

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration)

Between)

UNITED STATES POSTAL SERVICE)

And)

NATIONAL ASSOCIATION OF LETTER
CARRIERS, AFL-CIO)

) **GRIEVANT:** Lionel Kinler

) **POST OFFICE:** Mandeville, LA

) **CASE Numbers:**

) **USPS:** G16N-4G-C 19205028

) **NALC:** M1019LK

) **DRT:** 08464361

BEFORE: Sherrie Rose Talmadge, Esq., ARBITRATOR

APPEARANCES:

For the U.S. Postal Service: James T. D'Aquin, Labor Relations Specialist

For the NALC: Corey Walton, Local Business Agent
Joseph Ruffino, Technical Advisor

Place of Hearing: 1 St. Ann Drive, Mandeville, LA

Date of Hearing: January 30, 2020

Date of Award: March 17, 2020

Relevant Contract Provisions: Article 5

Date of Contract: 2016 - 2019

Type of Grievance: Contract

AWARD SUMMARY

Management violated Article 5 of the National Agreement, by changing the existing valid past practice of allowing Union stewards, including Steward Kinler, on USPS approved Union time, to conduct on the clock Union duties off Postal premises at the Union office, without providing the Union notice and an opportunity to bargain in good faith.

Accordingly, the grievance is sustained. As a remedy, the longstanding practice of permitting stewards to conduct Union duties off Postal premises, while on the clock, is to be reinstated. The Service is to cease and desist from unilaterally changing an established past practice without providing the Union prior notice and an opportunity to bargain in good faith. Any future changes must be done in accordance with the National Agreement and JCAM at Article 5.

However, the Union's request for a \$200.00 lump sum payment is not warranted.



Sherrie Rose Talmadge, Arbitrator

STATEMENT OF THE ISSUES

1. Did Management violate Article 5 of the National Agreement by not allowing Union Steward Lionel Kinler to conduct his Union duties at the Union office located off the Mandeville, LA Post Office premises?
2. And if so, what is the appropriate remedy?

CONTRACT PROVISIONS, MANUALS and HANDBOOKS

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.

JCAM

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.

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.

FINDINGS OF FACTS¹

According to NALC Branch President J.J. Mosely, approximately 8 or more years ago, Mandeville Postmaster Benny Moschitta decided to no longer permit the Union to work on grievance processing and investigations at the postal facility and told the Union to find another place to do union work off postal premises. President Mosely and former Shop Stewards Mark Nave and Kent Kable indicated that for the past eight (8) years, the NALC Branch 6377 Union representatives have been traveling to their Union office at 901 Florida Avenue, Mandeville, LA on the clock for grievance processing and investigations. The Union began renting the Union office on or about May 13, 2009 and is currently bound by a lease on their Union office space. This practice of permitting shop stewards to travel, on the clock, to their Union office off of the Postal premises for grievance processing and investigations continued while OIC Terry Harris and OIC Drew

¹ At the hearing, the parties had the opportunity to question the sworn witnesses under direct and cross examination, and present material documentary evidence. At the conclusion of the hearing, the parties presented closing arguments.

Arbitration decision continued.

Cheremie were detailed to the Mandeville Post Office. The Union witness statements of Branch President JJ Mosely and former stewards corroborated Steward Kinler's testimony that that neither Postmaster Moschitta, OIC Terry Harris or OIC Drew Cheremie informed the Union of any problems with the Union representatives leaving the premises to perform Union work

During February 2019, OIC Leslie Golden was detailed to the Mandeville Installation while Postmaster Moschitta remains out on extended leave.

Lionel Kinler, the steward located at the Mandeville Post Office, testified that on March 20, 2019, he had a disagreement with OIC Golden about interviewing a carrier off the postal premises.

On March 21, 2019, OIC Golden sent a letter to the NALC Branch 6377 representatives in reference to "Union Office Location Off-Premises", which states:

Please be advised that the off-premises union office/location will not be utilized on the clock. Note that we have provided an office for both the NALC and APWU at the Mandeville Post Office. There is a computer available for your use within that office and adequate printers in the building. There is a file cabinet that will accommodate any current files. Please discuss with me your intent of adding your own equipment or adding locks or other security measures to any postal owned equipment.

Safety and Accountability are my concern. Do no hesitate to confer with myself or management if we can further assist.

In response, Union President JJ Mosely sent OIC Golden a letter dated March 20, 2019, which states in material part:

Subject: UNION HALL

References: (a) Article 15 and 17 of the National Agreement

(b) Postmaster Benny Moschitta

1. To whom it may concern, this Union, North Shore Local Branch 6377 once had an office space in the conference room in the Mandeville Post Office. During the 2011-2016 Contract Agreement, Postmaster Benny Moschitta decided not to let the Union work in the Mandeville Post Office. He told us that we had to find a place other than this post office to do union work. Which we did.
2. Since that conversation with Postmaster Benny Moschitta this Union moved to a place in Mandeville, LA. We are located at 901 Florida Avenue, Mandeville, LA 70448. Our files, records and equipment are kept in this building. For the last 8 years we have been working out of this office space doing union work on and off the clock.

Arbitration decision continued.

3. So, if this office wishes to pay out our yearly contract and relocate this union back in the Mandeville Post Office conference room, we are willing to do so. Until then, we will continue to do business as usual.
4. Further information concerning this matter should be address to JJ Mosely @ 504 259 xxxx.

Steward Kinler testified that OIC Golden did not offer to negotiate with the Union concerning this proposed change to the existing past practice of permitting the Union representatives to utilize their off-premises office to perform Union business.

Steward Kinler testified that, having moved into the room provided by the OIC for Union business, there is no secure computer so he brings his own laptop, there are no secure files so he keeps the Union files in his car and he brough his own printer. The computer Management offered Kinler was intended to be shared with the APWU, which was not secure.

OIC Golden testified that that it is more efficient and economical to have the Union steward on site. She explained that Management provided the Union with an office and internet. Golden noted that the employees that the steward needs to interview to investigate grievances are located at the Post Office, as is the information that is requested, and it is where Labor-Management meetings are held. Golden acknowledged under cross-examination that she did not do a study to show whether it is less efficient to have the Union steward perform Union business off premises.

POSITIONS OF THE PARTIES

UNION'S POSITION

The Union has met its burden of proving that Management has violated Article 5 of the National Agreement when it unilaterally ended the Union's valid ten-year past practice of conducting official Union duties, on the clock, at the local Union Hall.

OIC Golden unilaterally ended the practice when she sent the letter dated May 21, 2019, stating that "off-premise union office/location will not be utilized on the clock." The JCAM (5-4) provides that 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 and engage in good faith bargaining over the impact on the bargaining unit. At no time did Management attempt to engage in good faith bargaining before sending out their eviction notice.

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In accordance with Article 5, Management cannot unilaterally end an established past practice. To change an established past practice, Management must provide notice and bargain in good faith. Management did not provide notice or bargain in good faith to change the established past practice.

Throughout the steps of the grievance procedure, Management made no rebuttal to the Union's position, provided no statements from any Manager or Supervisor in defense of their position and failed to challenge the Union's contention that there was a legitimate past practice.

The Union requested that the grievance be sustained. For a remedy, the Union requested: 1) That Management cease and desist from violating past practice procedures covered under Article 5 and allow the Union stewards in Mandeville, LA to continue to work at the Union's office located off the Mandeville Post Office premises; and 2) That the NALC Branch 6377 be paid a lump sum of 200 to service as an incentive for future compliance.

POSTAL SERVICE POSITION

Management did not violate Article 5 of the National Agreement by changing the past practice of allowing union stewards to perform daily duties on the clock off the premises at their union hall. OIC Golden followed the required steps to end this past practice. She sent the Union president a letter informing him of her intention and wrote, "Do not hesitate to confer with myself or management if we can further assist". This was an attempt by management to open the lines of communication.

The Union's president's response, stating that either management pays out the contract on the union hall or they will continue to do business at the union hall, was a violation of the management/employee relationship. Union officials are employees of the Postal Service and the time spent on union business is paid for by the Service. No employee has the right to dictate to management how to run operations. When employees have an issue with instructions, they are to follow instructions and grieve later.

OIC Golden testified that the decision to end the past practice was for safety and efficiency reasons. The majority of the union's work needs to be conducted at the Post Office where the carriers are based, and where interviews with carriers or representing carriers at investigative interviews occurs. The Post Office is where the information is located for information requests, where grievances are filed, and Informal and Formal A

Arbitration decision continued.

meetings are held. It is more efficient to have the stewards at the Post Office during normal business hours. Furthermore, allowing union officials to travel back and forth from the union hall to the Post Office on the clock created an unnecessary financial liability should the steward get into an accident on route and on the clock.

The Union's assertion that they were forced into a lease of their union hall when Postmaster Moschitta allegedly forced them to rent this hall to perform union duties is not credible and was not corroborated by any documented evidence by Moschitta that such a mandate exists. The Union President's letter acknowledges that the Union hall is used for off the clock activities. Management is not saying that the Union cannot use their union hall to conduct business after hours. Additionally, the Union's documents indicate that they began renting their hall in 2009, although the Union President wrote in his letter to Golden that during the 2011 – 2016 contract agreement, Postmaster Moschitta decided not to let the union work in the Post Office. Thus, any purported mandate would not have occurred until several years after the Union began renting their hall.

The Union's requested punitive remedy of a \$200.00 lump sum payment to the Union for a breach of contract is not supported by the National Agreement and would exceed the remedial powers vested in the arbitrator. Many arbitrators have declined to impose punitive remedies because contractual remedies are intended to be compensatory, and punitive remedies do not foster the promotion of harmonious labor relations. Base on the above, the Union has not proven a violation of Article 5 of the National Agreement. The Service requested that the grievance be denied in its entirety.

DISCUSSION

At issue is whether the Service violated the National Agreement and the National Labor Relations Act, as incorporated by reference in Article 5, when management unilaterally changed the longstanding past practice of permitting the Union stewards to perform Union duties off-premises while on the clock. The Union has met its burden of proof to establish a contractual violation.

Article 3 of the National Agreement provides that management has exclusive rights "to maintain the efficiency of the operations entrusted to it" and "to determine the methods, means, and personnel by which such operations are to be conducted," "subject to the provisions of this Agreement." Management's authority to maintain efficiency of the operations is restricted only by the existence of specific contractual limitations.

Arbitration decision continued.

The Union argues that when OIC Golden sent the Union the March 21, 2019 letter stating, “Please be advised that the off-premises union office/location will not be utilized on the clock”, the Service violated Article 5 of the National Agreement, which incorporates the terms of the National Labor Relations Act, by unilaterally changing a condition of employment (as defined by Section 8(d) of the NLRA) without providing the Union with prior notice and an opportunity to bargain in good faith. The Union presented evidence of an established 8+ year past practice permitting the Union stewards to perform on the clock Union duties off-premises. The practice began during the 2011-2016 local negotiations when Postmaster Moschitta informed the Union that he wanted the Union to find a place other than the post office to perform union work, and the Union moved to the Union Hall to perform those duties.

In Arbitrator Mittenthal’s discussion of the elements of a valid past practice, which have been incorporated into the JCAM (July 2014, Page 5-2 – 5-4), he noted that there should be clarity and consistency, longevity and repetition, acceptability, mutuality by the parties, and every practice must be carefully related to its origin and purpose. In the present case, all of the criteria were met to establish a binding “past practice” in which for at least eight years the Union stewards at the Mandeville Post Office were permitted to perform on the clock Union duties off premises. There was no dispute that over at least eight years the union stewards at the Mandeville Post Office, when granted approved union time, travelled to the Union Hall to complete those duties. The benefit had been consistent and without objection. The practice was established at the direction of Postmaster Moschitta who asked the union stewards to leave the post office to perform union duties, thus, establishing that Management supported the practice that it was mutuality accepted by the parties. The longevity of the practice demonstrated that it served a purpose. The ongoing 8+ years of this practice, which continued while various Officers in Charge were detailed to the Mandeville Post Office, reflects evidence of a long-standing and mutually acceptable practice.

Arbitrator Mittenthal noted that one of the functions of past practice is:

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.

Arbitration decision continued.

Thus, a clear and long-standing past practice can establish a condition of employment. Past practices mutually accepted by the parties will attain the status of contractual rights and duties, where they are not at variance with any written provision in the contract. Although the National Agreement provides for on the clock time afforded to Union stewards, with permission, to perform various Union duties, such as investigating grievances and interviewing witnesses, the contract does not address whether those duties are to be performed on or off the premises. Therefore, the past practice of having the stewards perform Union duties off premises, while on the clock, does not conflict with the terms of the National Agreement.

Management may have a right to eliminate an otherwise binding past practice where the underlying basis for the practice has been changed. National Arbitrator Carlton Snow (W4N-5R-C 42883) has held:

It is logical to expect that the party asserting a change in underlying circumstances will provide evidence of the assertion. It should be shown that the past practice has become unsafe to persons or property; or that it is inefficient and uneconomical; or that there is a change in the nature of the business performed; or that there has been some technological change in the operation of the plant. It is also recognized that a change in the bargaining unit might also relate a need for some change in a past practice. In an arbitration proceeding, however, there must be more than mere speculation about such matters.

In this case, OIC Golden indicated in her letter that the reason she was changing the past practice of allowing Union stewards to perform Union duties off premises while on the clock and requiring them to perform these duties at the Post Office, was because of safety and accountability concerns. She also testified that having the steward perform union duties at the post office would be more efficient. Although these are valid considerations, there was no substantiating evidence presented to indicate that permitting the Union stewards to perform on the clock Union duties off premises led to an increase in safety or accountability issues. There were no reports or studies of any increase in safety issues or a lack of accountability by the stewards as a result of the existing past practice. OIC Golden acknowledged that she had not performed any studies that supported her contention that having the stewards perform Union duties at the post office was more efficient. Thus, I find that there was no evidence to support a finding that the stewards' practice of performing Union duties off premises while on the clock had an impact on the safety or accountability concerns briefly mentioned in Golden's letter.

Arbitration decision continued.

I conclude that permitting stewards to perform Union duties, with approval, on the clock while off premises was an established past practice that had become binding at the local level. By unilaterally changing a mutually accepted benefit established by practice, the Employer violated Article 5 of the National Agreement. Article 5 states:

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 stewards' opportunity to perform Union duties on the clock and off premises constituted a "condition of employment" as defined in Section 8(d) of the National Labor Relations Act. In a similar matter, Arbitrator August in USPS and NALC, (C16N-4C-C 19401954, NALC: 2219C40, 2020) held that Management violated 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. See also Arbitrator August citing to Arbitrator Barrett (G16N-4G-C 19281894) reviewing a similar issue in which he found 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 from the space long allocated for their own purposes.

The Employer's actions violated the terms of National Agreement and were inconsistent with its obligations under law. Section 8(d) of the NLRA requires the parties to bargain in good faith. The Employer may not unilaterally change a mandatory subject of bargaining without providing the Union with prior notice and an opportunity to bargain in good faith to resolution or impasse.

Arbitrator Mittenthal, as cited above, also discusses 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 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....

Arbitration decision continued.

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.

I do not find that Management provided the Union with prior notice and an opportunity to bargain in good faith. OIC Golden provided a notice to the Union of her intent to terminate the practice which had been in existence for over eight years. Nonetheless, she did not first engage in good faith bargaining before determining what changes, if any, could be made regarding this “separate enforceable condition of employment”. Article 5 of the National Agreement placed 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 between the parties.

Management did not offer the Union the opportunity to engage in good faith bargaining about Management’s decision, and the impacts of that decision, to change the valid past practice, including whether the safety and accountability concerns could be addressed. Golden’s letter to the Union expressly stating, “Please be advised that the off-premises union office/location will not be utilized on the clock,” was a directive requiring the Union steward to now perform all on the clock union duties at the Post Office. Golden’s letter was merely apprising the Union that she had made the decision to implement the change. The letter only offered some discussion about whether the room and supplies being offered were sufficient. Union steward Kinler testified that some of his concerns included the ability to maintain confidentiality, access to locking file cabinets and a secure computer and printer, in addition to space which can be locked by the Union. Some of these Issues, Kinler testified, have not been met and, as a result, he maintains the Union files in his car for safety and confidentiality, and uses his own laptop.

Thus, the Union established that the parties had a clear and consistent, longstanding past practice of permitting the Union stewards at Mandeville Post Office to conduct on the clock Union business off the Post Office premises at the Union office. That practice became a binding part of the collective bargaining agreement between the parties. The Service violated Article 5 of the National Agreement when it unilaterally implemented a change eliminating the existing past practice without providing the Union with notice and an opportunity to bargaining in good faith to resolution or impasse. Moreover, there were no extenuating circumstances which would have allowed the

Arbitration decision continued.

Service to act without first engaging the Union in good faith negotiations. For the foregoing reasons, the grievance is sustained, and the parties are to return to status quo ante. The Union's request for a \$200.00 lump sum payment is a punitive remedy which is not warranted in this case.

AWARD

Management violated Article 5 of the National Agreement, by changing the existing valid past practice of allowing Union stewards, including Steward Kinler, on USPS approved Union time, to conduct on the clock Union duties off Postal premises at the Union office, without providing the Union notice and an opportunity to bargain in good faith.

Accordingly, the grievance is sustained. As a remedy, the longstanding practice of permitting stewards to conduct Union duties off Postal premises, while on the clock, is to be reinstated. The Service is to cease and desist from unilaterally changing an established past practice without providing the Union prior notice and an opportunity to bargain in good faith. Any future changes must be done in accordance with the National Agreement and JCAM at Article 5. However, the Union's request for a \$200.00 lump sum payment is not warranted.

Respectfully submitted by:



Sherrie Rose Talmadge, Arbitrator