REGIONAL ARBITRATION PANEL

In the Matter of Arbitration	Grievant:	Class Action
Between	Post Office:	Clarksville, TN 37040
United States Postal Service	USPS No.:	C16N-4C C 19401954
And	Union No.:	2219C40
National Association of Letter Carriers, AFL-CIO		

BEFORE: Glenda M. August, Arbitrator

APPEARANCES:

For the U.S. Postal Service	Sarah Shelburne
For the National Association of Letter Carriers	Corey Walton

Place of Hearing:	2031 Wilma Rudolph Blvd., Clarksville, TN 37040
Date of Hearing:	December 6, 2019
Date of Award:	January 3, 2020
Relevant Contract Provision:	Articles 3, 5, 15, 17 & 31
Contract Year:	2016 - 2019
Type of Grievance:	Contract

AWARD: The grievance is sustained. Management violated the National Agreement at Article 5 when they attempted to unilaterally terminate the valid past practice of allowing Union Stewards on USPS approved Union time, to travel to the Union Hall to complete their Union duties. Management must immediately reinstate and continue this valid past practice. Any future changes must be done in accordance with the National Agreement and JCAM at Article 5.

Glenda M. August

Glenda M. August
Arbitrator

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I. ISSUE (s)

1.) Did local Management violate Articles 15, 17 or 31 during the processing of this grievance? If so, what is the appropriate remedy?

2.) Did local Management violate Articles 3 or 5 of the National Agreement when they issued a letter to the local Branch to stop a valid Past Practice of Stewards going to the local Union Hall to perform Grievance handling? If so, what is the appropriate remedy?

II. RELEVANT CONTRACT PROVISIONS

ARTICLE 3
MANAGEMENT RIGHTS

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

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

B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;

C. To maintain the efficiency of the operations entrusted to it;

D. To determine the methods, means, and personnel by which such operations are to be conducted;

E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and

F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

(The preceding Article, Article 3, shall apply to City Carrier Assistant Employees.)

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.

(The preceding Article, Article 5, shall apply to City Carrier Assistant Employees.)

ARTICLE 15
GRIEVANCE-ARBITRATION PROCEDURE

Section 1. Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include,

but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

ARTICLE 17
REPRESENTATION

Section 1. Stewards

Stewards may be designated for the purpose of investigating, presenting and adjusting grievances.

ARTICLE 19
HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

IV. FACTS

This case surrounds the Service's decision to end an alleged past practice, where Union Stewards from the Clarksville, TN Post Office travelled to the local Union Hall to handle grievances. On August 5, 2019, the Postmaster at Clarksville issued a letter to the local NALC Branch President notifying him of Management's intent to terminate the past practice. The Postmaster in his letter stated that the practice was an "exercise in discretion" and there was no intention of a future commitment". He went on to notify the Union that the practice would end 30 days after the Union's receipt of the notification.

The Union filed the instant grievance alleging Management violated the National Agreement at Article 5 when they unilaterally terminated the "past practice" of allowing Stewards at Clarksville to process their grievances at the local Union office. The Union further alleged that during the processing of the grievance in the case at bar, Management violated Articles 15, 17 and 31. A hearing was held on December 6, 2019 at the Clarksville, TN Post Office located at 2031 Wilma Rudolph Blvd, Clarksville, TN, 37040. The parties agreed that the grievance is properly before this Arbitrator for decision pursuant to the 2016-2019 National Agreement.

V. UNION'S CONTENTIONS

The Union contended that Management arbitrarily terminated the past practice of the Local Union performing requested Union time at the local Union hall. They further contended that on August 5, 2019, Postmaster John Greiner issued a letter to local Branch President Ray Maki that stated in part:

> Dear Mr. Maki, please accept this letter as advance notification of management's intent to discontinue what the Union may consider a past practice of the Union Representatives performing Steward duties at the Branch 354 Union Hall located at 2405 Old Russellville Pike Clarksville TN 37040. Management allowing Steward duties to be performed at the Branch was an exercise in discretion and there was Management (sic) no intention of a future commitment. This "practice" will end 30 days from your receipt of this notification.

According to the Union, Management failed to reach out to the Union to allow them to bargain in good faith about changing the practice of Stewards performing their duties at the Union hall prior to the issuance of this "eviction notice".

The Union argued that in determining whether a past practice existed, one must review the opinion of National Arbitrator Richard Mittenthal, where, in a paper given to the National Academy of Arbitrators, he described the elements required to establish a valid past practice:

> • First, there should be clarity and consistency. A course of conduct which is vague and ambiguous or which has been contradicted as often as it has been followed can hardly qualify as a practice. But where those in the plant invariably respond the same way to a particular set of conditions, their conduct may very well ripen into a practice.
>
> • Second, there should be longevity and repetition. A period of time has to elapse during which a consistent pattern of behavior emerges. Hence, one or two isolated instances of certain conduct do not ordinarily establish a practice. Just how frequently and over how long a period something must be done before it can be characterized as a practice is a matter of good judgment for which no formula can be devised.
>
> • Third, there should be acceptability. The employees and supervisors alike must have knowledge of the particular conduct and must regard it as the correct and customary means of handling a situation. Such acceptability may frequently be implied from long acquiescence in a known course of conduct. Where this acquiescence does not exist, that is, where employees constantly protest a particular

course of action through complaints and grievances, it is doubtful that any practice will be created.

• One must consider, too, the underlying circumstance which give a practice its true dimensions. A practice is no broader than the circumstances out of which it has arisen, although its scope can always be enlarged in the day-to-day administration of the agreement. No meaningful description of a practice can be made without mention of these circumstances. For instance, a work assignment practice which develops on the afternoon and midnight shifts and which is responsive to the peculiar needs for night work cannot be automatically extended to the day shift. The point is that every practice must be carefully related to its origin and purpose.

• Finally, the significance to be attributed to a practice may possibly be affected by whether or not it is supported by mutuality. Some practices are the product, either in their inception or in their application, of a joint understanding; others develop from choices made by the employer in the exercise of its managerial discretion without any intention of a future commitment.

According to the Union, it would have been impossible for this type practice to continue for some 25 years ***without*** being supported by mutuality; they noted that the practice was likely borne out of a joint understanding of the Steward's desire to have available to them, the vast resources provided at the Union Hall. The union argued that the practice apparently did not affect operations in the Clarksville Post Office, based on the number of years that practice was allowed to exist.

In support of their position, the Union cited the opinion of Arbitrator JoAnn Nixon where she relied upon National Arbitrator Carlton Snow's conclusions about how to determine the existence of a "past practice". The Union noted that in case number J11N-4J-C 17364079, Arbitrator JoAnn Nixon reviewed the existence of a past practice and opined:

> In examining the aforementioned case, I reviewed the decision of National Arbitrator Carlton Snow in case number H7N-58R-C316, where Arbitrator Snow addressed the impact of past practice, stating:
>
> > The largest hurdle to overcome in using a "past practice" analysis is establishing the existence of a "practice." When there is evidence the parties had mutually agreed that a practice existed for a period of time (even if it is unclear which contractual provision was thought to have governed), the practice must be deemed established. The point is that a collective bargaining agreement includes more than the written provision in a printed document as the United States Supreme Court has recognized. A labor contract also included understanding and mutually accepted practices which have

> developed between the parties during their relationship. In the grievances submitted to the arbitrator in this particular case, it was the mutually accepted practice of the parties, at least prior to mid-1987, to make temporary T-6 vacancies available for opting by the senior-most-qualified employes (sic).

As I stated in that decision, while Arbitrator Snow addressed past practice, he emphasized the fact that it must be well established. "When there is evidence the parties had mutually agreed that a practice existed for a period of time (even if it is unclear which contractual provision was thought to have governed), the practice must be deemed established." In the instant case, there is no doubt the Past Practice existed and even Management in its Step B contentions conceded they made a unilateral change to the past practice.

The Union further cited the JCAM at page 5-4 where they contended that the parties agreed:

Changing Past Practices that Implement Separate Conditions of Employment.

If the Postal Service seeks to change or terminate a binding past practice implementing conditions of employment concerning areas where the contract is silent, Article 5 prohibits it from doing so unilaterally without providing the union appropriate notice. Prior to making such a change unilaterally, the Postal Service must provide notice to the union and engage in good faith bargaining over the impact on the bargaining unit. If the parties are unable to agree, the union may grieve the change.

Management changes in such "silent" contracts are generally not considered violations if 1) the company changes owners or bargaining unit, 2) the nature of the business changes, or 3) the practice is no longer efficient or economical. The first of these has rarely arisen in Postal Service cases involving its numerous bargaining units.

A change in local union leadership or the arrival of a new postmaster or supervisor is not, in itself, sufficient justification to change or terminate a binding past practice, as noted in the previous paragraph.

It was the position of the Union that Management at Clarksville never attempted to bargain in good faith after sending the "notification" referenced in the grievance file (JX-2, Page 26). It was the Union's contention that at the Informal A meeting, they themselves made an attempt at bargaining in good faith; they noted that the Union attempted to plead their case but there was no resolution, thus the instant grievance was filed.

Finally, the Union argued, Article 5 does not state that it is the responsibility of the Union to set a meeting date with Management to negotiate changes to a past practice. They further argued that it is Management's obligation under Article 5 to negotiate and notify. In the case at bar, the Union contended that Management violated Article 5 when they arbitrarily ended the past practice of Stewards performing their Union duties at the local Union Hall. The Union asserted that when Union Steward time is requested and approved, it is understood that the writing, investigation, and adjustment of grievances is performed by the Steward of the local Union Hal of Branch 364, NALC. The Union requested that this Arbitrator sustain the instant grievance and grant the requested remedy, that local Management continue the past practice, which has lasted more than 25 years; allowing local Union Stewards to travel to the local Union hall while on Steward time.

VI. MANAGEMENT'S CONTENTIONS

Management contended that appropriate notice was provided to the NALC local Union at Clarksville, TN prior to making a unilateral change in compliance with the Joint Contract Administration Manual (JCAM). According to the Service, John Greiner, Postmaster at Clarksville provided four methods of communication for the Union to contact him to discuss the notification. The Service asserted that the Union failed to contact him to engage in negotiations, and Management was not made aware of the Union's concerns until the Informal A meeting held on August 22, 2019.

It was the position of Management that the Informal and Formal A meetings were held prior to the end of the 30-day notice period and the Union was provided the opportunity to negotiate but failed to do so. According to the Service, Management was not required to specifically ask the Union if they wanted to negotiate, and the Union, rather than make a request to negotiate, filed the instant grievance. The Service contended that as remedy the Union requested, "Local management will continue the valid past practice of local Union Stewards to travel to the local Union Hall while on Steward time." They further contended that the remedy request confirms that local Union Stewards were in fact on Steward's time, paid by the Postal Service while they were travelling to the local Union Hall. Management argued that this is not required by the National Agreement, and is a practice which is not economical as testified by the Clarksville Postmaster.

Management cited the JCAM regarding making changes in these type "silent" contracts:

> Management changes in such "silent" contracts are generally not considered violations if 1) the company changes owners or bargaining unit, 2) the nature of the business changes, or 3) the practice is no longer efficient or economical. The first of these has rarely arisen in Postal Service cases involving its numerous bargaining units.

Management disputed the Union's contention that the Postmaster is a new arrival and has failed to bargain in good faith regarding this "silent contract". According to Management, Postmaster Greiner is not a new arrival as he arrived in Clarksville in April, 2018. The Service contended that in the instant case, the Union failed to meet their burden of proof; they further contended that the evidence of record fails to demonstrate how the end of the practice would negatively impact the duties to be performed by a Steward.

It was argued by Management that the pictures included by the Union in the grievance file serves only to demonstrate the location of Union Hall and the facility available to them. Management further argued that the Union failed to demonstrate how the Union's ability to investigate, process and prepare grievances would be negatively impacted in any way, shape form or fashion with the Steward being required to perform union duties at the Postal Service. The Service asserted that the very room where the Arbitration Hearing was held, was the space proposed for the Steward to complete his Union duties. Management maintained that the room is spacious and accommodating to meet all the Union's needs.

Finally, Management argued that Steward's duties are performed while the Steward is on the clock and being paid by the Postal Service. In this case, contended Management, the Service is exercising its' right to ensure the efficiency of operations as well as working to diminish safety related concerns, by discontinuing the practice of Stewards performing Union duties at the Brach 364 Union Hall. Here, Management further contended, the Union failed to provide evidence of any Article 15, 17 or 31 violations during the processing of the instant grievance. Management argued that the Union also failed to prove that Management violated Articles 3 and 5, since the service completing all requirements to end a past practice. According to Management, the Postmaster provided notice and offered contact methods for the Union to discuss the matter. The Service maintained that the Union failed to request negotiations, and missed

the opportunity to do so. Based on the Union's failure to meet their burden to prove Management violated the National Agreement, Management requested that the grievance in the case at bar be denied in its' entirety.

VII. DISCUSSION AND OPINION

ARTICLE 5

PROHIBITION OF UNILATERALACTION

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.

(The preceding Article, Article 5, shall apply to City Carrier Assistant Employees.)

Prohibition on Unilateral Changes. Article 5 prohibits management taking any unilateral action inconsistent with the terms of the existing agreement or with its obligations under law. Section 8(d) of the National Labor Relations Act prohibits an employer from making unilateral changes in wages, hours or working conditions during the term of a collective bargaining agreement.

In H1N-5G-C 14964, March 11, 1987 (C-06858) National Arbitrator Bernstein wrote concerning Article 5:

> The only purpose the Article can serve is to incorporate all the Service's "obligations under law" into the Agreement, so as to give the Service's legal obligations the additional status of contractual obligations as well. This incorporation has significance primarily in terms of enforcement mechanism—it enables the signatory unions to utilize the contractual vehicle of arbitration to enforce all of the Service's legal obligations. Moreover, the specific reference to the National Labor Relations Act is persuasive evidence that the parties were especially interested in utilizing the grievance and arbitration procedure spelled out in Article 15 to enforce the Service's NLRB commitments.

Not all unilateral actions are prohibited by the language in Article 5—only those affecting wages, hours or working conditions as defined in Section 8(d) of the National Labor Relations Act. Additionally, certain management decisions concerning the operation of the business are specifically reserved in Article 3 unless otherwise restricted by a specific contractual provision.

Past Practice

The following explanation represents the national parties' general agreement on the subject of past practice. The explanation is not exhaustive, and is intended to provide the local parties general guidance on the subject. The local parties must insure that the facts surrounding a dispute in which past practice plays a part are surfaced and thoroughly developed so an informed decision can be made.

Article 5 may also limit the employer's ability to take a unilateral action where a valid past practice exists. While most labor disputes can be resolved by application of the written language of the Agreement, it has long been recognized that the resolution of some disputes require the examination of the past practice of the parties.

Defining Past Practice

In a paper given to the National Academy of Arbitrators, Arbitrator Mittenthal described the elements required to establish a valid past practice:

• First, there should be clarity and consistency. A course of conduct which is vague and ambiguous or which has been contradicted as often as it has been followed can hardly qualify as a practice. But where those in the plant invariably respond the same way to a particular set of conditions, their conduct may very well ripen into a practice.

• Second, there should be longevity and repetition. A period of time has to elapse during which a consistent pattern of behavior emerges. Hence, one or two isolated instances of certain conduct do not ordinarily establish a practice. Just how frequently and over how long a period something must be done before it can be characterized as a practice is a matter of good judgment for which no formula can be devised.

• Third, there should be acceptability. The employees and supervisors alike must have knowledge of the particular conduct and must regard it as the correct and customary means of handling a situation. Such acceptability may frequently be implied from long acquiescence in a known course of conduct. Where this acquiescence does not exist, that is, where employees constantly protest a particular course of action through complaints and grievances, it is doubtful that any practice will be created.

• One must consider, too, the underlying circumstance which give a practice its true dimensions. A practice is no broader than the circumstances out of which it has arisen, although its scope can always be enlarged in the day-to-day administration of the agreement. No meaningful description of a practice can be made without mention of these circumstances. For instance, a work assignment practice which develops on the afternoon and midnight shifts and which is responsive to the peculiar needs for night work cannot be automatically extended to the day shift. The point is that every practice must be carefully related to its origin and purpose.

• Finally, the significance to be attributed to a practice may possibly be affected by whether or not it is supported by mutuality. Some practices are the product, either in their inception or in their application, of a joint understanding; others develop from choices made by the employer in the exercise of its managerial discretion without any intention of a future commitment.

Functions of Past Practice In the same paper, Arbitrator Mittenthal notes that there are three distinct functions of past practice:

To Implement Contract Language. Contract language may not be sufficiently specific to resolve all issues that arise. In such cases, the past practice of the parties provides evidence of how the provision at issue should be applied. For example, Article 15, Section 2, Step 3 of the 1978 National Agreement (and successor agreements through the 2000 National Agreement) required the parties to hold Step 3 meetings. The contract language, however, did not specify where the meetings were to be held. Arbitrator Mittenthal held that in the absence of any specific controlling contract language, the Postal Service did not violate the National Agreement by insisting that Step 3 meetings be held at locations consistent with past practice (N8-NAT-0006, July 10, 1979, C-03241).

To Clarify Ambiguous Language. Past practice is used to assess the intent of the parties when the contract language is ambiguous, that is, when a contract provision could plausibly be interpreted in one of several different ways. A practice is used in such circumstances because it is an indicator of how the parties have mutually interpreted and applied the ambiguous language. For example, in a dispute concerning the meaning of an LMOU provision, evidence showing how the provision has been applied in the past provides insight into how the parties interpreted the language. If a clear past practice has developed, it is generally found that the past practice has established the meaning of the disputed provision.

To Implement Separate Conditions of Employment. Past practice can establish a separate enforceable condition of employment concerning issues where the contract is "silent." This is referred to by a variety of terms, but the one most frequently used is the silent contract. For example, a past practice of providing the local union with a file cabinet may become a binding past practice, even though there are no contract or LMOU provisions concerning the issue.

Changing Past Practices

The manner by which a past practice can be changed depends on its purpose and how it arose. Past practices that implement or clarify existing contract language are treated differently than those concerning the "silent contract."

Changing Past Practices that Implement or Clarify Contract Language. If a binding past practice clarifies or implements a contract provision, it becomes, in effect, an unwritten part of that provision. Generally, it can only be changed by changing the underlying contract language, or through bargaining.

Changing Past Practices that Implement Separate Conditions of Employment. If the Postal Service seeks to change or terminate a binding past practice implementing conditions of employment concerning areas where the contract is silent, Article 5 prohibits it from doing so unilaterally without providing the union appropriate notice. Prior to making such a change unilaterally, the Postal Service must provide notice to the union and engage in good faith bargaining over the

> impact on the bargaining unit. If the parties are unable to agree, the union may grieve the change.
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> Management changes in such "silent" contracts are generally not considered violations if 1) the company changes owners or bargaining unit, 2) the nature of the business changes, or 3) the practice is no longer efficient or economical. The first of these has rarely arisen in Postal Service cases involving its numerous bargaining units.
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> A change in local union leadership or the arrival of a new postmaster or supervisor is not, in itself, sufficient justification to change or terminate a binding past practice, as noted in the previous paragraph.

The issue in the case at bar is regarding a past practice which the Union alleges was unilaterally terminated by Management at the Clarksville, TN Post Office. When reviewing past practice cases, the first step must be to identify the practice and determine whether it was in fact a "valid" past practice.

The JCAM provides guidance on identifying past practice situations and utilizes the guidance provided by National Arbitrator Richard Mittenthal to the National Academy of Arbitrators, and described the "elements required to establish a valid past practice". In this document, Arbitrator Mittenthal found that first, there should be clarity and consistency, Second, there should be longevity and repetition, third, there should be acceptability. Arbitrator Mittenthal added that one must consider, too, the underlying circumstance which give a practice its true dimensions, finding that every practice must be carefully related to its origin and purpose. Finally, Mr. Mittenthal stated that the significance to be attributed to a practice may possibly be affected by whether or not it is supported by mutuality.

Regarding mutuality, Arbitrator Mittenthal found that "some practices are the product, either in their inception or in their application, of a joint understanding; **others develop from choices made by the employer in the exercise of its managerial discretion without any intention of a future commitment."** In the case at bar, Management contended that in Clarksville, the past practice of allowing Stewards to conduct their Union duties at the Union Hall instead of remaining at the Clarksville Post Office, was a decision made with managerial discretion without the intention of a future commitment.

In examining the fact circumstances in the instant case, as we apply the elements required to prove a valid "past practice", one must certainly believe that there was clarity and consistency

since there was no dispute that the Union Steward (s) at Clarksville, TN, when granted approved Union time, travelled to the Union Hall to complete those duties. This occurred for the past 25 years which has to be considered consistent and also proves that there was longevity, repetition and acceptability on the part of the Union and Management at that office. Certainly, an objective review of the grievance file would render an assumption that the practice was borne out of convenience for the Union (accessibility to files and other resources to conduct the business at hand), but Management's support for the arrangement over all these years proves that the Service accepted the practice. The origin and purpose had to have been defined by the parties who agreed to the practice, but the longevity of the practice demonstrated that it served a purpose; otherwise, there would have been, or "should" have been prior discussions about making a change to the long-time practice. And, finally, no practice continues for twenty-five (25) years if mutuality ***did not*** exist.

The practice of allowing the Union Steward to travel to the Union Hall to process grievances in Clarksville, can only be determined to be a "valid" past practice; one which survived for at least twenty-five (25) years, as stated by the local Union's Branch President of 25 years. In the same document presented to the National Academy of Arbitrators, Arbitrator Mittenthal reviewed the three functions of past practice. The practice at issue in this case would have been deemed to "implement separate conditions of employment", since the National Agreement is silent regarding where and at what location Union Stewards would perform their "Union" duties. Regarding this type of past practice, Mr. Mittenthal stated:

> **To Implement Separate Conditions of Employment**. Past practice can establish a separate enforceable condition of employment concerning issues where the contract is "silent." This is referred to by a variety of terms, but the one most frequently used is the silent contract. For example, a past practice of providing the local union with a file cabinet may become a binding past practice, even though there are no contract or LMOU provisions concerning the issue.

Mr. Mittenthal opined that this type of past practice, "can establish a ***separate enforceable*** condition of employment concerning issues where the contract is "silent", most frequently described as the ***"silent contract".***

The JCAM goes on to clarify, that where the Postal Service seeks to change or terminate a binding past practice implementing conditions of employment concerning areas where the contract

is silent, Article 5 prohibits it from doing so unilaterally without providing the union appropriate notice. Prior to making such a change unilaterally, the Postal Service must provide notice to the union ***and*** engage in good faith bargaining over the impact on the bargaining unit. The JCAM goes on to state that "if the parties are unable to agree, the union may grieve the change." The JCAM at page 5-4, provides that "Management changes in such "silent" contracts are generally not considered violations ***if*** 1) the company changes owners or bargaining unit, 2) the nature of the business changes, or 3) the practice is no longer efficient or economical."

The parties agreed and provided guidance to their local representatives that the "first of these has rarely arisen in Postal Service cases involving its numerous bargaining units. **A change in local union leadership or the arrival of a new postmaster or supervisor is not, in itself, sufficient justification to change or terminate a binding past practice, as noted in the previous paragraph.** As clarified in the JCAM, simply changing Managers or Union representatives is not in and of itself sufficient reason to allow a change. Regarding the nature of the business changing, this does not apply in this case, since the Postal Service maintains the same mission as twenty-five (25) years prior and that is to serve their customers in the delivery of the nation's mail. Management relied on the last of the listed requirements for making changes without violation and that is that the practice of allowing Union Stewards to travel to the Union Hall to complete their Union duties, is "no longer efficient or economical". However, the grievance file does not support that fact.

To make a change to a "valid" past practice, such as in the instant case", the JCAM provides that, "where the Postal Service seeks to change or terminate a binding past practice implementing conditions of employment concerning areas where the contract is silent, Article 5 prohibits it from doing so unilaterally without providing the union appropriate notice. Prior to making such a change unilaterally, the Postal Service must provide notice to the union ***and*** engage in good faith bargaining over the impact on the bargaining unit. The grievance file demonstrated that Postmaster Greiner provided a notice to the Union of his intent to terminate the practice which began more than twenty-five (25) years prior. However, he did not first engage in good faith bargaining before determining what changes, if any, could be made regarding this "***separate enforceable*** condition of employment".

Contrary to Management's argument that it was incumbent upon the Union to request to meet and negotiate the terms of a "future" practice to cover the location for completing Union duties for Union Stewards in Clarksville, Article 5 of the National Agreement places the responsibility upon Management to provide "Notice" to the Union **"and"** to engage in good faith bargaining with local Union representatives, before making a final decision to terminate the practice. Good faith bargaining requires a "give and take", and although Management disputed the Union's efforts, the Joint Exhibit 2 at Page 74, provided a list of what I would call "reasonable" demands given the fact that these resources are likely readily available at the Union Hall. Especially important to any advocate would be the ability to maintain confidentiality which would require that there would be locking file cabinets and access to the space which could be limited to Union personnel by lock and key.

Arbitrator Donald J. Barrett, reviewed a similar issue in case number G16N-4G-C 19281894, where he provided the following analysis:

> The Union argues that this is a unilateral action by Management, and I am in agreement.
>
> While the notice offers the Union a chance to comment, the decision to remove the Union from their office space acquired fourteen (14) years previous has already been made.
>
> "Unilateral" is defined as "One-side", "ex-parte." To any reasonable observation, the manager's notice meets such a definition as one sided. He notified the Union that in thirty days they were out of the office, and he was repurposing it for other postal duties, i.e. his new office.
>
> There is no attempt to "bargain in good faith" pursuant to the Agreement with the Union prior to taking such action, simply a notice informing them of his intentions.
> ...
>
> While the manager is technically correct that there is no language in the Agreement regarding providing the Union with office space, Article 5 does relate to a past practice, which without dispute covers completely the long-standing practice of the Lakeland Post Office providing the Union with their office space.
>
> Further, while Management argues that the Union failed to respond to the subject notice other than with a grievance, it must be understood that the grievance process provides just that-a means to discuss the subject matter fully, in an attempt to resolve those differences such as Management's intention to "re-purpose" the

Union's office, however the record before me, inclusive of that which I have cited above serves only to undermine Manager Pope's contention that he was willing to bargain in good faith but for the Union's failure to do so.

It is apparent by his response to question number twenty (as well as numbers 24 & 28) that Manager Pope's mind was set without any consideration to the established past practice in place for fourteen years.

As agreed at hearing by the parties, a past practice does exist in the instant matter before me. Further, both counsels refer to that authoritative treatment provided by National Arbitrator Mittenthal, who analyzed a group of factors that originated in the steel industry, and are now generally applied by arbitrators in determining whether workplace activity qualifies as a "past practice."

Those factors are:

Clarity and consistency of the pattern of conduct, longevity and repetition of the activity,...acceptability of the pattern, and mutual acknowledgement of the pattern by the parties."

Those very patters existed at the time the manager issued his notice, or more likely referred to as an "eviction notice" (by the arbitrator) yet the manager, by his responses to the Union on May 10th appears not to be aware of such lawful, and contractual mandates.

Further, as Arbitrator Mittenthal stated in the same treatise, an established practice that is an enforceable condition of employment, wholly apart from any basis in the agreement, cannot be unilaterally modified or terminated during the term of the contract. (I paraphrase)

The Service argues that there is a change of conditions at this facility, i.e. the manager needing this space to be closer to the workroom floor as a legitimate basis for discontinuing the past practice, I must respectfully disagree.

By the mere fact that this practice, the Union's use of this space for many years was uninterrupted, nor impeached the operations of this office during all these many years (there is no evidence before me of this being the case) but for the arrival of a new manager who made this unilateral decisions that he wanted to be in the space currently occupied by the Union, this past practice would have continued as is.

There is no other reasonable conclusion to be reached than that fact.

> No other past manager, nor postmaster has moved to vacate the Union's office for postal use until Manager Pope arrived, and almost immediately moved to evict the Union for his own use, in a manner that clearly violates Article 5 of the Agreement.
> ...
> There is an overwhelming body of arbitral precedent that establishes that past practices may be held enforceable through the arbitration process-that such a "practice" is in actuality a part of the parties' entire Agreement, though silent in words contained within such an Agreement.
>
> As Arbitrator Jacobs once wrote, "A Union-Management contract is far more than words on paper. It is also all the oral understandings, interpretations and mutually acceptable habits of action which have grown up around it over the course of time."
>
> In the instant matter before me, I find clear and convincing evidence that management did violate Article 5 of the parties' Agreement (and applicable law) in the manner by which they attempted to unilaterally remove the union form the space long allocated for their own purposes.

Arbitrator Barrett's review and analysis in concert with Arbitrator Mittenthal's direction regarding past practice situations, was spot on. Likewise, in the instant case, the practice of allowing the Union Stewards at Clarksville, TN to travel to the Union Hall (located 1.5 miles from the Post Office) to conduct Union business, was a very well established, and valid "past practice". This enforceable condition of employment in that office cannot be unilaterally terminated or changed except in accordance with Article 5 of the National Agreement.

The evidence of record demonstrated that Management at Clarksville attempted to unilaterally terminate the practice without bargaining in good faith with the Union before doing so; as such, a violation of Article 5 occurred. Additionally, there was no extenuating circumstance, clearly evidenced by the record, which would have allowed the Service to act without first engaging the Union in good faith negotiations. For the foregoing reasons, the grievance is sustained.

AWARD

The grievance is sustained. Management violated the National Agreement at Article 5 when they attempted to unilaterally terminate the valid past practice of allowing Union Stewards on USPS approved Union time, to travel to the Union Hall to complete their Union duties. Management must immediately reinstate and continue this valid past practice. Any future changes must be done in accordance with the National Agreement and JCAM at Article 5.

Glenda M. August

GLENDA M. AUGUST
Arbitrator

January 3, 2020

New Iberia, LA