C# 09882

A.B

REGULAR ARBITRATION PANEL

IN THE MATTER OF THE ARBITRATION Between	GRIEVANTS: (1) Phillip Mantzke & (2) Samuel Strazzere
UNITED STATES POSTAL SERVICE	POST OFFICE: Dunedin, FL
And	
NATIONAL ASSOCIATION OF LETTER CARRIERS	CASE NUMBERS: (1) S7N-3W-C 22866 and (2) S7N-3W-C 25246

BEFORE: P. M. WILLIAMS, ARBITRATOR, SOUTHERN REGION

APPEARANCES:

FOR THE POSTAL SERVICE:
William Daigneault, Labor Relations Representative

FOR THE NATIONAL ASSOCIATION OF LETTER CARRIERS:
Johnny W. Bourlon, President, Branch 1477

PLACE OF HEARING:
Post Office, Dunedin, FL

DATE OF HEARING:
February 8, 1990

DECISION AND AWARD

BACKGROUND:

The grievants were employed as full time regular city letter carriers and assigned to the Post Office, Dunedin, FL. Each grievance to be considered here involved the alleged failure of the Employer to grant the grievant(s) a change of schedule (COS).

At the hearing the parties stipulated that the two grievances involved the same issue, therefore such could be combined for the purpose of a single decision and award being made by me.

The parties also stipulated that each of the grievants was summoned to serve on jury duty under conditions that qualified him for court leave. It was also agreed that each made a formal request for his regular non-scheduled day to be changed in order to have it be on a day in the week when he was released from having to serve on a federal grand jury duty in the case of grievant (1), and a state petit jury in the case of grievant (2).

All interested parties appeared at the hearing, including the two grievants, where they were given an opportunity to present such evidence through the exhibits and the testimony of witnesses as was deemed appropriate. All witnesses were placed under oath and were cross-examined by the opposing party. After both parties completed the evidentiary portion of their case each made a closing statement to end the hearing.

POSITION OF THE PARTIES:

National Association of Letter Carriers (Union):

The Union contended that in failing to approve the Forms 3189 that it alleged each grievant had submitted to the Employer for purposes of having his non-scheduled day changed to a day that did not coincide with a day that he was required to be on jury duty, the Employer had violated Articles 2, 5 and 19 of the National Agreement (NA) and Part 516 of the Employee and Labor Relations Manual (ELM). It requested that grievant (1) be granted one day of Administrative Leave in lieu of each of his non-scheduled days that either have fallen or will fall on Friday during the period he must serve on a federal grand jury; and that grievant (2) be awarded four hours of Administrative Leave for Friday, May 4, 1989, because he timely requested, but was denied, a COS even though employees were available to cover his route. It asked that both grievances be sustained because in the past the Employer had approved a letter carrier's (a steward) request for a COS under circumstances that were similar to the ones presented here, thus a prevailing past custom and practice existed at this installation covering changes of schedules in instances such as these.

United States Postal Service (Employer):

The Employer denied the existence of such a custom and practice as the Union claimed was in effect at this post office, or in the Tampa Division. It contended the employee who allegedly had had a COS approved, had not asked for a COS, rather his request was for annual leave, which was approved. It requested that both grievances be denied because neither was supported by either the terms of the NA or by Part 516 of the ELM, or by a prior past custom or practice at either the post office or the Tampa area.

ISSUE: Did the Employer violate the terms of the NA or applicable rules and regulations, and/or the established past custom or practice at the Dunedin Post Office when it denied the grievants' requests for a COS while each was on court leave, and if so, what is the proper remedy?

OPINION:

The Union cited Articles 2, 5 and 19 of the NA and portions of Part 516 of the ELM as tending to be dispositive of the grievances. The articles and sections of the ELM cited will be quoted here:

"Article 2 - NON-DISCRIMINATION AND CIVIL RIGHTS

"Section 1. Statement of Principle

"The Employer and the Unions agree that there shall be no discrimination by the Employer or the Unions against employees because of race, color, creed, religion, national origin, sex, age, or marital status.

"In addition, consistent with other provisions of this Agreement, there shall be no unlawful discrimination against handicapped employees, as prohibited by the Rehabilitation Act..."

"Grievances arising under this Article may be filed at Step 2 of the grievance procedure within fourteen (14) days of when the employee or the Union has first learned or may reasonably have been expected to have learned of the alleged discrimination, unless filed directly at the national level, in which case the provisions of the Agreement for initiating grievances at that level shall apply."

"Article 5 - PROHIBITION OF UNILATERAL ACTION

"The Employer will not take any actions affecting wages, hours or 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."

"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..."

"ELM §516.44 Accommodation of Employees Called for Court Service.

a. Employee Options. Employees who are eligible for court leave and who have a conflict with court duty and work schedules have the following options.

(1) Work their postal hours in addition to performing court service.

(2) Have their work schedules changed temporarily to conform to the hours of court service. (Employes who do not choose this option may not have their work schedule changed and are expected to report for postal duty upon completion of their court service.)

b. Performance of Postal Tour of Duty in Addition to Court Service.

If employees work their full postal tours of duty in addition to performing court service, their court service is not charged to court leave as the court service is performed outside of their postal tours of duty. Accordingly, employees may retain any fees or payment received incident to such court service. If employees chose to work their full postal tours of duty in addition to performing court service, but are required to be in court beyond the starting time of their scheduled tours, they report for postal duty as soon as possible after completion of court service and work the remaining hours of their scheduled tours. The hours of court service which overlap the employees' scheduled tours of duty are charged to court leave and the employees remit to the Postal Service that portion of court fees received for the hours charged to court leave. The combined court leave and postal work hours may not exceed 8 hours."

"c. Temporary Change in Schedule. Employees who choose to have their work schedules changed temporarily to conform to court service hours submit Form 3189, Request for Temporary Schedule Change for Personal Convenience, as soon as possible, together with Form 3971, requesting such schedule change to the appropriate postal official at their installation. (See 232.23, Handbook F-21, Time and Attendance.) Such request states that the schedule change is for the employee's personal convenience and is agreed to by the local union. Employees who exercise this option receive full compensation for the period of court service including any applicable night shift differential."

The record shows that grievance (1) was heard at Step 1 on June 14, 1989 and appealed to Step 2 on July 10th. The Step 2 decision denying it was dated July 26th and the appeal to Step 3 form was completed August 10th. The record also shows that grievance (2) was initiated at Step 1 on November 3rd, taken to Step 2 on the 7th, and that the letter denying it was issued the 27th with the appeal to Step 3 being made on December 4th. It is correct to say therefore that neither grievance was begun at Step 2 as is authorized by Article 2. Moreover, at the hearing the Union did not assert or claim that a violation of Article 2 had occurred. With no claim or proof of an Article 2 violation being made by the Union at the hearing I am constrained to find that to the extent that the grievance claims a violation of the provisions of Article 2 its allegation is unsupported by the record, in which case its contention that such a violation happened should be, and the same hereby is, dismissed.

Turning now to the Union's contention of the existence of a prevailing custom and past practice at this installation as a result of the Employer having approved a COS request submitted by a Union steward in October of 1987.

The steward testified that on a Thursday (October 22nd) he contacted his immediate supervisor (who happened to be a 204B supervisor), and requested that his non-scheduled day of Wednesday (the previous day), be changed to Friday (the following day). He testified that he had served on jury duty on Wednesday and had just been advised by the judge (on Thursday) that he was to be excused from jury duty for Friday. He said he was prompted to make the request because he wanted to have a day off that week. It was also his testimony that the 204B supervisor approved his request, which he claimed was documented by a Form 3189 and also a Form 3971. It was his further testimony that those forms had disappeared (implying the Employer was responsible), and thus were not available for his or the Union's use in either the grievance procedure or at the hearing.

Putting aside the fact that the testimony of the steward and that of the 204B supervisor were not the same in material respects (insofar as what was requested and documented by the former and what was approved by the latter), it seems to me that even if the testimony of both men is taken in its most favorable light (insofar as the position of the Union is concerned), it nevertheless must be said that in the absence of clear language in the NA to support what is being contended here, proof of but a single instance of a COS ever being approved in Dunedin falls short of that which is required to show that at this

installation it is the established custom and practice for a COS to be approved whenever an employee makes a request for one following his becoming aware of the fact that he must serve or has served on jury duty on one of his regular non-scheduled days.

In presenting its case the Union correctly anticipated that the Employer would rely on an award of national arbitrator Howard Gamser (Case # N8-E-0088) rendered on October 3, 1980 to establish the fact that without a clear showing being made of the existence of a custom and practice favoring the approval of a COS in situations such as this it was inappropriate to sustain grievances of this kind. Its answer to the Employer's contention in that regard was relatively straightforward and to the point. It claimed the Gamser award was applicable only to the postal installations in the area of Philadelphia, and that it had no applicability in either Dunedin or the Tampa Division.

I am unable to agree with the Union's assertion that the Gamser award is to impact only on the installations in the area where the grievances relating to it were filed. To the contrary it has been my experience that when the parties at the national level refer a matter to a national arbitrator (after having assigned to it a national number) it is their intent that thereafter the decision and award of the case will be national in scope and application. Moreover, in such cases it is not their intent that thrust of the opinion and award is limited to the local area or to the Region of its origin. Rather the opinion and award is pre-emptive of the subject that it encompasses and it remains so until the parties, at the national level, undertake to vary its impact either by immediate mutual agreement or through negotiation that come about later.

I shall not lengthen this opinion by quoting all of what I consider the material portions of Mr. Gamser's opinion that impact on this case. It is to be noted however that in his opinion he said the Union had substantiated its contention "*** that for some twenty-two years, if not longer, at the Philadelphia Post Office, employees were permitted, when serving as a juror or otherwise entitled to court leave under the then current provisions of a postal manual, regulations or the Federal Personnel Manual, to change their work schedules so that their scheduled days of work coincided with their scheduled days of court service. For example, a carrier who normally worked a schedule which required him to work on Saturday and to be off on a Wednesday could file a PS Form 3189, or its predecessor form, requesting a temporary schedule change for personal convenience. Such a request would be granted and permit the employee to have a work schedule from Monday through Friday for the length of time the employee was off on court leave. Such a request was routinely and consistently granted by postal supervisors. Thus, the employee would be paid for five days during the week, without working at his postal service job, and that employee would turn over to the postal service the amount he received as a fee for being present at court as a juror or a witness. The Saturday that the employee would normally have worked was regarded temporarily as a non-scheduled day (Final ¶ on page 5)."

In the last complete ¶ on page 7 Mr. Gamser went on to say, "[i]t must ultimately be concluded, based on the record made in this proceeding, that the postal employees in the Philadelphia Post Office were"

"previously entitled and continued to be entitled to make a temporary change in their weekly work schedule to coincide their duty days with the days they were assigned to be on court leave. The Union sought to broaden such a conclusion to make it applicable to all employees of the Postal Service wherever they happened to be located. Evidence to demonstrate a consistent past practice of so interpreting the provisions of the E&LR Manual and the similar provisions covering court leave in earlier manuals, regulations and the Federal Personnel Manual was not sufficiently conclusive, as it was presented by the Union, to support the Union's position in this regard. The substantiation of the Union's claims in this regard must be established in other proceedings initiated at appropriate postal installations."

Mr. Gamser's AWARD containined the following language:

"1. The Philadelphia Post Office must revert to its previous practice of permitting employees to make temporary changes in their work schedules so their days off shall coincide with the days of the week that such employees are not required to be in court under such circumstances which make them eligible for court leave pursuant to the provisions of Chapter 516 of the Employee and Labor Relations Manual currently in effect.

"2. As to other postal installation, where it is established in an appropriate proceeding that the management of the installation consistently interpreted the provisions of the E&LR Manual and the related provisions of any earlier manual, regulation, or the Federal Personnel Manual, in the same manner as did management at Philadelphia, then, in that event, management must continue such practice or revert to such practice until and unless a change in the provisions of the E&LR Manual is made pursuant to the procedure outlined in Article XIX of the National Agreement..."

My reading of Mr. Gamser's opinion is persuasive that for at least 22 years management in Philadelphia had interpreted Part 516 of the ELM so as to permit employees who were entitled to court leave to change their work schedules in order to avoid the loss of one of their non-scheduled days in a given work week. And, his Award directed that the prior practice in Philadelphia be continued until such time as the language of the ELM was changed. I also believe that the language of his Award carefully avoided implying that it should have national effect unless it was established that the situation at a particular installation was similar to that which existed in Philadelphia, i.e., the custom and practice was for management to grant employees the option of changing their regular work schedule so their non-scheduled day would not be on a day when they were also eligible for court leave.

In this situation the Union did not successfully established that local management over a long priod had consistently interpreted the language of Part 516 of the ELM in the same manner as had the management at Philadelphia. Rather, at best it merely established a weak probability that in one isolated instance a 204B supervisor may have permitted a Union steward to change his non-scheduled day, after the fact, from the day prior to the date of the request to the day following it.

I am constrained to say that I do not find the situation involving the steward in Dunedin to be comparable to what had been going on at Philadelphia Post Office for 22 or more years before 1980. And it is to be quickly added that even if the situations were fairly comparable from the standpoint of what happened (and they are not), it hardly needs emphasizing that they are incomparable from the standpoint of occurrences because the local COS situation admittedly involved but a single event, whereas in Philadelphia COS requests had been approved on a regular basis for 22 years or more.

But equally important, insofar as its claim here is concerned, is the fact that the Union does not seem to put strong reliance on what had happened in Philadelphia to support its case. And, that fact leads me to another of the Union's arguments. It being that a violation of Article 5 occurred as a result of the disapproval of the two COS requests.

At the hearing other than making brief reference to a violation of Article 5 having occurred the Union did not seriously pursue the assertion that each grievance made on that issue. It would seem however that its basic complaint stemmed from its notion that the past custom and practice at Dunedin was to approve a COS request under circumstances such as existed in each of these cases, therefore the practical effect of the disapproval was a unilateral action on the part of the Employer to change the "terms and conditions of employment", which was prohibited.

Had the Union been able to successfully establish the existence of a past custom and practice in Dunedin perhaps there would be merit to its claim that a violation of Article 5 had occurred. However, in the absence of such a successful showing (which is the situation insofar as this record is concerned) its assertion of such a violation is without merit and therefore must be, and the same hereby is, dismissed.

At the hearing the Union vigorously argued that Part 516 of the ELM gave employees the option of making a request for a COS when a court leave situation existed, consequently, having such a option, the Employer was unable to deny a COS request once it was made.

What the Union argues is not completely without merit. However, I believe the essential thrust of its argument fails to appropriately consider what is a fundamental element of court leave, which element, I believe, necessarily impacts on the options that employees have available. To assist in the discussion of this point I will briefly quote from §§ 516.11 and 516.4 of the ELM (the underlining is mine):

"516.11 Definitions:

"516.111 Court Leave. Court leave is the authorized absence from work status (without loss of or reduction in pay, leave to which otherwise entitled, credit for time or service, or performance rating) of an employee who is summoned in connection with a judicial proceeding, by a court or authority responsible for the conduct of that proceeding, to serve as a juror or to serve as a witness in a nonofficial capacity on behalf of a state or local government, or witness in a non official capacity on behalf of a private party in as judicial proceeding in which the Postal Service is a party or the real party in interest..."

"§516.4 Granting Court Leave

"§516.41 Pay Status Requirement. Court leave is granted only to eligible employees who, except for jury duty or service as a witness in a nonofficial capacity on behalf of a state or local government, or service as a witness in a nonofficial capacity on behalf of a private party in a judicial proceeding to which the Postal Servie is a party or the real party in interest, would be in a work status or on annual leave..."

Ignoring for purposes of the current discussion the situation of the employee being on annual leave (because neither grievant was on leave) I believe it is correct to say that neither of these grievants can properly be categorized as being in a "work status" for the day(s) that each makes a request for administrative leave because in each intance the day involved was a non-scheduled day. It seems to me that in the granting of court leave it is essential for the employee to otherwise be expected and/or required to be on duty, and if he is not, no need exists, record-wise, for his pay status to be explained because he is not in a pay status. Rather he is non-scheduled. He therefore does not meet the requirement of §516.41.

It also seems to me that the language of §§ 516.111 and 516.41, and §516.44 (see page 3 hereof), is persuasive of the fact that while one may interpret §516.44(a)(2) as authorizing a non-scheduled day to be changed to a day that does not coincide with a court leave day, as was done in the Philadelphia situation, that language does not also tend to authorize an employee to change a non-scheduled (non-work) day to a scheduled (work) day in mid-week and after the fact, which is the notion put forth by the Union as the reason for sustaining grievance (2).

I do not read the langugae of the §§ cited as necessarily applying to the situation in grievance (1) because in (1) only each fifth week does the grievant's non-scheduled day fall on Friday, which is the only day of the week that he is called upon to serve as a member of the federal grand jury. It is important to recall that his situation and that the steward in October, 1987 are therefore not the same. Neither is his situation similar to what was happening in Philadelphia when Mr. Gamser was called on to resolve the 1980 dispute. It seems correct to say therefore that what happened to the steward, if indeed his request was granted by the 204B supervisor as was claimed, and what happened in Philadelphia are not sufficiently similar to the situation of grievance (1) so that it can or should be said that it is the custom and practice at this installation for employees to change, at will, a non-scheduled day into a single day of court leave.

Lastly it is to be said that two grievances present interpretive issues. As such the Union is under a duty to show by probative proof, and a preponderance of the evidence, that the relief it requests is either authorized by, or supported by, the provisions of the NA and applicable rules and regulations. Here its essential claim was to the effect that it was the past custom and practice in Dunedin for employees to be able to change their non-scheduled day (non-pay status day) into a court leave day (pay status day) in situations such as were

presented. I am constrained to say that I am of the opinion, and so find, the Union has failed to meet the burden of proof that is required of it for me to sustain either of the grievances. The grievances therefore must be, and the same hereby are, denied.

On the basis of the entire record in this case the undersigned makes the following

AWARD

Grievances (1) and (2) are denied in accordance with the opinion expressed above.

P. M. Williams
Arbitrator

Dated at Oklahoma City, Oklahoma
this 26th day of February, 1990.