C#10254

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration between NATIONAL ASSOCIATION OF LETTER CARRIERS and UNITED STATES POSTAL SERVICE	CASE NOS. H7N-5R-C 316 H7N-5R-C 317 H7N-5R-C 318 H7N-5R-C 46846

BEFORE: Professor Carlton J. Snow

APPEARANCES: Ms. Sophia Davis

Mr. Rodney Stone

PLACE OF HEARING: Washington, D.C.

DATE OF HEARING: May 1, 1990

POST-HEARING BRIEFS: July 19, 1990

AWARD:

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that T-6 vacancies of at least five working days within seven calendar days shall be filled according to Article 25 of the parties' National Agreement, and management may not assign different employes on an "as needed" basis to carry a route on a T-6 string. It is so ordered and awarded.

Date: September 10, 1990

Carlton J. Snow
Professor of Law

IN THE MATTER OF ARBITRATION)
)
BETWEEN)
)
NATIONAL ASSOCIATION OF) ANALYSIS AND AWARD
LETTER CARRIERS)
)
AND) Carlton J. Snow
) Arbitrator
UNITED STATES POSTAL SERVICE)
(Case Nos. H7N-5R-C 316,)
H7N-5R-C 317, H7N-5R-C 318,)
AND H7N-5R-C 46846))

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from July 21, 1987 to November 20, 1990. A hearing occurred on May 1, 1990 in a conference room of the United States Postal Service located at 475 L'Enfant Plaza in Washington, D.C. Ms. Sophia Davis of the Cohen, Weiss, and Simon law firm represented the National Association of Letter Carriers. Mr. Rodney A. Stone, Labor Relations Executive, represented the United States Postal Service.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. A court reporter for Diversified Reporting Services, Inc. reported the proceeding for the parties and submitted a transcript of 113 pages. The parties also submitted

the four volumes of transcript from Case No. H7N-4U-C 3766 for consideration in this case as well.

The parties stipulated that the matter properly had proceeded to arbitration and that there were no challenges to the arbitrator's jurisdiction. The parties also agreed that Case No. H4N-5R-C 46846 was the same grievance as the one set forth in Case No. H7N-5R-C 318 and that there was no necessity for the arbitrator to consider the former case in this proceeding. The parties elected to submit post-hearing briefs, and the arbitrator officially closed the hearing on July 19, 1990 after receipt of the final brief in the matter.

II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

> Must the T-6 vacancy of at least five working days within seven calendar days be filled according to Article 25 of the National Agreement, or may the Employer assign different employes on an "as needed" basis to carry a route on the T-6 string?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 3 MANAGEMENT RIGHTS

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

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

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

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

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

ARTICLE 25 HIGHER LEVEL ASSIGNMENTS

Section 4. Higher Level Details

Detailing of employees to higher level bargaining unit work in each craft shall be from those eligible, qualified and available employees in each craft in the immediate work area in which the temporarily vacant higher level position exists. However, for details of an anticipated duration of one week (five working days within seven calendar days) or longer to those higher level craft positions enumerated in the craft Articles of this Agreement as being permanently filled on the basis of promotion of the senior qualified employee, the senior, qualified, eligible, available employee in the immediate work area in which the temporarily vacant higher level position exists shall be selected.

IV. STATEMENT OF FACTS

The Union in these cases has challenged the Employer's decision to cease offering temporary vacancies of T-6 carrier positions to the senior-most-qualified carrier seeking to fill these vacancies. The grievants, all Level 5 Letter Carriers, contend that management should have "opted" the temporarily vacant T-6 positions. In other words, the grievants maintain that they should have been given an opportunity to choose the higher level assignments and the associated higher levels of pay.

The basic function of a T-6 Carrier differs from that of a Level 5 Carrier in that a T-6 Carrier routinely delivers mail to a designated group of not less than five carrier routes, while a Level 5 Carrier primarily services the same route each workday. The second duty distinguishing the T-6 position from that of a Level 5 Carrier is the responsibility of giving job instruction to newly assigned carriers. The T-6 Carrier has this responsibility, but a Level 5 Carrier does not. The grievants, nevertheless, contend that, as senior-most-qualified Level 5 Carriers, it was their contractual right to "opt" for temporarily vacant T-6 positions whenever management anticipated that the vacancies would exist for at least five consecutive workdays within a seven-day period.

In each of these grievances, a T-6 "vacancy" occurred during the absence of the regular T-6 Carrier. Management did not post the positions as ones that were available for

"opting," but the grievants, nevertheless, made known their desire for the work by "opting" themselves into the projected work schedules. None of the grievants was allowed to carry a T-6 route during the absence of the regular T-6 Carrier. The Employer used a different procedure. That is, management broke the T-6 "strings" and assigned part-time flexible carriers to the various routes within the broken T-6 string. Each grievance has maintained that management should have provided the carrier with an opportunity to opt for the T-6 route during the absence of the regular T-6 Carrier.

In these grievances, the Union has challenged the Employer's decision that denied the grievants the right to opt for these temporarily vacant T-6 routes. Specifically, Case No. H7N-5R-C 316 concerned full-time carrier James Priddy who sought to cover a three week absence of T-6 Carrier M. Jones beginning on August 1, 1987. Case No. H7N-5R-C 317 concerned part-time flexible carrier Phil Pearson who sought to cover a one week absence of T-6 Carrier M. Ausen beginning on July 31, 1987. Finally, Case No. H7N-5R-C 318 involved part-time flexible carrier T. Ramirez who sought to cover a two week absence of T-6 Carrier Low beginning on August 1, 1987.

The matter proceeded through the grievance procedure in a manner that has not been challenged. When the parties were unable to resolve their differences, the matter proceeded to arbitration.

V. POSITION OF THE PARTIES

A. The Union

It is the position of the Union that the Employer has violated the parties' collective bargaining agreement by failing to allow carriers to opt for temporarily vacant T-6 positions based on their seniority. According to the Union, Article 25 of the parties' agreement provides that higher level details of anticipated duration of five working days within seven calendar days shall be filled by "the senior, qualified, eligible, available employee in the immediate work area in which the temporarily vacant higher level position exists." (See, Union's Post-hearing Brief, 3-4).

The Union interprets Article 25 in the parties' agreement as requiring that T-6 positions which are vacant for at least five working days within seven calendar days shall be filled pursuant to Article 25 of the labor contract and that the Employer is without authority to "pick and choose, without regard to seniority," different employes to carry routes on a vacant T-6 route without making an assignment pursuant to Article 25. (See, Union's Post-hearing Brief, 5). It is the position of the Union that the Employer's only alternative, if Article 25 does not apply, is to post the vacancy pursuant to Article 21 of the parties' agreement.

The Union also maintains that Step 4 settlement agreements and internal memoranda already have resolved this issue and have created binding precedent that requires management to fill T-6 vacancies pursuant to provisions of Article 25 in

the labor contract. According to the Union, Step 4 settlement agreements in North Carolina and Alaska specifically addressed the dispute between the parties and had resolved it in the Union's favor. Thus, those decisions allegedly should provide the appropriate guidelines in these cases.

Moreover, the Union maintains that a memorandum from the Senior Assistant Postmaster General in 1973 clearly settled the issue of T-6 assignments in the event that a regular T-6 Carrier was absent, regardless of whether or not the replacement carrier performed all the duties of the T-6 Carrier. The Union contends that this settlement agreement resolved any issues surrounding differences between duties of a Level 5 carrier and those of a T-6 carrier.

Finally, the Union stresses that any argument which relies on "efficiency" must fail because the "plain meaning" of the parties' agreement is clear about the fact that vacancies shall be filled according to contractual provisions set forth in the parties' labor contract. In any event, the Union maintains that, in this case, the Employer failed to justify its efficiency argument; and this argument allegedly cannot justify management's action in this case.

B. The Employer

The Employer argues that management did not violate the parties' collective bargaining agreement when it denied the grievants an opportunity to opt for temporarily vacant T-6 positions. It is the contention of the Employer that no contractual violation can be established in these cases because the Union failed to carry its burden of proving an entitlement to the higher level assignments in dispute. It is the contention of the Employer that the Union failed to offer sufficient evidence from which a contractual violation can be found in this case.

Second, the Employer maintains that the language of Article 25 allows the Employer to exercise discretionary authority with respect to whether or not to assign higher level work. In the Employer's view, it is a prerogative of management to decide about the necessity of making such assignments available. In the opinion of the Employer, any contrary decision would alter the plain meaning of the parties' agreement, a result expressly prohibited under Article 15.4.A.6 of the labor contract.

The Employer also contends that it is the function of management to direct employes in performing their official duties and in assigning them so that the efficiency of the operation can be protected. In this case, the efficiency of the operation allegedly mandates more cost-efficient uses of workers than the automatic opting of T-6 vacancies is able to accomplish. In essence, the Employer contends that it

has established through "uncontroverted testimony" that "pivoting" routes is most efficient. In other words, by pivoting routes, management breaks the T-6 strings among other available carriers who have less than eight hours of work assigned to them. This procedure is used rather than assigning the T-6 route as a string, and the result allegedly produces a reduction of between two and four hours a day in personnel requirements.

The Employer also contends that the Union's reliance on prior Step 4 settlement agreements involving T-6 replacements is not dispositive of the issues in these cases, absent evidence that underlying factual circumstances are similar. The employer believes that the factual circumstances surrounding examples provided by the Union either lack supporting factual documentation or are distinguishable from the issues in this case.

Finally, the Employer contends that, even if the Union is correct in its view that a bargaining agreement violation has occurred, the remedy sought is inappropriate. The Employer argues the Union failed to prove that the grievants in the case, in fact, were the "senior, qualified, available employes whom Article 25 seeks to protect. Because it is only known that these grievants "self-nominated" themselves for the T-6 positions and management never declared the positions to be open, the Employer argues that the most senior-qualified employes may not actually have been the ones who self-nominated themselves.

VI. ANALYSIS

A. Filling Temporary Vacancies under Article 25

It is a well-established principle of contract interpretation that, if language of an agreement is clear and if there is an absence of contradictory evidence, the standard meaning of the words in the parties' agreement ought to be accepted. This rule in aid of interpretation has been codified in the Restatement (Second) of Contracts. It states:

> Unless a different intention is manifested, where language has a generally prevailing meaning it is interpreted in accordance with that meaning. (See, § 202(3)(a), p. 86 (1981)).

The rule of interpretation is that an arbitrator should follow the meaning of words given to them by general usage, if there is one. This rule of interpretation, of course, would yield to evidence of internal inconsistency or absurdity.

Arbitral authority is a creation of the parties' agreement, and there may be instances where arbitrators may not like what contract negotiators like. Indeed, it has been a source of more than a little regret to some arbitrators that negotiators obviously did not agree with the arbitrator about values ought to be present in an agreement. Logic, nevertheless, requires an arbitrator to construe contractual words as having a meaning that is consistent with general usage, if there is an absence of contrary evidence. This rule of interpretation, of course, can be overcome by evidence to the contrary about the actual intent of the parties. Such an analysis has deep roots in arbitration. (See, e.g., Phelps Dodge Copper Products Corp., 16 LA 229 (1951); Ohio Chemical and

Surgical Equipment Co., 49 LA 377 (1966); and Safeway Stores, 85 LA 472 (1985)).

Article 25, Section 4 of the parties' agreement states:

> Detailing of employees to higher level bargaining unit work in each craft shall be from those eligible, qualified and available employees in each craft in the immediate work area in which the temporarily vacant higher level position exists. However, for details of an anticipated duration of one week (five working days within seven calendar days) or longer to those higher level craft positions enumerated in the craft Articles of this Agreement as being permanently filled on the basis of promotion of the senior qualified employee, the senior, qualified, eligible, available employee in the immediate work area in which the temporarily vacant higher level position exists shall be selected. (See, Joint Exhibit No. 1, emphasis added).

This language does not require that the Employer fill "all" temporary vacancies in accordance with provisions of Article 25 in the National Agreement. The language makes clear that, if Employes are detailed to higher level work, they shall be from eligible, qualified, and available employes. But it does not necessarily follow that management is required to fill all vacancies which arise, even if it is contrary to the realistic expectations of management to do so. The parties have left an unfilled gap in their collective bargaining agreement with respect to whether or not the vacancies must be filled while being clear in the written agreement about how they are to be filled if there is a decision to do so.

Anglo-American common law is replete with examples of mandatory language about procedures to be followed without being clear about what circumstances will activate use of the

procedures. Courts have also been quite willing to read mandatory language as having a permissive intent. (See, e.g., Allied Steel & Conveyors, Inc. v. Ford Motor Co., 277 F.2d 907 (1960)). In Great Lakes Pipeline Co., an arbitrator had to decide whether or not mandatory language about a process also made clear when the process was to be used. (See, 25 LA 885 (1955)). In that case, the collective bargaining agreement stated that "the company will fill" certain job vacancies caused by vacations, and the arbitrator reasoned that the mandatory language with respect to how the job will be filled did not answer the question with respect to whether or not the Employer had a contractual obligation to fill the temporary vacancy. The point is that mandatory language about using certain procedures in a given situation does not necessarily answer questions about when the mandatory procedure is to be implemented. (See, e.g., Electro Metallurgical Co., 28 LA 253 (1967)).

Neutral decision makers in the arbitration system for the parties to this agreement have recognized that Article 25 may have described a bargain between the parties with respect to mandatory procedures but that the contractual provision has not been definitive about when the procedures must be used by management. For example, one arbitrator in such a case stated:

> Article 25 deals with 'higher level assignments' and sets out how upgraded employees should be paid. If detailing to a higher level is decided upon, Section 25.4 prescribes how employees are selected. Certainly, there is nothing in Article 25 that requires upgrading if a position carrying a higher

> classification is kept vacant or if the duties assigned are not within the higher classification. (See, Employer's Exhibit No. 12).

Another decision in this arbitration system stated:

> Article 25 does not require that a temporary vacancy be filled. It simply gives information on how the vacancy is to be filled and who is to fill it if it is filled. (See, Employer's Exhibit No. 11, emphasis added).

Focusing on the parties' written agreement as an expression of their common meaning, it cannot be said that Article 25 requires the Employer to fill a temporary vacancy. No evidence submitted to the arbitrator established such a negotiated intent for the actual words in Article 25 of the parties' collective bargaining agreement. In their agreement, the parties simply have left ambiguous their intent as to when the mandatory procedures must be activated.

B. The Impact of Past Practice

Arbitrators long have used past practices between the parties as a means of filling gaps in their agreement or clarifying ambiguous language. The United States Supreme court has sanctioned the use of such an interpretive construct as long as the interpretation is faithful to the bargain of the parties. The Supreme Court has stated:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law--the practices of the industry and the shop--is equally a part of the collective bargaining agreement although not expressed in it. (See, United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960)).

Arbitrators, of course, have relied heavily on past practices between the parties as a gap-filling device in resolving contract interpretation disputes. (See, e.g., AMF Western Tool, Inc., 49 LA 719; Associated Wholesale Grocers, Inc., 81 LA 1126; and Bureau of Engraving, Inc., 80 LA 623).

Past practice in this case has helped fill the gap in meaning contained in Article 25 of the agreement. Mr. William Guiverson, President of the Seattle Branch of the NALC, testified at the arbitration hearing that in approximately June of 1987 management made a change in policy with respect to assigning T-6 vacancies. He testified as follows:

> Prior to 1987, the strings that were vacant during vacations and that were listed on the opting sheets in the various offices. After--I started earlier, approximately mid-June or June, they ceased putting the T-6 positions on the opting sheet and did not allow any more opting on them. (See, Tr. 49).

It was clear from evidence submitted to the arbitrator that "opting" referred to the practice between the parties of allowing the "most qualified--senior qualified employee requesting that position during the vacancy of a T-6 carrier" to be assigned the work. (See, Tr. 36).

The parties also submitted evidence about the change in practice with respect to filling a T-6 temporary vacancy in Kirkland, Washington. Mr. Martens charted the change in the arbitration hearing. When asked if prior to 1987 (when the Union filed these grievances) T-6 vacancies had been posted, Mr. Martens testified that, "yes, T-6 vacancies were posted." (see, Tr. 100-101). He also stated that:

> At some point we determined that it was--for one, we found out that Article 41 did not apply to higher level assignments, and that higher level assignments could be filled by Article 25, at which point we realized that we were then able to more effectively handle our work hours by not filling the T-6 positions. (See, Tr. 101).

The Employer asserted that there is "no dispute between the parties that T-6 vacancies are, as higher level positions, not subject to the provisions of Article 41." (See, Employer's Post-hearing Brief, p. 4). The Union, however, was not as certain about this issue, claiming that "under either Article 25 or Article 41, the temporary assignments at issue should have been awarded to the grievants involved." (See, Union's Post-hearing Brief, p. 14). The issue submitted to the arbitrator, however, has inquired about only whether or not the T-6 vacancies must be filled "according to Article 25."

Evidence submitted to the arbitrator made clear that, prior to 1987, management filled temporary T-6 vacancies either in accordance with Article 25 or Article 41. The Union contended that at least as early as November 5, 1973, the parties mutually recognized that Article 25 provided the governing contractual provision in cases involving T-6 vacancies. On November 5, 1973, Senior Assistant Postmaster General Darrell F. Brown sent a memorandum to all assistant regional postmasters general about the topic of Article 25 and higher level pay for Level 6 assignments. (See, Union's Exhibit No. 1). Although it would be inaccurate to suggest that the memorandum of November 5, 1973 disposed of the issue in this case, it added support to a conclusion that assignments

of temporary T-6 vacancies are properly considered only under Article 25 of the parties' collective bargaining agreement.

A Step 4 settlement agreement emerged out of a class action initiated in North Carolina. It raised a question about whether or not a T-6 assignment should be filled in accordance with Article 41 or Article 25. Both parties agreed that:

> Temporary T-6 positions are higher level assignments and they are not subject to Article XLI, Section 2B3-4-5. As such they are to be filled per the provisions of Article 25, National Agreement. (See, Union's Exhibit No. 2).

It is reasonable to conclude, based on evidence submitted to the arbitrator at the hearing, that the parties intended to place temporary assignments under guidelines consistent with provisions of Article 25 in the parties' agreement.

The question to be resolved is what impact such a conclusion has on the situation that arose in Kirkland, Washington. The evidence made clear that, prior to mid-1987, a practice had developed that had the result of permitting senior-most-qualified employes to opt for temporary T-6 vacancies as they occurred. Mr. Martens, then Superintendent of Postal Operations in Kirkland, agreed that prior to 1987, all such vacancies, without distinction, had been posted for opting. (See, Tr. 101-102). Sometime in mid-1987, management halted this past practice, and these grievances came to the surface.

The concept of past practice in arbitration is an idea borrowed directly from Anglo-American common law. It long has

been recognized that the conduct of parties after a bargain has been struck may indicate the meaning they gave language in their agreement which later became the source of a dispute. Courts give evidence of past practice great weight. As one court has stated:

> The interpretation placed upon a contract by the parties themselves, before a dispute has arisen, is entitled to the greatest weight. (See, Reconstruction Finance Corp., 200 F.2d 672, 676 (4th Cir. 1972)).

As another court stated many years ago, "Show me what the parties did under the contract, and I will show you what the contract means." (See, Thompson v. Fairleigh, 187 S.W.2d 812 (1945)). Gaps in a collective bargaining agreement can be filled by subsequent conduct of the parties. As Arbitrator Mittenthal has stated:

> Custom in practice profoundly influence every area of human activity. Protocol guides the relations between states; etiquette affects an individual's social behavior; habit governs most of our daily actions; and mores help to determine our laws. It is hardly surprising, therefore, to find that past practice in an industrial plant plays a significant role in the administration of the collective agreement. (See, Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," Proceedings of the Fourteenth Annual Meeting of the National Academy of Arbitrators, 30 (1961)).

The largest hurdle to overcome in using a "past practice" analysis is establishing the existence of a "practice." Where there is evidence the parties had mutually agreed that a practice existed for a period of time (even if it is unclear which contractual provision was thought to have governed), the practice must be deemed established. The point is that a

collective bargaining agreement includes more than the written provisions in a printed document, as the United States Supreme Court has recognized. A labor contract also includes understandings and mutually accepted practices which have developed between the parties during their relationship. In the grievances submitted to the arbitrator in this particular case, it was the mutually accepted practice of the parties, at least prior to mid-1987, to make temporary T-6 vacancies available for opting by the senior-most-qualified employes.

Once established, however, past practice does not become immutable. Like virtually everything in life, it is subject to being changed, just as express provisions in an agreement are subject to change. At the same time, this general proposition must be applied to specific facts in a given case. If a past practice served to clarify ambiguous contractual language, the practice would be binding for the life of an agreement until the parties altered the contractual provision. Likewise, if the past practice established a meaning for contractual language that the parties subsequently incorporated into an express provision of their agreement, elimination of the practice would require mutual agreement.

In this case, it is clear that management unilaterally changed a past practice of the parties. There was no showing of mutual consent to do so. Another possibility that would justify unilateral modification of a past practice would be a change in circumstances, such as new technology that greatly enhanced the efficiency of an operation.

There has been little dispute among arbitrators about the fact that a change in circumstances will justify a change in a past practice if it has not been codified in the parties' agreement. As the eminent Saul Wallen stated:

> The practice must continue to be a response to the same underlying conditions. Where there is a change in those conditions, practice may be changed. (See, Wallen,"Collective Bargaining and the Arbitrator's Role," Proceedings of the Fifteenth Annual Academy of Arbitrators, 127 (1962)).

If conditions which gave rise to a practice no longer exist, an employer generally is not obligated to continue to operate by relying on the practice. (See, e.g., Pickands, Mather & Co., 38 LA 228 (1961); Gulf Oil Corp., 34 LA 99 (1959); and United States Steel Corp., 36 LA 273 (1961)). This realization, added to the clear language of Article 3 in the parties' agreement, at first blush gave great weight to the Employer's argument that it is empowered to alter the alleged practice in order to "maintain the efficiency of the operations entrusted to it." (See, Employer's Post-hearing Brief, p.10). At the same time, the parties have been clear about the fact that rights of the Employer in Article 3 remain "subject to the provisions of this agreement." (See, Joint Exhibit No.1, p. 4).

The Employer's curtailment of a past practice must be tested in terms of the reasons behind the emergence of the practice itself. If technology has changed to a point that the Employer must alter the past practice of opting out all available temporary T-6 positions, the burden is on the Employer to establish that fact. The arbitrator simply did

not receive evidence in the hearing to establish that circumstances changed in such a way that justified elimination of the past practice.

Testimony from Mr. Martens revealed that management changed the practice of opting out T-6 vacancies when the Employer believed that it was no longer under a contractual obligation to do so. The evidence suggested that this conclusion came before any economic analysis of potential savings. The arbitrator received no evidence of any economic projections made prior to changing the system of opting out T-6 vacancies.

Evidence received by the arbitrator in support of the Employer's "efficiency" justification for eliminating the past practice consisted of four handwritten sheets of paper. Two of the handwritten sheets compiled by Mr. Martens compared a period in June, July, and August of 1986 with the same dates in 1987. In 1986, management still used the "opting" procedure. In 1987, this had been replaced with "pivoting" or shifting under-utilized carriers as needed in order to fill gaps elsewhere. The data seemed to suggest that during this period there was a savings of 548 hours. (See, Employer's Exhibit No. 1). The document, however, would have been more persuasive in this case (1) if it had not been offered as a justification after the fact to avoid an existing obligation under the parties' agreement and (2) if it had reflected any changes in mail volume between the two periods, something neither it nor testimony accomplished.

Other documents in defense of the "efficiency" justification showed a comparison of times needed by "opting" carriers to cover T-6 routes as contrasted with times used during the following year for part-time flexible clerks whom management assigned to carry various parts of the T-6 routes. The data seemed to show that time had been saved. (See, Employer's Exhibit Nos. 2 and 3). Unfortunately, there are gaps in the data because the Employer was unable to locate all of the vehicle record cards from which the information had been extracted. These, of course, were records in the Employer's control, and the failure to provide all applicable records undermined the reliability of the remainder. Additionally, the vehicle cards failed to show if other vehicles had been used on a particular route on a given day or only the time spent by a specific vehicle on that route. As Mr. Martens testified, "some of the vehicle cards were missing so I wasn't able to accurately determine who was on each of the routes." (See, Tr. 87).

In order for an employer to use an "efficiency" argument as a means of overcoming its obligagtion to continue applying a strong past practice, management needs to verify valid business reasons for eliminating the practice. In order to show that the elimination has been in good faith, it needs to be established that management has given advance consideration to projected savings from its anticipated action. Hindsight might establish that a savings resulted from elimination of the past practice, but it would not be reasonable to use such

evidence to justify a managerial decision to deprive a party to a collective bargaining agreement reasonable expectations associated with the binding past practice. Evidence established the existence of reasonable expectations on the part of bargaining unit members that they would be given a right to opt for temporarily vacant T-6 positions, and the Employer failed to show a change in underlying circumstances that justified elimination of the past practice.

C. An Appropriate Remedy

The Employer argued the arbitrator received no evidence that the grievants in this case are the "senior, qualified, available" employes about whom Article 25 speaks and that it is known only that they "self-nominated" themselves by writing their names on a schedule. (See, Employer's Post-hearing Brief, p.13). It is conceded that the arbitrator has felt the gravitational pull of the argument, but it ultimately has failed to be persuasive.

It is recognized that there may have been more senior, qualified, available employes who would have opted for the disputed positions had the positions been posted in the customary manner. It was the action of the Employer that disrupted the conventional way of filling the position. Additionally, the arbitrator received no evidence that any other employe was more senior, more qualified, or more available than were the grievants. Accordingly, the argument ultimately has not prevailed.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that T-6 vacancies of at least five working days within seven calendar days shall be filled according to Article 25 of the parties' National Agreement, and management may not assign different employes on an "as needed" basis to carry a route on a T-6 string. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow

Carlton J. Snow
Professor of Law

Date: September 10, 1990