

C-20253

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	) GRIEVANT: Class Action
Between	) POST OFFICE: Windsor, CT
UNITED STATES POSTAL SERVICE	)
and	) CASE Numbers:
NATIONAL ASSOCIATION OF	) USPS:B94N-4B-C 99221535
LETTER CARRIERS, AFL-CIO	) NALC:9906095030
	) GTS:27530

BEFORE: Sherrie Rose Talmadge, Esq., ARBITRATOR

APPEARANCES:

For the U.S. Postal Service: Bruce W. Harvey, Labor Relations Specialist

For the Union: Gennaro G. Mascolo, Vice-president Branch 86

Place of Hearing: Windsor, CT

Date(s) of Hearing: October 14, 1999

AWARD

Despite a casual ongoing practice in which carriers had been permitted to wear Union caps on the street, I find that this practice did not rise to the level of an endorsement by the parties to amend the clear language of ELM Section 933.111, specifying the required uniform headgear for carriers, to include Union caps. Moreover, the evidence did not substantiate the Union's claim that the Service engaged in disparate treatment towards the Union steward. Accordingly, the grievance is denied.

Date of Award: December 17, 1999

  
Sherrie Rose Talmadge, Arbitrator

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COMM. DIVISION

## **STIPULATED ISSUES**

1. Did the Windsor Management violate a proven past practice and treat the Union steward disparately when they ordered same not to wear his Union cap on the street?
2. If so, what shall the remedy be?

## **RELEVANT 1994-1998 CONTRACT ARTICLES and HANDBOOK PROVISIONS**

### **ELM, Section 931, Uniforms**

#### **Section 931.11**

Certain employees must wear prescribed uniforms in performing their duties. These employees are entitled: (a) to a uniform allowance to purchase authorized uniform items or (b) to be furnished uniforms which meet USPS specifications.

#### **Section 933 Authorized Uniform Items and Combinations**

#### **Section 933.111, Type 1a (Uniforms worn by city letter carriers)** **Items for Men<sup>1</sup>**

#### **Headgear**

Service cap, postal navy blue; baseball cap, summer or winter style, postal blue with vertical corporate emblem; sun visor, postal blue with vertical corporate emblem; sun helmet, white with blue band; winter fur trooper cap, postal blue with vertical corporate emblem; knit watch cap, with convertible face mask, postal navy blue with vertical corporate emblem

## **FINDINGS OF FACT<sup>2</sup>**

The parties stipulated that on Friday, June 4, 1999, a supervisor at the Windsor Post Office instructed Curt Roessler, the Union steward, not to wear his Union cap on the street. Roessler has been a letter carrier at the Windsor Post Office for fourteen years, and steward for three or four years. Roessler testified that on June 4 supervisor Candace Winzer directed him to remove his Union hat while

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<sup>1</sup> Women's headgear also includes a WAVE-style hat.

<sup>2</sup> At the hearing all witnesses testified under oath. Both parties had an opportunity to engage in direct and cross examination of the witnesses, and to submit relevant documentary evidence. At the conclusion of the hearing, the parties presented oral closing arguments.

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on the street making deliveries. Roessler believed that this instruction pertained only to him, until later that day or the next, OIC Dave Schineller informed Roessler that the instruction applied to all the carriers. On or after June 4, 1999, Schineller had a talk with the entire workforce informing them that only the postal uniform hats could be worn on the street.

Three carriers, Roessler, David Jensen, a carrier for 16 years at Windsor, and Michael Francis Gentile, Jr., a carrier for twenty years at Windsor and alternate steward, testified that for more than twenty years the practice at the Windsor Post Office had been that carriers were permitted to wear hats on the street that were related to the Post Office, including the NALC cap. Both Jensen and Gentile noted that Management had observed him wear the NALC caps on the street over a seven or eight year period, without objection. The Joint exhibits also included a statement signed by fourteen letter carriers indicating that letter carriers in the Windsor Post Office have been able to wear caps related to the Postal Service which have included NALC Ball caps, express mail caps and postal-related hats with a "safety matters" insignia. Roessler testified that he had worn the same blue NALC cap, with a red and blue NALC patch, on the street for the past two or three years. At no time, prior to June 4, 1999, did the Union receive notice that the Service would terminate this practice or that Management sought to bargain over this change in working conditions.

David Schineller, who was OIC at Windsor on June 4, 1999, testified that at least since 1983 the Windsor Post Office has not had a policy permitting letter carriers to wear non-uniformed hats on the street. The parties stipulated that

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Christine R. Murphy, Windsor Postmaster from August 1995 through April 1999, would testify that there was no policy that allowed carriers to wear non-uniform hats. At the hearing Supervisor Winzer denied giving an order to, or speaking to, Roessler about his Union hat on June 4, 1999. However, Schineller testified that on June 4 Winzer had informed him that some of the carriers were wearing their Union baseball caps in the street. On June 4, he informed Roessler and Jensen, who were wearing their Union caps, and five or six other carriers, that they were not to wear them on the street because they were not the proper uniform hats. At no time did Management give a service talk to the carrier workforce (36 regular carriers, one part-time regular and eight PTFs), informing them that they were not to wear their Union caps on the street.

### POSITIONS OF THE PARTIES

#### UNION'S POSITION

The Union argued that the Postal Service violated an established past practice when it directed the Union steward, and others, to discontinue the practice of wearing Union caps while delivering mail on the street. The Union maintained that the Windsor Post Office had an ongoing past practice for more than 20 years permitting letter carriers to wear Union caps on the street, while delivering mail, as well as in the Post Office. On June 4, 1999, Management terminated that practice when Union steward Roessler and Jensen, among others, were directed not to wear Union caps while on the street. Management did not provide notice to the Union that it had decided to eliminate the practice, nor did Management seek to

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negotiate with the Union over the discontinuation of the practice. Accordingly, the Union urged that the grievance be upheld, and that the practice be reinstated.

### **POSTAL SERVICE POSITION**

The Service argued that the Union did not establish the existence of a past practice of permitting carriers to wear Union caps in the street. The Service cited Arbitrator Mittenthal's criteria for conduct to be considered a past practice: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) mutuality; (5) underlying circumstances that give a practice its true dimension. In this case, the Service contended that the parties differed as to the nature of the policy concerning Union caps, citing the former Postmaster's testimony that there was no policy permitting the wearing of Union caps on the street. Thus, the Service maintained that there had been no existing practice concerning the wearing of Union hats that occurred with frequency and regularity in repetition establishing an understanding that it would continue in the future. Moreover, the contractual language establishes the headgear uniform. To allow carriers to wear Union caps would violate the contractual language. The parties can not establish a binding practice that violates the National Agreement. The Service did not acknowledge that the carriers could wear Union caps on the street. At best there were isolated occasions when the carriers were not wearing uniform hats.

In addition, the Service noted that there had been no evidence of disparate treatment towards the steward. The OIC had informed the entire staff that they were not to wear Union hats on the street. In conclusion, the Service requested that the grievance be denied.

## DISCUSSION

Although custom and past practice are used to establish the intent of contract clauses that are ambiguous or so general as to be capable of different interpretations, ordinarily they will not be used to give meaning to a provision that is clear and unambiguous.<sup>3</sup>

The language of the ELM Section 933.111 specifies that uniforms are to be worn by city letter carriers and provides an itemized list of permissible headgear. The itemized headgear is specifically described as including the vertical corporate emblem, except for the service cap and the sun helmet, which is identified as white with a blue band. Although the Union argued that the National Agreement does not prohibit wearing Union caps on the street while delivering mail, the language of Section 933.111, incorporated into the National Agreement by Article 19, appears to clearly and unambiguously specify the permissible headgear for letter carriers.

The Union asserted that the Service violated a longstanding past practice permitting letter carriers to wear Union caps while on the street delivering mail. For a past practice to become a binding condition of employment, the longstanding practice must have been accepted by the parties to become an integral part of the agreement with just as much force as any of its written provisions. (See Arbitrator Mittenthal's July 10, 1979 National decision in USPS and NALC, Case No, N8-NAT-0006). In this case I find that the parties did have a longstanding informal past practice, with the Service permitting (or at least tacitly acquiescing) the wearing of Union caps on the street while the carriers delivered mail. This finding was reached based on the credible testimony of three carriers that throughout a 20-year period

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various supervisors had observed them wear Union caps on the street without objection.

Nonetheless, where a conflict exists between the clear and unambiguous language of the contract, and a long standing past practice, the Arbitrator is required to follow the language of the contract.<sup>4</sup> In order for a past practice to modify clear contract language, the party asserting that the contract language has been modified must "show the assent of the other party and that the minds of the parties must be shown to have met on a definite modification".<sup>5</sup> As Arbitrator George E. Bowles noted in his May 8, 1981 decision, USPS and APWU, (Case Nos. CBC-4A-C 21729, et al), "Even by the most liberal construction, past practice cannot modify clear contract language except by definite, certain and intentional acts, a positive acceptance or endorsement by both parties." In light of the testimony of both OIC Schineller, who had been a supervisor in Windsor since 1990, and Christine Murphy, Postmaster at Windsor from 1995 through April 1999, that the Service did not have a policy allowing carriers to wear non-uniform caps on the street, I find that the parties did not have a meeting of the minds to amend the clear language of Section 933.111 to include the wearing of Union caps.

Consequently, I find that although there may have been an informal practice through the years allowing the carriers to wear NALC caps on the street, the evidence did not prove that the Service endorsed an amendment to the clear language of ELM Section 933.111, specifying required uniform headgear for

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<sup>3</sup> Elkouri and Elkouri, How Arbitration Works, (5<sup>th</sup> Ed., c.1997, pg. 651).

<sup>4</sup> Elkouri, supra at 652, citing Arbitrator John F. Caraway in BASF Wyandotte Corp., 84 LA1055-58 (1985).

<sup>5</sup> Elkouri, supra at 653, citing Arbitrator Hamilton Douglas in Merrill-Stevens Dry Dock & Repair

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carriers, to include Union caps. I also note that the evidence did not substantiate the Union claim of disparate treatment towards the Union steward. The record indicated that Schineller directed at least five or six other carriers, including Jensen and the chief steward, not to wear Union caps on the street on either June 4 or 5, 1999.

### AWARD

Despite a casual ongoing practice in which carriers had been permitted to wear Union caps on the street, I find that this practice did not rise to the level of an endorsement by the parties to amend the clear language of ELM Section 933.111, specifying the required uniform headgear for carriers, to include Union caps. Moreover, the evidence did not substantiate the Union's claim that the Service engaged in disparate treatment towards the Union steward. Accordingly, the grievance is denied.

Respectfully submitted by:

  
Sherrie Rose Talmadge, Arbitrator