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| IN THE MATTER OF ARBITRATION<br><br>BETWEEN<br><br>NATIONAL ASSOCIATION OF LETTER CARRIERS<br><br>AND<br><br>UNITED STATES POSTAL SERVICE<br><br>WITH<br><br>AMERICAN POSTAL WORKERS UNION<br>Intervenor | POST OFFICE: Washington, D.C.<br><br>GRIEVANCE NO.: H7N-1A-C 25966 |

BEFORE: Professor Carlton J. Snow

APPEARANCES: For the U.S. Postal Service:
Mr. D. James Shipman

For the National Association of Letter Carriers:
Ms. Michelle Dunham Guerra

For the American Postal Workers Union:
Mr. Arthur M. Luby

PLACE OF HEARING: 475 L'Enfant Plaza S.W.
Washington, D.C.

DATE OF HEARING: October 25, 1992

POST-HEARING BRIEFS: January 11, 1993

AWARD:

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer did not violate the parties' National Agreement when it made available temporary letter carrier transport duties to the Motor Vehicle Operator Craft exclusively. The grievance is denied. It is so ordered and awarded.

Date: February 19, 1993

Carlton J. Snow
Professor of Law

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## 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 took place on October 29, 1992 in Room 10841 of the United States Postal Service headquarters in Washington, D.C. Mr. D. James Shipman, Field Director of Human Resources for the Des Moines Division, represented the United States Postal Service. Mr. David Molloy, Labor Relations Representative, assisted Mr. Shipman. Ms. Michelle Dunham Guerra of the Cohen, Weiss & Simon law firm in New York City represented the National Association of Letter Carriers. Mr. Arthur M. Luby of the O'Donnell, Schwartz & Anderson law firm in Washington, D.C. represented the American Postal Workers Union.

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. The advocates fully and fairly represented their respective parties. Ms. Kim Petrarca of Diversified Reporting Services, Inc. recorded the proceeding for the parties and submitted a transcript of 169 pages.

There were no challenged to the substantive arbitrability of the dispute, but the Employer raised an objective to the procedural arbitrability of the matter. In Case No. H7N-1A-C 25966, the dispute was adjudged to be procedurally arbitrable, and the matter came to hearing on the merits of the case. The arbitrator officially closed the hearing on January 11, 1993 after receipt of the final brief in the matter.

## II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

Did the Employer violate Article 41.1.A and D of the parties' National Agreement by not following local practice with regard to posting and bidding available letter carrier bus driving duties in the Letter Carrier craft? If so, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 41. LETTER CARRIER CRAFT

Section 1. Posting

A. In the Letter Carrier Craft, vacant craft duty assignments shall be posted as follows:

1. A vacant or newly established duty assignment not under consideration for reversion shall be posted within five working days of the day it becomes vacant or is established.

All city letter carrier craft full-time duty assignments other than letter routes, utility or T-6 swings, parcel post routes, collection routes, combination routes, official mail messenger service, special carrier assignments and night routers, shall be known as full-time Reserve Letter Carrier duty assignments. The term "unassigned regular" is to be used only in those instances where full-time letter carriers are excess to the needs of the delivery unit and not holding a valid bid assignment.

Positions currently designated in the Letter Carrier Craft:

KP-11 City Carrier, PS-5 (includes the cuty assignment of Official Mail Messenger Service in the Washington, D. C. Post Office)

KP-11 Special Carrier, PS-5

SP 2-261 Carrier Technician, PS-6

Positions that may in the future be designated in the Letter Carrier Craft.

Changes in the foregoing position titles shall not affect the application of this provision.

D. Other Positions

City letter carriers shall continue to be entitled to bid or apply for all other positions in the U.S. Postal Service for which they have, in the past, been permitted to bid or apply, including the positions listed below and any new positions added to the list:

SP 2-188 Examination Specialist
SP 2-195 Vehicle Operations-Maintenance Assistant.

## IV. STATEMENT OF FACTS

In this case, the Union has challenged the decision of the Employer not to post a Letter Carrier Bus Transport position in the Letter Carrier Craft. In 1988, Grand Central Station at 45th and Lexington Avenue in New York City began an extensive renovation which lasted approximately three years. As a result, it was necessary to relocate the facility at Grand Central Station; and management relocated postal employes who worked out of Grand Central Station to the FDR Station at 909 Third Avenue between 54th and 55th Streets.

Working through the Employee Involvement Program, the parties formed an employe-management group named The Transition Team; and its function was to propose resolutions to problems which might arise as a consequence of the relocation. A fundamental question confronted by this group of employe and management representatives was how to move approximately 300 letter carriers from the FDR Station to their routes in the Grand Central Station area.

Some transition team members, who were also shop stewards for the National Association of Letter Carriers, investigated the matter and found that used city buses could be obtained at a reasonable cost and, then, could be used to transport carriers from FDR Station to their routes in the Grand Central Station area. The proposal was that the buses drive in circuits from FDR Station and drop off carriers at their routes along with mail sorted for delivery on each carrier's route. It was also proposed that five duty assignments be made.

These involved driving the buses and transporting letter carriers with their mail to the routes.

At a meeting of the Transition Team on May 23, 1988, Arthur Ullman, former president of Branch 36, set forth his understanding that the bus driver positions would be filled by letter carriers and that these positions would be posted as temporary bids for carriers at Grand Central Station. If not enough carriers bid the position, the job would be posted city wide as a temporary bid until the Grand Central Station renovation had been completed. Mr. Cleveland Morgan, a letter carrier, tested the proposed bus routes in March of 1989.

On approximately April 11, 1989, workers in Branch 36 learned from management that the bus driver positions would be posted for the Motor Vehicle Craft alone. At that point, the NALC filed a class action grievance to challenge management's decision to post the position of Bus Driver as a Motor Vehicle Craft position. (See, Joint Exhibit No. 2(J)). The parties certified the matter for national level arbitration on May 7, 1990, and a hearing on arbitrability took place on April 17, 1992. Ultimately, the arbitrator ruled that the case was arbitrable and that there was jurisdiction to proceed to the merits of the case.

## V. POSITION OF THE PARTIES

### A. The National Association of Letter Carriers

It is the position of the National Association of Letter Carriers that Article 41(A) and (D) require management to post the Letter Carrier Bus Transport position in the Letter Carrier Craft. According to the NALC, there always has been a clear distinction between the Motor Vehicle Craft and the Letter Carrier Craft that should be preserved in this case. While both crafts have job duties which involve transporting mail, the Union contends the practice always has been clear with regard to making the Motor Vehicle Craft responsible for picking up and delivering unsorted bulk mail. Delivery of sorted mail always has come within the jurisdiction of the Letter Carrier Craft, according to the NALC. It is the contention of the NALC that this basic jurisdictional difference is confirmed in the Fleet Management Handbook of the Employer and in key position descriptions.

It is the belief of the NALC that arbitral decisions support its position in this case. In addition to national awards, the NALC argues that there also two regional decisions in which arbitral distinctions have been drawn between types of mail delivered by the Letter Carrier Craft and mail handled by the Motor Vehicle Craft. One decision (Case No. E-4V-2B-C 9847) allegedly established that the inner city delivery of bulk mail is a Motor Vehicle Craft assignment. (See, NALC Exhibit No. 10). The other is a decision in 1982 (Case No. E8N-2W-C 3370) which allegedly concluded that the route delivery of sorted

mail is a letter carrier assignment despite the fact that the delivery in that case was made in a seven-ton truck. This is the type vehicle normally driven by a member of the Motor Vehicle Craft.

According to the NALC's theory of the case, Article 41(D) states that letter carriers are entitled to bid on other positions which letter carriers have been allowed to bid on and have been assigned to work in the past. The NALC believes there is a clear past practice of allowing letter carriers to obtain bidded assignments which involve the delivery of other carriers to their route in buses. According to the NALC, such work is directly related to the carrier function so much so that, even assuming an argument could be made that delivering mail itself is tangential to delivering carriers, the position, nevertheless, should still be assigned to the Letter Carrier Craft.

The Union asserts that there are at least three instances of the past practice dating back to the 1960s. In those instances, Letter Carrier Craft assignments were made when it was necessary for bus drivers to deliver carriers to their routes. Moreover, the NALC argues that there is no instance in which a member of the Motor Vehicle Craft ever transported carriers or sorted mail in the New York area.

According to the NALC, it is important to recall that the disputed Bus Driver positions in this case were never treated by management as new positions. Under Article 1, Section 5, when new positions are created, management is

obligated to consult with unions to determine which craft is most suitable for the position. The Employer never invoked such a procedure in this case, and the NALC, accordingly, argues that the assignment should have been made to the Letter Carrier Craft.

Even though the Grand Central Station renovation has been completed, the NALC believes that the issue raised by this grievance is not moot. Such situations continue to arise, especially in the New York area; and the NALC argues that an arbitral interpretation of the agreement is necessary.

B. The American Postal Workers Union

The American Postal Workers Union argues that (1) this dispute involves driving a city bus, and (2) the American Postal Workers Union represents the only craft in the company for which driving a bus is regarded as applicable experience in order to be qualified for the job, namely, the Motor Vehicle Craft.

The APWU argues that driving a bus requires obtaining a commercial driver's license. Only one craft requires a commercial driver's license for qualification, namely, the Motor Vehicle Craft. While there may be letter carriers who hold a commercial driver's license, it is not a condition of employment in the Letter Carrier Craft. The bulk of letter carriers do not possess the minimum experience or qualifications

to hold the disputed position.

As the APWU sees it, the NALC is claiming that Article 41 gives letter carriers a right to bid on all duty assignments on which they previously had a right to bid. But the NALC theory of the case focuses on "duty assignments," while the phrase used in Article 41(D) is "positions." The APWU argues that there is a distinct difference between a "position" and a "duty assignment." As the APWU sees it, duty assignments are temporary and vary from installation to installation, while positions are permanent.

C. The Employer

The Employer argues that the U.S. Postal Service does not have a position entitled "bus driver." Nor did management create a new position when the decision was made to transport letter carriers by bus to their routes in the Grand Central Station area. Accordingly, when a need for a bus driver arose, management representatives in New York had to decide which existing position most suited this collection of duties. According to the Employer, it was a reasonable judgment to assign the work to a motor vehicle operator. Although the NALC has maintained that letter carriers were entitled to bid on the temporary duty assignment, the Employer argues that there is no contractual authority or basis in past practice for such a position. It is the contention of the Employer

that, in those instances where a letter carrier transported other letter carriers to their routes, the driver of the vehicle performed letter carrier duties as well as driving the bus. Hence, any pattern that might have existed in the past allegedly is not relevant in this case because this was solely an assignment involving transportation.

The Employer maintains that using motor vehicle operators in such a position constitutes a clearly defined pattern consistently followed by management. The functional purpose of the Motor Vehicle Craft is to operate motor vehicles. The functional purpose of a letter carrier is to deliver mail to individual customers. Accordingly, the Employer argues that any operation of a motor vehicle by a letter carrier is appropriate when that duty is ancillary to accomplishing the primary purpose of the letter carrier.

It is the belief of the Employer that differences in qualification standards for the two positions are significant. In the qualification standards for motor vehicle operators, experience requirements are satisfied by time spent driving large vehicles, including buses of 24 passengers or more. No such experience is required by qualification standards for city letter carriers, according to the Employer. Moreover, qualification standards for motor vehicle operators refer to division requirements for driving vehicles of 10,000 pounds or more. Qualification standards for city letter carriers contain no such requirements and refer to division requirements for driving vehicles weighing less than 10,000 pounds.

Hence, it is the position of the Employer that the NALC failed to set forth a persuasive basis for its theory of the case.

## VI. ANALYSIS

### A. The Matter of Past Practice

Past practice is an important source of guidance for an arbitrator and has been recognized as such by the United States Supreme Court. The Court 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 though not expressed in it. (See, United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960)).

The National Association of Letter Carriers has argued that, even if it does not prevail on the basis of an express contractual provision, the concept of past practice supports its theory of the case.

The National Association of Letter Carriers has argued that Article 41(A) and (D) entitled letter carriers to bid on temporary duty assignments created during the renovation of Grand Central Station. Article 41.1(A) allegedly vested letter carriers with a contractual right to bid on letter carrier duty assignments. Even if the position were not to be considered a "letter carrier" duty position, Article 41.1(D) allegedly entitled letter carriers to bid on positions which they had been allowed to bid on in the past.

Article 41.1(D) states that:

> Letter carriers shall continue to be entitled to bid on or apply for all other positions in the U.S. Postal Service which they have, in the past, been permitted to bid or apply. . . . (See, Joint Exhibit No. 1, p. 172).

The parties have expressly agreed that a letter carrier has a right to bid on "positions" which have been the subject of prior bids or applications. In other words, rights of the NALC bargaining unit vest with regard to a "position" when there is evidence that a past practice has been established with regard to bidding on such position.

No evidence submitted to the arbitrator established that the Employer created a new "position." What management created was a "temporary duty assignment" involving transportation of letter carriers by bus to their routes. There is no reference in Article 41.1(D) to "duty assignments" but, rather, to "positions." Even if one were to assume that management created a new "position," it was the burden of the National Association of Letter Carriers to prove the existence of a binding past practice with regard to such a position.

It is not an inevitable requirement that, because something was done a certain way in the past, it ineluctably must be performed that way in the future. All patterns of conduct in the work place do not necessarily rise to the level of a past practice. As Arbitrator Garrett stated almost four decades ago:

> A custom or practice is not something which arises simply because a given course of action has been pursued by management or the employees on one or more occasion. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type of situation. It must be shown to be the accepted course of conduct characteristically repeated in response to a set of underlying circumstances. (See, U.S. Steel, 2 LA 1187 (1953)).

The highly regarded work of Arbitrator Mittenthal on the

concept of past practice has been widely accepted by arbitrators throughout the nation, and he has set forth five factors that define a past practice. (See, Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," Proceedings of the Fourteenth Annual Meeting, National Academy of Arbitrators 30 (1961)).

Arbitrator Mittenthal's research established that activity rises to the level of a past practice when it is clear and consistent constituting an inevitable response to underlying conditions. Activity also needs to be followed over a reasonably long period of time. Moreover, activity that qualifies as a past practice must be accepted by the parties and regarded as the correct response to the circumstances. When establishing a past practice, a party needs strong proof; and arbitrators routinely seek longevity of activity; consistency and uniformity; frequency of the same pattern; and some indication of mutuality.

The length of time of an asserted past practice combined with the frequency of occurrence during the time period constitutes a significant consideration. Arbitrator Mittenthal set forth the factor of longevity as an important one, and it has been widely adopted by other arbitrators. As he stated:

> A period of time has to elapse during which a consistent pattern of behavior emerges. Hence, one or two isolated instances of a certain conduct do not establish a practice. (See, Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," Proceedings of the Fourteenth Annual Meeting, National Academy of Arbitrators 30, 32 (1961)).

There is no definite formula for determining the period of time which must elapse during which the parties followed a consistent pattern of behavior. (See, e.g., Kennicott Copper, 34 LA 763 (1960); and North American Cement Corp., 28 LA 414 (1957)).

In the dispute before the arbitrator, the National Association of Letter Carriers offered as evidence of a past practice testimony from Mr. Frank Orapello, Vice-president of Branch 36. He testified that the practice of using letter carriers to transport other letter carriers to their routes had existed in various forms in New York since the 1960s. He cited three specific instances.

The first instance occurred in a situation similar to facts before the arbitrator. Letter carriers were transported in the 1960s to their routes on regular buses. Drivers of the buses were letter carriers, and the job was a bid assignment. (See, Tr. 62-63). In another instance, a carrier named Cookie Carrion transported other letter carriers from 1973 to 1984 in a large bus to routes in the Times Square area. This position was also a bid assignment. (See, Tr. 64). He described a third instance of a letter carrier bid assignment for transporting carriers which management filled with three letter carriers. (See, Tr. 66). According to Mr. Orapello, some carriers today continue transporting other carriers to their routes while using vans instead of buses. (See, Tr. 66).

In all instances described by Mr. Orapello, drivers of

the vehicles were letter carriers. Every letter carrier who served as a driver, however, also performed traditional letter carrier duties. Evidence submitted to the arbitrator established that drivers from the Letter Carrier Craft would drop other carriers along their routes and, then, park the vehicle. The driver, then, proceeded to deliver mail on his or her own route, thus performing traditional letter carrier duties.

While recognizing that instances about which Mr. Orapello testified are similar to the present case, they are clearly distinguishable from the circumstances of this grievance. In the case before the arbitrator, the duty assignment was to drive a bus. It included no traditional letter carrier duties, such as delivery of sorted mail directly to customers on a specific route. Instances cited by the National Association of Letter Carriers all involved traditional duties of letter carriers, and the disputed duty assignment in this case is different from the prior instances.

Evidence submitted to the arbitrator failed to establish a clear-cut past practice with respect to the type of duty assignment made by the Employer in this case. The arbitrator received no evidence that the particular duty assignment challenged in this case ever before had been made by management. Moreover, the instances cited by Mr. Orapello span a period of nearly thirty years. The arbitrator received no strong evidence that use of letter carriers as "bus drivers" occurred frequently or consistently during this entire span of time. Nor did the evidence establish that the parties

ever intended the use of letter carriers as bus drivers to constitute a past practice. It is clear that such a duty assignment has never been added to the list of jobs to be made available to bid by the Letter Carrier Craft.

Article 41.1(D) refers to contractual rights over "positions." No evidence established that letter carriers have a contractual right to bid on "temporary duty assignments." Without proof that the parties have modified their agreement by establishing a past practice, there is no basis for concluding that letter carriers have a right to bid on newly created or temporary assignments not involving letter carrier duties. The Employer, of course, must be guided by the concept of good faith in making temporary duty assignments, and that obligation encompasses fundamental notions of fairness. (See, Restatement (Second) of Contracts, § 205, 99 (1981)).

B. "Functional Purpose" Test

The National Association of Letter Carriers has argued that, even if there is no express contractual right nor a right based on past practice to the disputed position, the new duty assignment, nevertheless, should have been posted as a letter carrier position based on its functional purpose. In other words, the NALC has argued that its bargaining unit has a right to bid on this job because it is the most suitable craft for the new duty assignment.

The arbitrator received no evidence that a job or duty assignment involving only transporting letter carriers ever before has arisen. The Employer considered the bus driver openings as temporary duty assignments. Operating in good faith, management has reasonable discretion with regard to temporary duty assignments. The parties have agreed that, after appropriate consultation, "each newly created position shall be assigned by the Employer to the national craft unit most appropriate for such position within thirty (30) days after its creation." (See, Joint Exhibit No. 1, p. 2).

Letter carriers traditionally have been responsible for delivering sorted mail as well as transportation to their route. The National Association of Letter Carriers has argued that, because this is precisely the function of the disputed bid assignment, letter carriers had a right to bid on the assignment; and the Employer assigned the duties to the wrong craft. In support of its contention, the NALC has relied on a decision in 1988 in which the arbitrator concluded that the function of picking up and transporting bulk mail constituted Motor Vehicle Craft work, while delivery and collection of sorted mail by vehicle and on foot constituted letter carrier work. (See, Case No. E-2B-C 9847). The second decision resulted from a 1982 case in which the arbitrator differentiated duties of two crafts based on a long-standing distinction between the delivery function to customers and the bulk mail function. (See, Case No. E8N-2W-C 3370).

Those decisions, however, failed to confront the disputed

issue in this case. The parties at the hearing agreed that there is a difference between the two crafts with regard to delivery functions. What remained in dispute was the driving function of the two crafts. The cases on which the Union relied failed to provide guidance with regard to the disputed issue in this case.

Mr. Thomas Almirall, Organization and Job Evaluation Analyst, testified about driving responsibilities of each craft. It is his function to advise field managers who must match duties to positions. When making a recommendation to them, he testified that he focuses on the primary functional purpose of the position under scrutiny. There was no dispute about the fact that he is familiar with the primary functions of the Letter Carrier Craft, Motor Vehicle Operators, and temporary Letter Carrier Transport positions.

According to Mr. Almirall, the primary function of the disputed position in this case involved transporting letter carriers to their routes with the driver having no direct role in the delivery of mail. (See, Tr. 129). He described the primary duty of a letter carrier as the actual delivery to and collection of mail from customers. (See, Tr. 129). According to Mr. Almirall, driving duties performed by carriers constitute ancillary duties to their primary function. (See, Tr. 130). Driving, however, is fundamental to duties of motor vehicle operators. Relying on guidance from such experts, the Employer assigned the temporary duties to what it believed to be the appropriate craft.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer did not violate the parties' National Agreement when it made available temporary letter carrier transport duties to the Motor Vehicle Operator Craft exclusively. The grievance is denied. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: February 19, 1993