

ARBITRATION AWARD

C3241

July 10, 1979

UNITED STATES POSTAL SERVICE

-and-

Case No. N8-NAT-0006

NATIONAL ASSOCIATION OF LETTER
CARRIERS

Subject: Location of Step 3 Meetings - Past Practice

Statement of the Issue: Whether the Postal Service is entitled under the terms of the National Agreement to schedule Step 3 meetings at the location of its choice? Whether the Postal Service is entitled under the National Agreement to insist that the location of Step 3 meetings be governed by past practice? If these questions are both answered in the negative, how should the location issue be resolved?

Contract Provisions Involved: Article XV of the July 21, 1978 National Agreement.

<u>Grievance Data:</u>	<u>Date</u>
Grievance Filed:	April 18, 1979
Step 4 Meeting:	May 9, 1979
Step 4 Answer:	June 1, 1979
Case Heard:	June 19, 1979
Transcript Received:	June 25, 1979
Briefs Submitted:	June 29, 1979

Statement of the Award: The grievance is denied.

BACKGROUND

This case concerns the location of Step 3 grievance meetings on matters other than discipline. The Postal Service maintains the 1978 Agreement plainly implies that Management can schedule Step 3 meetings at the location of its choice. It urges moreover that the parties are bound by the practices with respect to Step 3 locations and that these meetings should therefore be held in the same places they were previously held. The Association disagrees. It alleges that the 1978 Agreement says nothing whatever about Step 3 locations, that the parties reached no mutual understandings on this subject in the most recent negotiations, and that they are not bound by past practice given the dramatic changes in grievance procedure which were incorporated in the 1978 Agreement. It asks the arbitrator to establish equitable Step 3 location principles which will effectuate the parties' "continuing joint responsibility for efficient functioning of the grievance procedure..."

The grievance procedure in the 1975 Agreement had four distinct steps for contractual disputes other than discipline and discharge. Steps 1 and 2A took place at the installation level, ordinarily the local post office. The discussion in Step 1 was between the aggrieved employee and his immediate supervisor, sometimes in the presence of his Association representative. The discussion in Step 2A was between the Association representative (or Steward) and the installation head or his designee. Step 3 took place at the regional level. The discussion there was between regional (or area) representatives of the Association and the Postal Service. The Agreement then described Step 3 in these words:

"Appeals from decisions rendered at Step 2A shall be made in writing to the Regional Director for Employee and Labor Relations.

"The employee shall be represented before the regional office by an area or regional Union representative. A decision by the Employer regarding the grievance shall be rendered within fifteen (15) days after it has been appealed to Step 3. Such decision shall be in writing stating the reasons therefor. The

Union shall be entitled to appeal an adverse decision to Step 4 (national level) of the grievance procedure within fifteen (15) days after receipt of the Employer's decision."

Step 4 took place at the national level. The discussion there was between national representatives of the Association and the Postal Service. If the dispute was not resolved in Step 4, the Association could appeal the grievance to arbitration.

The parties had their Step 3 meetings at different places in different regions. In the Eastern, Central and Southern Regions, these meetings were held at the Postal Service's regional office. The representatives met in Philadelphia, Chicago and Memphis, respectively. In the Western Region, these meetings were held in a variety of locations depending upon where the case arose. The representatives met at the Postal Service's regional office, the Business Agent's home city, Seattle, Portland, Salt Lake City, Denver, Phoenix or some other mutually convenient site. In the Northeastern Region, these meetings were held in many locations. The representatives met at the Postal Service's regional office, the Business Agent's office, a sectional center facility, a local post office or some other installation. Occasionally they even handled a Step 3 over the phone. These practices have existed for some years.

The discipline and discharge grievances were processed differently. They passed through Step 1 and Step 2A just like other grievances. But they then went to Step 2B and, absent any resolution of the problem there, the Association was free to appeal the matter to arbitration. Step 2B provided for discussion between the Association and a Postal Service representative above the installation level "at a location convenient to the parties." These quoted words were the only reference in the 1975 Agreement to the place where a grievance meeting was to be held.

Prior to the negotiation of the 1978 Agreement, the parties apparently concluded that the grievance procedure was deficient in many respects. A study committee was formed to deal with the problem. It proposed far-reaching changes in the grievance procedure. The parties adopted those proposals and wrote them into the 1978 Agreement.

Apart from the definition of a grievance, the entire grievance procedure was rewritten. The new procedure, although agreed to on July 21, 1978, did not become effective until February 1, 1979.

There continue to be four steps. Steps 1 and 2 still take place at the installation level. However, the Step 1 discussion now occurs before the grievance is reduced to writing. Not until that grievance is appealed to Step 2 does it assume a written form. And Step 2 is now the point at which the parties' representatives are responsible for full development of the facts and arguments. Step 3 still takes place at the regional level. But it is now the final step in the procedure for all cases except those which involve "an interpretive issue under the National Agreement or some supplement thereto which may be of general application..." In other words, most cases are now appealed from Step 3 directly to arbitration. Step 4 still takes place at the national level. It handles those cases which appear to have national implications. The distinction between discipline and non-discipline cases no longer exists under the current procedure.

Because Step 3 is the final step in most cases, the rules concerning the Step 3 meeting have been enlarged. The 1978 Agreement describes Step 3 as follows:

"(a) Any appeal from an adverse decision in Step 2 shall be in writing to the Regional Director for Employee and Labor Relations, with a copy to the Employer's Step 2 representative, and shall specify the reasons for the appeal.

"(b) The grievant shall be represented at the Employer's Regional level by a Union's Regional representative, or designee. The Step 3 meeting of the parties' representatives to discuss the grievance shall be held within fifteen (15) days after it has been appealed to Step 3. Each party's representative shall be responsible for making certain that all relevant facts and contentions have been developed and considered. The Union representative shall have authority to settle or withdraw the grievance in whole or in part. The Employer's

representative likewise shall have authority to grant the grievance in whole or in part. In any case, where the parties' representatives mutually conclude that relevant facts or contentions were not developed adequately in Step 2, they shall have authority to return the grievance to the Step 2 level for full development of all facts and further consideration at that level. . . "

The remaining provisions of Step 3 concern matters other than the Step 3 meeting itself. Paragraph (c) sets a time limit on the issuance of the Postal Service's Step 3 decision and describes what should be included in that decision. Paragraphs (d) and (e) indicate the circumstances in which the Association may appeal the Step 3 decision to arbitration or to Step 4. Paragraph (f) refers to the handling of "representative" grievances.

The Association President filed the instant grievance on April 18, 1979, just two and one-half months after the effective date of the new grievance procedure. He protested the Postal Service's "insistence that it may unilaterally determine that in certain areas of the country it will hold Step 3 meetings only at USPS Regional Headquarters." He complained that this action was a violation of Articles V and XV and that "the location of Step 3 hearings should be a matter of agreement between the parties and neither party may be unreasonable or arbitrary in the location-scheduling process." He emphasized, at the arbitration hearing, that the Postal Service's position required Business Agents to travel regularly to the Postal Service's regional offices at considerable expense and thus placed an unnecessarily heavy burden on the Association's finances.

The Postal Service was not persuaded by any of these arguments. It relied heavily on past practice, stressing that "the manner in which. . . contract grievances had been handled in the past. . . [has] continued without change since the 1973 National Agreement became effective." It believed its actions were in no way a violation of the 1978 Agreement.

DISCUSSION AND FINDINGS

This grievance raises a series of questions regarding the location of Step 3 meetings. The Postal Service says the 1978 Agreement permits Management to insist that these meetings be held either at a location of its choice or at those locations where such meetings were held in the past. It believes this position is supported by implications drawn from express contract language, by statements made in the 1978 negotiations, and by practices in existence for a good many years. The Association disagrees with each of these propositions. It claims that the 1978 Agreement is silent on Step 3 meeting sites and that neither negotiating history nor past practice can bind the Association to any location arrangement under the circumstances of this case.

Each of these points requires separate discussion.

I - Express Language

The 1978 Agreement nowhere addresses the question of where the Step 3 meetings are to be held. It is silent on this subject. It does state that "the grievant shall be represented at the Employer's Regional level by a Union's Regional representative, or designee..." But the underscored words are merely a synonym for Step 3. They refer to the level of the grievance discussion*, not the location of these discussions. They do not provide that the meetings will take place "at the Employer's Regional office."

The Postal Service recognized this reality in its Step 4 decision in the present case. Its decision noted, "Other than the fact of a Step 3 meeting, the labor agreement makes no specific provision for where such meetings will be held..." The parties chose, consciously or not, to ignore the Step 3 location in their description of the Step 3 procedure. Hence, the 1978 Agreement provides no express answer to the issues raised by this grievance.

* Just as the installation level relates to Steps 1 and 2 and the national level to Step 4, so too the regional level relates to Step 3.

I I - Implications from Express Language

The Postal Service emphasizes two aspects of the 1978 Agreement. First, it notes that former Step 2B called for meetings on employee discipline to be held "at a location convenient to the parties" and that these words are nowhere found in the current contract. Second, it notes the parties wrote into the present grievance procedure that a grievance will automatically move to the next step where there is a "failure by the Employer to schedule a meeting...in any of the Steps...within the time herein provided..." Its position is that this language "implies" that Management "may schedule meetings at the location of its choice."

This argument is not convincing. The Postal Service has an obligation to schedule a Step 3 meeting once a proper appeal has been taken from a Step 2 decision. But that obligation pertains strictly to time constraints. Management's duty to schedule a Step 3 meeting within a certain period does not imply the right to select unilaterally the time and place for the meeting. These are quite different subjects. Neither the contract language nor the structure of the grievance procedure will support such an implication. When the parties stated Management was to "schedule a meeting..." within fifteen days, they were simply attempting to insure the prompt passage of grievances through Step 3. They were not concerned with the actual mechanics of the Step 3 arrangements. They were well aware, from the former Step 2B, that they could provide for the "location" of a Step 3 meeting. They did not do so. Their contract language cannot now be construed in such a way as to override their silence.

There is no merit to the Postal Service claim that the language of the 1978 Agreement gives Management the right to schedule grievance meetings at the location of its choice.

I I I - The 1978 Negotiations

The Postal Service asserts that the Association raised "the issue of the situs for grievance meetings" in the 1978 negotiations and that the parties had an "understanding" on this matter. It claims the "understanding" was that the locations of Step 3 meetings would be the same as they'd been in the past.

There are several difficulties with this argument. To begin with, the Postal Service seems to have changed its position in one critical respect. Its Step 4 decision stated that "the location of the Step 3 meetings was not an issue during the 1978 national negotiations . . ." But its arbitration brief states that meeting location was an issue in these negotiations. The latter view is, I think, an overstatement. All that the Association did in the negotiations was to ask a question about where the Step 3 discipline cases would be held and then express its concern that any shift of these cases to the Postal Service regional offices would create organizational problems. The Postal Service's reply was that meeting locations would remain the same, both for discipline and contract (i. e., non-discipline) grievances. The Association said nothing further.

Given these circumstances, I cannot find that the parties reached any "understanding" on Step 3 locations. A point of information was raised by the Association. The answer was provided by the Postal Service. Neither party sought any kind of agreement on Step 3 locations. Their exchange is relevant in evaluating the merit of the Postal Service's claim regarding past practice. But that exchange by itself does not constitute a basis for denial of the grievance. There simply was no "understanding."

I V - Past Practice

Past practice may serve to clarify, implement, and even amend contract language. But these are not its only functions. Sometimes an established practice is regarded as a distinct and binding condition of employment, one which cannot be changed without the mutual consent of the parties. Its binding quality may arise either from a contract provision which specifically requires the continuance of existing practices or, absent such a provision, from the theory that long-standing practices which have been accepted by the parties become an integral part of the agreement with just as much force as any of its written provisions.*

* For a detailed explanation of these principles, see my article, "Past Practice and the Administration of Collective Bargaining Agreements", 59 Michigan Law Review 1017 (1961).

It is this latter theory upon which the Postal Service seems to rely. There has been a long-standing practice with respect to the location of Step 3 meetings on non-discipline grievances. In the Eastern, Central and Southern Regions, those meetings were held at the Postal Service's regional offices. In the Northeastern and Western Regions, those meetings were held at various places including the Postal Service's regional offices. Such Step 3 arrangements appear to have been acceptable to both sides for a number of years under a number of contracts. At least there is no evidence of any dispute on this subject prior to April 1979. The Association did inquire in the 1978 negotiations about the planned location of Step 3 meetings on discipline grievances. And, as I explained in Part III of this opinion, the Postal Service replied that it intended to continue its practices regarding meeting locations for both discipline and non-discipline cases. The Association did not then challenge the Postal Service on this point. It did not assert that it would no longer consider itself bound by any Step 3 location practices; it did not assert that it disagreed in any way with Management's intention to continue such practices under the 1978 Agreement.

On these facts, it can be implied from the parties' conscious acquiescence in these long-standing practices that there was mutual agreement to the continuance of these practices for the life of the 1978 Agreement. The Postal Service's argument is correct.

V - Association Contentions

The Association insists that no such implication is justified because (1) there has been an "inconsistent practice" and (2) there were "significant substantive and procedural revisions of the grievance procedure" in the 1978 Agreement.

As for the first point, it is true there is no uniform, nation-wide practice regarding Step 3 meeting locations. The Eastern, Central and Southern Regions have one practice; the Northeastern Region has another; and the Western has still another. To this extent, one can argue that the practice has been "inconsistent." But practices in large collective bargaining units often vary from plant to plant and even from department to department within a plant. That variance is the result of

the different needs and different situations which initially prompt the development of the practice. Here, for instance, the size of the region, the location of the Business Agents, and the relative convenience (or inconvenience) of the Step 3 representatives no doubt account for the different practices. It must be remembered that this case concerns regional-level grievance meetings. The relevant practice would be those arrangements which regional-level representatives have created. The evidence clearly suggests that the practice, at least within each region, has been consistent for some years. Hence, the implication in question cannot be defeated by any alleged "inconsistent practice."

As for the second point, it is true that dramatic changes were made in the grievance procedure in the 1978 Agreement. The contract clause describing the procedure was, apart from the definition of a grievance, completely rewritten. The function of certain steps in the procedure was revised; the parties' representatives, particularly in Steps 2 and 3, were given greater responsibility; the duties of these representatives were spelled out in greater detail; and so on.


However, these many changes cannot obscure the fact that the administrative processing of non-discipline cases remains largely the same. The grievance procedure still consists of four steps. Those steps still involve the same levels of discussion. For instance, Step 3 still is the regional level. The Step 3 people still are the parties' regional-level representatives. And grievances still are processed through the same five regions. Thus, the administrative processing of grievances has been much more stable than the Association is willing to concede. The Step 3 location practice relates to this very matter of administrative processing. It does not relate to the subjects which have been revamped by the new grievance procedure. For these reasons, the implication in question cannot be defeated by the language changes in the 1978 Agreement.

V I - Conclusion

My conclusion, accordingly, is that the parties are bound by the practices with respect to Step 3 meeting locations for non-discipline grievances. The Postal Service therefore did not violate the 1978 Agreement by insisting that Step 3 meetings be held at locations consistent with past practice.

AWARD

The grievance is denied.


Richard Mittenthal, Arbitrator