breaks be expanded to 15 mintues. This was rejected. The Union is now asking the Arbitrator for something which has not been attempted nationally, and which has been rejected locally.

A past practice must be acknowledged by the parties at the policy level. The practice relied upon by the Union was not.

For these reasons the Postal Service requests that the grievance be denied.

Conclusions

The principle upon which the Union relies is quite correct. That is, that an Employer cannot properly modify, alter, or discontinue a binding past practice through unilateral action. Article 5 of the National Agreement supports this principle. The question remains, however, as to whether the practice at issue constitutes a true "past practice" within the meaning of the general principle.

The past practice rule is what might be termed a quasi-contractual concept. That is, by their actions parties are deemed under the rule to have mutually agreed on a condition of employment. Having so mutually agreed, if by actions rather than by specific written terms, one party may not then unilaterally change the

conditions agreed to. But there is an additional requirement imposed by the contractual nature of the past practice concept. That is that the practice, as a substitute for written contractual agreement, must be known by, and therefore implicitly agreed to by, agents of the parties possessing the authority to effect binding agreements. A past practice cannot be validated as a contractual principle if it was not known to an agent of the party to be held accountable who possessed contracting authority.

In the present dispute it is uncontested that Supervisors of the CFS Unit knew of, and allowed to continue, the 15 minute break practice. It is equally clear that those Supervisors did not possess contracting authority. Therefore, for the Union to prevail in such a case it would be necessary to demonstrate that Management, at a level possessing contracting authority, also knew of the practice. There is no such demonstration in this dispute.

This principle is illustrated in the cases cited by the Union. The Levak case, for example, involved a situation in which an office-wide practice concerning breaks was in dispute. Not only did local management at the highest level authorize a 15 minute break, but reinstituted such a break on an allegedly "experimental basis" for some three years after an attempt to discontinue it was resisted. It was when the management again attempted to institute a ten minute break that the Union filed a grievance which was, in those circumstances, upheld by Arbitrator Levak.

The other two Awards cited by the Union deal with past

practices which had been established according to the principles here discussed, and so are not directly relevant to the present dispute where the practice at issue has not been so established.

In brief, the Postal Service is correct contending that there is no "past practice" established in this dispute, for the reason that there is no showing that any Management official with contracting authority was aware of the 15 minute break practice in the CFS Unit.

AWARD

Management did not violate Article 5 and/or Article 15 of the National Agreement when they unilaterally changed the rest breaks for CFS employees from 15 minutes to ten minutes. The grievance is therefore denied.

WILLIAM EATON
Arbitrator

April 4 1986