

C# 10089

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration)
between)
UNITED STATES POSTAL SERVICE)
and)
AMERICAN POSTAL WORKERS UNION)

GRIEVANT:
 APWU President

CASE NO.
 H4C-NA-C 81

BEFORE: Richard Mittenthal, Arbitrator

APPEARANCES:

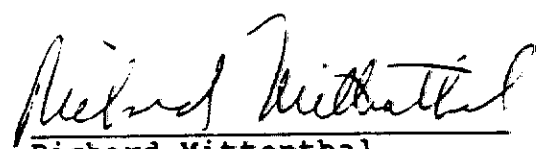
For the Postal Service:	R. Andrew German Assistant General Counsel
	Diana J. Vellieux Attorney Office of Labor Law

For the APWU:	Anton Hajjar Attorney (O'Donnell Schwartz & Anderson)
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Place of Hearing:	Washington, D.C.
Date of Hearing:	March 14, 1990
Date of Post-Hearing Briefs:	June 1, 1990

AWARD: The grievance is denied.

Date of Award: June 20, 1990.


 Richard Mittenthal
 Arbitrator

BACKGROUND

This grievance protests an addition to the Postal Operations Manual in April 1987 which restricts the use of postal premises for voter registration. The APWU insists that this regulation is not "fair, reasonable, and equitable" and is therefore a violation of Article 19 of the National Agreement. The Postal Service disagrees. It urges that the grievance is procedurally defective, that Article 19 cannot be invoked here because the regulation in question does not "directly relate to wages, hours or working conditions", and that, even if this article were applicable, the regulation is plainly "fair, reasonable, and equitable."

Prior to 1983, APWU locals in various communities were permitted to conduct voter registration drives on postal premises. Such drives were aimed at both postal employees and the general public. Such drives took place in public areas (e.g., post office lobbies) and in non-public, non-work areas (e.g., swing rooms, cafeterias and break areas). The registration was apparently conducted on a nonpartisan basis. People were registered in the party of their choice - Democrat, Republican, and so on. They were not asked to support a given party or candidate; they were not exposed to any political propaganda. At least nothing in the evidence suggests that they were subject to any kind of political appeal other than the importance of voting.

In 1982, perhaps earlier, legislation had been introduced in Congress calling for post office lobbies to be made available for voter registration. Management was uncomfortable with the idea of Congress determining how postal premises were to be used. It decided to draft its own policy on voter registration, no doubt in the hope that such a policy would discourage legislation. APWU President Biller learned of Management's plans in September 1982 and vigorously protested. Management replied that "permitting voter registration...in postal facilities could be disruptive to the orderly and efficient transaction of postal business by our customers."

Not until November 1983, however, did Management announce its proposed policy. That policy read in part:

Postmasters approached regarding the use of postal premises for registration and polling purposes should use the following guidelines:

A. Voter Registration. A postmaster may approve voter registration requests provided all the

following conditions are met.

(1) The registration must be conducted by government agencies or nonprofit civic leagues or organizations that operate for the promotion of social welfare but do not participate or intervene in any political campaign on behalf of any candidate for any public office.

(2) Absolutely no partisan or political literature will be available, displayed, or handed out. This includes photographs or likenesses and cartoons of elected officials and candidates for public office.

(3) Postal employees must not participate in any voter registration activity conducted on Postal Service premises.

(4) The registration must not interfere with the conduct of usual postal business, postal customers, or postal operations.

(5) The organization will be responsible for any equipment and supplies.

(6) Contributions may not be solicited.

(7) Access to the workroom floor is prohibited.

(8) Voter registration activities will not become permanent, but will be limited to an appropriate period before an election.

B. Polling... (Emphasis added)

Management sent the APWU a draft of the proposed policy on November 14, 1983. Its notice stated that the policy would be incorporated in a future Postal Bulletin, that the Postal Service believed the policy did not "directly relate to wages, hours, or working conditions", that the notice therefore was not being given pursuant to Article 19, but that the draft was merely being provided "as information of general interest." It formally issued the policy in a Postal Bulletin dated December 1, 1983. As a result of the policy guidelines, particularly A(1), APWU locals were prohibited from conducting voter registration on postal premises on the ground that the APWU had "participate[d] or intervene[d]" in the 1984 presidential election on behalf of Walter Mondale. And, pursuant

to A(3), all individual employees were prohibited from participating in any voter registration activities on postal premises, even those conducted by nonpartisan organizations under A(1).

No grievance was submitted at that time. Instead, the APWU filed suit in Federal District Court alleging that the A(1) and A(3) policy guidelines were contrary to applicable civil service laws and violated the constitutional rights of the APWU and its members. It sought an injunction against the enforcement of the policy guidelines. The District Court held in September 1984 (595 F. Supp. 1352) that these policy guidelines did not violate the First Amendment. It found too that the APWU was a partisan organization which had actively participated in supporting a political candidate in the 1984 presidential election and that the APWU was therefore properly barred from conducting voter registration drives on postal premises.

The APWU appealed this decision. The U. S. Circuit Court of Appeals for the District of Columbia held in June 1985 (764 F. 2d 858) that the District Court had correctly ruled that the A(1) policy restriction was constitutional. It explained:

...the District Court ruled that the APWU's right of access to postal premises for voter registration purposes was controlled by the standards applicable to a "nonpublic forum." Finding the restriction to be viewpoint neutral and "reasonable in light of the purpose which the forum at issue serves", the trial court held A(1) valid under the First Amendment, and further held that the restriction was properly applied to the APWU.

We agree with the District Court that the non-public forum standard is applicable to the APWU's access claim, that the Postal Service's interest in avoiding an appearance of involvement in the political process is reasonably promoted by restricting on-premises registration to clearly non-partisan organizations, and that the provision was properly applied to the APWU...

However, the Circuit Court questioned the District Court's ruling with respect to the A(3) restriction, the prohibition against individual employees participating in any voter registration on postal premises even while off-duty. It remanded that phase of the case to the District Court with instructions to consider whether the Hatch Act permitted off-duty employees to engage in voter registration conducted by a

true nonpartisan organization.

In the meantime, the Postal Service had republished the policy guidelines in a Postal Bulletin dated April 26, 1984. When the Circuit Court's decision was received in June 1985, Management revised the guidelines in an attempt to satisfy the Circuit Court's concern about the A(3) restriction. It deleted A(3) and substituted in its place the following guideline: "Voter registration is permitted only in those areas of the postal premises regularly open to the public." This meant, as a practical matter, that off-duty employees are now permitted to engage in voter registration conducted by a nonpartisan organization in a post office lobby or other public area.

Given this change and a few minor language revisions, the policy guidelines were placed in a new Postal Bulletin and made part of the Postal Operations Manual (POM, Section 221.69) in December 1986. Notice to that effect was provided to the APWU on December 16, 1986. The APWU did not request a meeting on this matter. Instead, APWU President Biller filed a grievance on February 13, 1987, complaining in effect that these policy guidelines were a violation of Article 19 of the National Agreement and requesting arbitration. The relevant portions of that article state:

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...

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least sixty (60) days prior to issuance. At the request of the Unions, the parties shall meet concerning such changes. If the Unions, after the meeting, believe the proposed changes violate the National Agreement (including this Article), they may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change... (Emphasis added)

DISCUSSION AND FINDINGS

The collective bargaining forces behind Article 19 seem fairly clear. The Postal Service must have sought the greatest possible managerial discretion with respect to its rule-making authority. The APWU, on the other hand, must have sought to prevent new or changed rules which might adversely affect its members. A compromise solution was inevitable. Provision had to be made for the rule changes which are necessary to the rational conduct of any enterprise. Provision also had to be made to insure against unreasonable changes.

The result can be found in the language of Article 19. Not all Postal Service regulations are subject to challenge through this clause. Only those that "directly relate to wages, hours or working conditions" can be attacked by the APWU on the ground that they are not "fair, reasonable, and equitable." A regulation not related, or only indirectly related, to "wages, hours or working conditions" cannot violate Article 19. This critical distinction is the core of the present dispute.

There are two basic issues before me. The first is whether the voter registration guidelines are "directly related to wages, hours or working conditions." If the answer is "no", as the Postal Service urges, there can be no Article 19 violation. If the answer is "yes", the second issue must be addressed, namely, whether such guidelines are "fair, reasonable, and equitable." The Postal Service insists they are "fair..."; the APWU insists they are not "fair..."

Voter registration, realistically viewed, has nothing to do with the "wages, hours or working conditions" of Postal Service employees. The APWU's interest in voter registration has its roots in civic duty, not collective bargaining. Its appellate brief to the Circuit Court sought to explain this interest. It stressed its belief that voter registration "promotes democratic government" and that "high voter participation is good for the Union...because [it]...will result in government reflecting more faithfully the views of the whole people." These are admirable sentiments and responsible goals but they do not demonstrate that voter registration, even in a clear nonpartisan manner, is "directly related to wages, hours or working conditions."

It may be that most of those who register in a postal facility will be Postal Service bargaining unit employees. It may be that such employees are likely to identify with APWU aims and interests. It may be that they therefore are likely

to vote for candidates who promise, if elected, to pursue better conditions for working people like themselves. It may be that such candidates will be elected. It may be that they will in turn honor their campaign promises and fight for better conditions. It may be that their efforts will be fruitful and improvements for postal workers and others will in time emerge. But to argue from such a scenario that voter registration may have an impact ultimately on "...working conditions" is tenuous in the extreme. The test is whether the regulation "directly relates to wages, hours or working conditions." The voting registration restrictions plainly do not establish any such "direct..." relationship.

The APWU nevertheless contends that because the voter registration rule "obviously applies to bargaining unit employees in that it regulates their conduct on postal premises during working hours", it must be considered "a work rule" and it thus "per se deals with working conditions."

This argument is not persuasive. Most, perhaps all, Postal Service regulations concerning employee behavior serve in the broadest sense to "regulate...conduct on postal premises..."¹ They are, by definition, "work rules." But the fact that they have a potential effect on employee behavior does not, by itself, demonstrate that such regulations "directly relate to...working conditions." Article 19 is not meant to apply to all Postal Service rules but only to "those parts of...handbooks, manuals and published regulations...that directly relate to wages, hours or working conditions." It is the subject matter of the regulation, not its effect, which determines whether Article 19 can properly be invoked. If the controlling consideration is simply whether the regulation has the effect of restricting employee behavior, then probably any and all rules regarding conduct would fall within the purview of Article 19. That could hardly have been what the parties intended. They limited Article 19 to that which "directly relates to...working conditions." The APWU view, if accepted, would eliminate the term "directly" and place all regulations, however indirect and remote their relationship to "wages, hours or working conditions", within the scope of Article 19.

The APWU also asserts that the Postal Service's obligations under the National Labor Relations Act are incorporated in the National Agreement through Article 5, that employee participation in voter registration is a form of protected concerted activity under Section 7 of the NLRA (29

¹ I refer here only to APWU-represented employees.

U.S. Code Sec. 157), and that such participation must therefore be considered to "directly relate to wages, hours or working conditions." It relies on the U. S. Supreme Court's decision in Eastex, Inc. v. NLRB (437 U.S. 556) to support its claim.

This argument is not convincing. Eastex dealt with an employer who had barred its employees from distributing, on non-work areas of its property on non-work time, a newsletter that, among other things, urged employees to oppose incorporation of a state right-to-work statute into the state constitution and criticized a presidential veto of an increase in the federal minimum wage. The NLRB held that the employer had violated Section 8(a)(1) of the NLRA by interfering with its employees' Section 7 rights. The Supreme Court agreed, explaining that the newsletter was protected concerted activity even though the newsletter items mentioned above did not concern Union organizational or collective bargaining matters. It believed the newsletter distribution involved "concerted activities for the purpose of...other mutual aid or protection..." within the meaning of Section 7.

More importantly, however, the Supreme Court went on to say:

It is true, of course, that some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity. We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the "mutual aid or protection" clause. It is neither necessary nor appropriate, however, for us to attempt to delineate precisely the boundaries of the "mutual aid or protection" clause. That task is for the Board to perform in the first instance as it considers the wide variety of cases that come before it...

How the NLRB would respond to the circumstances of the instant case is difficult to say. I believe it would not find any interference with Section 7 rights for the following reasons. First, assuming the employees' wish to register voters on postal premises is concerted activity, the relationship between that activity and employees' interests is, to use the Court's words, "so attenuated that [it]...cannot fairly be deemed to come within the 'mutual aid and protection clause'..." I have already explained, earlier in this opinion, the nature of that attenuation. Second, the fact is that employees are not being denied the right to participate in voter registration on postal premises. So long as they do so in a

public area of a post office when off-duty (i.e., on non-work time) under the aegis of a nonpartisan organization, they may register voters. The only restriction is that they not register voters in non-public, non-work areas of a post office (e.g., swing rooms, break areas). This kind of balancing of interests, Management's concern with controlling non-public areas versus the employees' concern with being able to join in the voter registration effort on postal premises, is justified and would, in my opinion, preclude finding a NLRA violation. The ruling in Eastex does not warrant any change in my analysis of the Article 19 (or Article 5) issue in this case.

Finally, the APWU stresses the Postal Service's obligation under Article 23 to permit APWU officials to enter postal premises "for the purpose of performing and engaging in official union duties and business related to the Collective Bargaining Agreement" even though such officials are not employed at that postal facility. It states that nonpartisan voter registration is protected by Article 23 as a form of "official union...business" and that the registration regulations must therefore be considered to "directly relate to...working conditions."

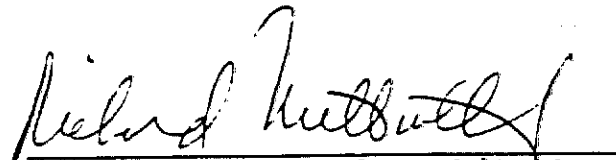
This argument fails as well. There simply is no compelling nexus between Article 19 and Article 23. At least no such connection has been demonstrated here. Voter registration no doubt is "union...business" but it is not "union...business related to the Collective Bargaining Agreement" within the meaning of Article 23. A claim made under Article 23 can be determined only on the basis of the particular circumstances of a particular case. It may be that an APWU official would be entitled to access to a postal facility because of some dispute arising out of a voter registration question.² It may be that denial of access in such a situation could result in an Article 23 violation. After all, "official union...business..." deals with any alleged violation of employee rights. But none of this is truly relevant to the issue of whether the voter registration regulations "directly relate to...working conditions." Or, more precisely, nothing in Article 23 demands that the arbitrator view such regulations as being "directly relate[d] to...working conditions."

² An APWU official can properly be denied access to postal premises for the purpose of setting up an APWU voter registration table on such premises. That is in effect what the District Court and the Circuit Court held. And that is what the former A(1) regulation, now POM Section 221.691(a), meant to prevent.

For these reasons, my ruling must be that the voter registration regulations do not fall within the reach of Article 19 and hence no violation of Article 19 has occurred. There is no need to consider the further questions of whether these regulations are "fair, reasonable, and equitable" or whether the grievance should be dismissed on the procedural grounds raised by the Postal Service.

AWARD

The grievance is denied.


Richard Mittenthal, Arbitrator