C-20300

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration	)	
	)	
between	)	
	)	Case No. Q94C-4Q-C 98062054
UNITED STATES POSTAL SERVICE	)	
	)	Grievance: Rights of Intervenor
and	)	
	)	
AMERICAN POSTAL WORKERS UNION	)	
	)	
and as Intervenor	)	
	)	
NATIONAL ASSOCIATION OF LETTER CARRIERS	)	

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the Postal Service: Mr. Kevin Rachel

For the APWU: Mr. Darryl Anderson
Ms. Melinda Holmes

For the NALC: Mr. Keith Secular

PLACE OF HEARING: Washington, D.C.

DATE OF HEARING: April 14, 1999

POST-HEARING BRIEFS: August 2, 1999

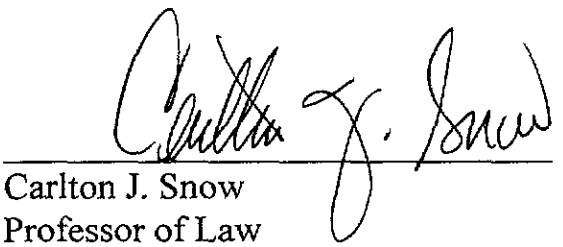
RELEVANT CONTRACTUAL PROVISION: Article 15

CONTRACT YEAR: 1994-98

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the National Association of Letter Carriers, when it has intervened in an area-level arbitration case, has the right to refer the case to Step 4 of the grievance procedure. It is so ordered and awarded.

Respectfully submitted,



Carlton J. Snow
Professor of Law

Date: January 1, 2000

NATIONAL ARBITRATION PANEL

IN THE MATTER OF ARBITRATION	)	
between	)	
UNITED STATES POSTAL SERVICE	)	ANALYSIS AND AWARD
and	)	Carlton J. Snow Arbitrator
AMERICAN POSTAL WORKERS UNION	)	
and as Intervenor	)	
NATIONAL ASSOCIATION OF LETTER CARRIERS (Case No. Q94C-4Q-C 98062054)	)	

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from November 21, 1994 through November 20, 1998. A hearing occurred on April 14, 1999 in a conference room of Postal Headquarters located at L'Enfant Plaza in Washington, D.C. Mr. Kevin Rachel, Deputy Managing Counsel, represented the United States Postal Service. Mr. Darryl Anderson and Ms.

Melinda Holmes of the O'Donnell, Schwartz, and Anderson law firm in Washington, D.C. represented the American Postal Workers Union. Mr. Keith Secular of Cohen, Weiss, and Simon in New York, N.Y. represented the National Association of Letter Carriers.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence and to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. Mr. Peter Shonerd of Diversified Reporting Services, tape-recorded the proceeding for the parties and submitted a transcript of 137 pages. The advocates fully and fairly represented their respective parties.

There were no challenges to the substantive or procedural arbitrability of the dispute, and the parties stipulated that the matter properly had been submitted to arbitration. They authorized the arbitrator to state the issue. The parties elected to submit the matter on the basis of evidence presented at the hearing as well as post-hearing briefs. The arbitrator officially closed the hearing on August 2, 1999 after receipt of the final brief in the matter.

II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

Does the National Association of Letter Carriers, on intervening in an area-level arbitration case, have a contractual right to refer a case to Step 4 of the relevant grievance procedure?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 15 - GRIEVANCE-ARBITRATION PROCEDURE

Section 5. Arbitration

A. General Provisions

9. In any arbitration proceeding in which a Union feels that its interests may be affected, it shall be entitled to intervene and participate in such arbitration proceeding, but it shall be required to share the cost of such arbitration equally with any or all other Union parties to such proceeding. Any dispute as to arbitrability may be submitted to the arbitrator and be determined by such arbitrator. The arbitrator's determination shall be final and binding.

B. Area Level Arbitration - Regular

5. If either party concludes that a case referred to **Area** Arbitration involves an interpretive issue under the National Agreement or some supplement thereto which may be of general application, that party may withdraw

the case from arbitration and refer the case to Step 4 of the grievance procedure. (Emphasis in the original.)

IV. STATEMENT OF FACTS

In this case, the American Postal Workers Union argued that another union which intervened in an APWU area level arbitration proceeding enjoyed no contractual right to refer the dispute to Step 4 of the grievance procedure codified in the contract between the Employer and the APWU. To pursue its contention, the American Postal Workers Union initiated a grievance against the Employer at Step 4 on February 17, 1998. It is this narrow issue which has been submitted to the arbitrator.

The focus of the dispute between the parties is on the correct interpretation of the labor contract, and factual matters are not in dispute. The limited purpose of the grievance is to determine whether unions that choose to intervene in area level arbitration proceedings of the American Postal Workers Union enjoy a contractual right to refer the APWU grievance to Step 4 of the grievance procedure. To preserve any right it might have in the matter, the National Association of Letter Carriers intervened and enjoyed full participation at the arbitration hearing at the national level.

V. POSITION OF THE PARTIES

A. American Postal Workers Union

It is the contention of the American Postal Workers Union that an intervening union in an APWU area-level arbitration proceeding has no authority to withdraw a grievance from arbitration and refer it to Step 4 of the APWU grievance procedure. The APWU believes that an intervening union may fully participate in the arbitration process but that only the APWU or the Employer actually may refer an APWU grievance to Step 4 of the grievance procedure. According to the APWU, (1) the plain meaning of the parties' agreement, (2) the context in which the terms in the contract have been used, (3) the bargaining history between the APWU and the Employer, and (4) considerations of efficiency compel adoption of its position in this dispute. The American Postal Workers Union asserts that, while an intervening union enjoys a right to participate actively in an arbitration proceeding in which it intervenes, this right is distinct and separate from the authority, as Intervenor, to guide a grievance through the contractual process set forth in the collective bargaining agreement between the Employer and the American Postal Workers Union. The APWU believes that, while an intervening union possesses participatory rights, it

does not possess internal appellate rights secured as a part of the bargain between the Employer and the American Postal Workers Union.

The American Postal Workers Union also argues that the Employer and the APWU agree on two pivotal aspects of the dispute, namely, (1) that the intervening union does not have a right to withdraw or to settle an APWU grievance; and (2) that, after another union has intervened, the APWU retains the authority to withdraw the grievance or to settle it, without consultation with the intervening union.

B. The Employer

The Employer contends that a union which chooses to intervene in an area-level arbitration proceeding may withdraw the grievance from area-level arbitration and send it forward to Step 4 of the APWU grievance procedure. It is the belief of the Employer that contractual language in the collective bargaining agreement between the Employer and the APWU does not prohibit such a course of action. In fact, the Employer contends the verbiage of the parties' agreement strongly implies that an intervening union is to be accorded the same rights in the arbitration proceeding that are enjoyed by the grieving union. Moreover,

the Employer maintains that both the past practice of the parties as well as federal arbitration policy favor resolving this issue by recognizing that an intervening union possesses the right to withdraw a grievance from area-level arbitration and to submit it to Step 4 of the APWU grievance process.

C. National Association of Letter Carriers

The position of the National Association of Letter Carriers is substantially similar to that of the United States Postal Service.

VI. ANALYSIS

A. Arbitral Jurisprudence

Parties who negotiate collective bargaining agreements are presumed to know that, if it becomes necessary for an arbitrator to interpret the labor contract, he or she will rely on arbitral jurisprudence as an important source of interpretive principles. To the extent that parties leave gaps in their agreement, arbitrators will use rules that have evolved in arbitral jurisprudence to fill gaps in incomplete contracts, unless the parties have made clear their intent to bargain around such default rules. The collective bargaining agreement of the parties remains as an arbitrator's lodestone, but contractual incompleteness is remedied by applying arbitral jurisprudence to fill contractual gaps in a manner consistent with the intent of the parties.

It is part of the genius of arbitral jurisprudence that it includes a body of principles consistent with Anglo-American legal standards of contract interpretation. Parties are presumed to understand that an arbitrator will draw on this source of guidance in fulfilling arbitral duties. Moreover, the parties have designed their arbitral process as a precedential system, and national arbitration decisions provide a conclusive interpretation of the parties' agreement. The parties have enjoyed a long

relationship of collective bargaining, and it is their custom to incorporate prior decisions into their agreement, unless and until they bargain around such decisions.

One well-established standard of contract interpretation states that:

> When interpreting agreements, arbitrators use the ordinary and popular meaning of words, unless there is an indication that the parties intended a special meaning. (*See* St. Antoine, *The Common Law of the Workplace*, 69 (1998).)

This arbitral standard is merely a restatement of a common law rule used in aid of interpretation. It states that, "where language has a generally prevailing meaning, it is interpreted in accordance with that meaning." (*See Restatement (Second) of Contracts,* §202(3)(a), 86 (1981).) Whether the source is arbitral jurisprudence or a court of law, interpretive principles are applied to the context of a full document. As *Restatement (Second)* makes clear, "English words are read as having the meaning given them by general usage," but the context of a contractual provision provides the backdrop against which any disputed verbiage must be understood. (*See* p. 89 (1981).) As a part of reading a contract in context, an arbitrator assumes, absent contrary evidence, that parties used contractual language in a sense which would generally be understood throughout the country; and without

turning it into a fortress, a dictionary may provide a good source of general usage of language.

B. Meaning of the Contract

Any resolution of the dispute between the parties must be rooted in the agreement reached by them at the bargaining table and codified in their collective bargaining agreement. A starting point in the analysis is Article 15.5.A.9 of the agreement which states:

> In any arbitration proceeding in which a Union feels that its interest may be affected, it shall be entitled to intervene and participate in such arbitration proceeding, but it shall be required to share the cost of such arbitration equally with any or all other Union parties to such proceeding. (*See* Joint Exhibit No. 1, p. 103.)

There is no ambiguity about the fact that the American Postal Workers Union and the Employer agreed to allow unions that possess an interest in the outcome of an arbitration proceeding between the APWU and the Employer to participate in the arbitral process. It is equally clear from the context of the parties' agreement that they have not defined precisely how an intervening union may protect its "affected interests." Rights to which an intervening union is entitled are not explicitly enumerated in the

agreement between the Employer and the American Postal Workers Union. As a consequence, arbitrators from time to time have been asked to determine the scope of rights enjoyed by an intervening union. For example, an arbitrator found that the APWU, as the intervenor, had a right to present exhibits in a dispute between the Employer and the Mail Handlers Union, notwithstanding the fact that the APWU did not present the exhibits at Step 2 of the grievance procedure. (See Employer's Exhibit No. 6, Case No. W7M-5F-C 7637 (1989); *see also*, Case No. H4N-4J-C 18504 (1989).)

Even though the collective bargaining agreement between the American Postal Workers Union and the Employer did not explicitly define specific rights of an intervening union, the parties would have the arbitrator infer certain rights from the text of the collective bargaining agreement. For example, the National Association of Letter Carriers argued that, as an intervening union, it must be characterized as a "party" to the arbitration proceeding. As such a "party," the NALC contended that it enjoys rights equal to every other party to the proceeding. It is the belief of the NALC that Article 15.5.A.9 of the APWU agreement impliedly classes an intervening union as a "party" to the arbitration proceeding. This conclusion allegedly is supported by the contractual requirement that an

intervening union must share the cost of the arbitration process with all "other" parties. The contractual reference to "other Union parties" necessarily requires that an intervening union be a party to the proceeding, in the opinion of the NALC. Otherwise, use of the word "other" in the contractual provision would be superfluous. As *Restatement (Second) of Contracts* makes clear, "where an integrated agreement has been negotiated with care and in detail and has been expertly drafted for the particular transaction, an interpretation is very strongly negated if it would render some provisions superfluous." (*See* 93 (1981).)

Consistent with the argument of the NALC, prior arbitration decisions have treated an intervening union as a "party" to the proceeding. (*See* Case No. W7M-5F-C 7637 (1989).) As the 1989 arbitration decision concluded, "once a party to the process, there is no basis for treating one party differently from another." (*See* Case No. W7M-5F-C 7637, p. 51 (1989).) This arbitral conclusion, of course, must be understood as meaning that an intervening union can only possess rights in the arbitration proceeding that do not conflict with rights of the original grievants. For example, an intervening union would not have a right to withdraw a grievance from arbitration or to settle a dispute against the wishes of the original parties. In other words, logic inherent in the parties' agreement

teaches that some rights held by the original parties to the dispute are not available to the intervening union.

Article 15.B.5 of the parties' agreement states that, "if either party concludes that a case referred to Area Arbitration involves an interpretive issue . . . , that party may withdraw the case from arbitration and refer the case to Step 4 of the grievance procedure." (*See* Joint Exhibit No. 1, p. 104, emphasis added.) The word "either" is subject to much dispute. In the view of the APWU, the word "either" is one of qualification and means that not every party may refer a case to Step 4. According to the APWU, the dictionary definition of the word "either" implies that only one of two parties is entitled to this right of referral. The position vigorously espoused by the APWU is that the parties with such a right obviously are the original two parties, namely, the APWU and the Employer. If, however, three parties are present in an intervention, it is not a foregone conclusion that the term "either party" refers to only two of the three parties. The text of the collective bargaining agreement itself gives no direct instruction with respect to whether or not an intervening union has a right to refer a matter to Step 4.

The National Association of Letter Carriers supported its theory of the case by returning its own volleys over the net. Opposed to the

APWU's view, the NALC responded that the reference in the agreement to the word "either" was intended to describe the "typical" arbitration proceeding between two parties. Because an intervening union, however, is also a "party" to the proceeding, the NALC argued that the word "either" must be construed broadly to include a third party in the "atypical" circumstance when an intervening union is present. According to the NALC, the presence of three parties in a proceeding compels a broad construction of the word "either " in Article 15.B.5 of the APWU agreement. It is the belief of the NALC that, notwithstanding the dictionary definition of the word, its construction is not inconsistent with the common meaning attached to the word.

The ease of the parties' ability to play dueling decisions, in an effort to show that established arbitral principles favor their respective cases, only served to illustrate that the term "either party" is ambiguous and not dispositive of the issue presented to the arbitrator. The American Postal Workers Union argued that the phrase, in and of itself, determined the result in the case. But the term, even assuming its clarity in the abstract, certainly is not clear when considered within the factual context in which it is used. In the typical arbitration setting, only two parties are present, namely, the original grieving union and the Employer. But the parties have designed

their arbitration process to include the atypical case in which three parties might be present. The APWU argued that use of the word "either" meant the parties intended to afford only the original two parties the right at issue in this case, but the argument failed to address the impact of such a contractual construction on an intervenor's rights. While the APWU's construction of the term is feasible, it is not logically required. The term "either" could just as logically be understood to mean any one of the three parties.

Nor does the argument that the status of an intervening union is that of "an equally contributing party" dictate the result in this case. Although an intervening union's status as a third party to the arbitration proceeding calls into question the APWU's theory of the case, the status of the intervening union as a party that contributes equally to the cost of the arbitration process fails to define other specific rights of an intervening union under the collective bargaining agreement. In other words, this is one of those cases where the contractual force of gravity has pulled the parties into a black hole where few words have been used but the gap in the parties' agreement is resplendent with meaning. None of the parties' understanding of intervenor rights is necessarily unreasonable, but neither is any single theory of the case dispositive.

The American Postal Workers Union added velocity to its argument that only the original two parties enjoy a right to submit a dispute to Step 4 by asserting that the NALC and the Employer would spread confusion with their contractual interpretation. As the APWU saw it, the NALC and the Employer confused an intervening union's right to participate in the arbitration proceeding with the right of the original parties to guide the grievance through the grievance procedure. The APWU complained that the NALC must not expect to control an APWU grievance. Thus, the APWU argued that an intervening union enjoys a right to participate in the arbitration proceeding and, accordingly, possesses all rights necessary to guarantee such participation. But the status of an intervenor does not extend to unrelated rights incident to the grievance procedure, according to the APWU. For example, the right to refer a matter to Step 4 is incident only to the grievance procedure and is not a right that emanates from participating in arbitration, according to the APWU. Hence, such a right is not available to an intervenor, as the APWU sees it.

The APWU premised its construction of the agreement on the design of the grievance procedure set forth in the labor contract. For example, only the APWU may file a grievance under the collective bargaining agreement. Only the APWU and the Employer may settle or

withdraw a grievance. Only the APWU and the Employer at Step 3 may determine whether an interpretive issue exists, whether a settlement should conclude the dispute, or whether to advance the matter to arbitration, either at the regional or national level. (*See* Joint Exhibit No. 1, art. 15, Step 3(c), (d), and (e).) The parties agree that an intervening union is not entitled to these rights because such intervenor rights would deny the original grievant and the Employer the right to participate under their own collective bargaining agreement.

Accordingly, the APWU argued for the existence of a distinction between a procedural right to guide a grievance through the grievance procedure (a right given only to original parties) and the right substantively to participate in an arbitration proceeding (a right given to both the original parties and the intervening union). The APWU maintained that, since the right to refer a matter to Step 4 is not incident to the arbitration proceeding, an intervening union must be denied such a right.

Even assuming the division for which the APWU argued exists, a bright line between rights incident to the grievance procedure and rights incident only to participation in the arbitration process is not nearly as bright as the APWU suggested. The right to transmute a regional arbitration hearing into a national grievance by referring a dispute to Step 4 affects

both the substantive nature of the arbitration proceeding itself as well as the procedural posture of the dispute. If a matter is sent to national arbitration, an intervening union will be bound by a ruling that affects its interests and is national in scope. The ability to refer a matter to Step 4 and, then, to national arbitration is tantamount to the ability to affect a party's interest. The right to do so is not less intrinsic to the arbitration process than the right to present evidence in a case to advance one's cause, and such a right to present evidence is an essential part of participating in the arbitration proceeding.

Relying on Article 15.2, Step 3(e), the American Postal Workers Union also argued that the phrase "either party" supports its construction of the labor contract. The provision states:

> If either party's representative maintains that the grievance involves an interpretive issue under the National Agreement . . ., the Union representative shall be entitled to appeal an adverse decision to Step 4 . . . . (*See* Joint Exhibit No. 1, p. 96, emphasis added.)

According to the analysis of the APWU, the phrase "either party" is consistently used in a manner that restricts its application to the original parties. As the APWU sees it, since the term "either party" is restricted to only the original parties, the use of the same term in Article 15.5.B.5 is necessarily qualified by that same meaning.

The use of the term "either party" in one setting, however, does not necessarily dictate that all circumstances surrounding the use of the term were intended to qualify the meaning of the term when used in another, entirely different setting. The fact that the parties applied the term "either party" to situations where the number of parties to which the term referred varied from two to three or more suggests that the parties did not intend to saddle the term with one rigid meaning. It is equally plausible that the parties intended a broader meaning of the word "either." It could include a meaning that encompassed three or more parties. Moreover, results achieved when using this analysis change with the order of its application. It is at least plausible that the term "either party" is defined by its use in Article 15.5.B.5 (where it is used in a three party setting) so that it might logically follow that, if an intervenor found itself in Step 2, it might have a right to refer the matter to Step 3. The point of this abstract litany is that, while the contract is clear about the fact that an intervening union may participate in the arbitration proceeding, nothing in the labor contract dictates with clarity and specificity what rights are given the intervening union. Nothing in the text of the agreement or the structure of the grievance procedure itself provides an absolute source of guidance for the arbitrator.

Hence, it is necessary to turn to other sources of guidance in the relationship between the parties, such as bargaining history and past practice.

C. The Matter of Past Practice

The U.S. Supreme Court has been clear about the importance of past practice as a source of guidance in understanding the contractual intent of the parties to a labor contract. As 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 although not expressed in it. (*See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 576 (1960).)

As the Court recognized, past practice in a collective bargaining relationship is important because "there are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties." (P. 575.) As another court noted, past practice and bargaining history are useful in determining contractual intent, observing that "it is necessary to consider the scope of other related bargaining agreements, as well as the practice, usage, and

custom pertaining to all such agreements." (*See U. S. Postal Service v. National Rural Letter Carriers,* 959 F.2d 283, 288 (D.C. Cir. 1992).)

Past practice has been the subject of scholarly examination for decades, and it would be inaccurate to comment on the topic without making reference to that doyen of arbitral insight, Richard Mittenthal. He set forth ground-breaking observations on past practice almost four decades ago, and the principles he posited have stood the test of time and been universally adopted by labor arbitrators. (*See* Mittenthal, *Proceedings of the Fourteenth Annual Meeting of the National Academy of Arbitrators* 30 (1961).)

Mittenthal taught that conduct or activity "qualifies as a past practice if it is shown to be the understood and accepted way of doing things over an extended period of time." (P. 32.) He suggested that it was appropriate to test a past practice by its (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; and (4) mutuality. When past practice is used to give meaning to an ambiguous contractual provision, its use is chiefly evidentiary. The burden of going forward with such evidence, of course, is on the party asserting the existence of a past practice. (*See* St. Antoine, *The Common Law of the Workplace,* 81 (1998).)

The National Association of Letter Carriers invoked past practice as a source of guidance to clarify ambiguity in Article 15 of the agreement between the APWU and the Employer. With past practice as the backdrop, the NALC relied on three arbitration cases to assert that an intervening union enjoys a right to refer a dispute to Step 4 of the grievance procedure. In the first case, the APWU intervened in a 1987 regional arbitration proceeding and asserted a right to withdraw the case from arbitration and to refer it to Step 4 of the grievance procedure. (*See* NALC Exhibit No. 1.) Both the Employer and the APWU supported such a right of referral. The NALC declined to take a position as to whether or not the referral was permissible under the NALC agreement but did not expressly oppose the referral. *(See* NALC's Post-hearing Brief, p. 4, fn. 1.)

The second case on which the NALC relied was a national arbitration decision. (*See* NALC's Exhibit No. 3, Case No. H7N-4Q-C 10845 (1991).) In this 1991 dispute, the NALC filed a grievance which proceeded to arbitration; and at this point the APWU intervened. The Employer, then, altered its position so that it was consistent with the NALC, the original grievant. Despite the fact that the original parties to the dispute now agreed, they did not withdraw the dispute but proceeded to process the matter because the APWU was not in agreement with the joint position of

the NALC and the Employer. The NALC concluded that "this disposition reflects the parties' mutual understanding that APWU once it intervened, was equally entitled to have this interpretive matter resolved on the merits." (*See* NALC's Post-hearing Brief, p. 5.)

Finally, the NALC relied on a settlement agreement in 1994 between the NALC and the Employer. (*See* APWU's Exhibit No. L.) The 1994 settlement agreement between the NALC and the Employer reached the following determination:

> During our discussion, we mutually agreed that upon intervention at a hearing, the intervening union becomes a full party to the hearing. As a party, the intervening union has the right to refer a grievance to Step 4. (*See* APWU's Exhibit No. L, emphasis added.)

The NALC argued that this settlement agreement revealed what the parties have understood their past practice to be, namely, "(1) that an intervening union is a full party to the arbitration proceeding; and (2) that full party status necessarily encompasses the right to refer a grievance to Step 4." (*See* NALIC's Post-hearing Brief, p. 5.)

Arbitrator Mittenthal taught that a past practice must be tested against a pattern of clarity and consistency. When this test is applied to the facts of the case before the arbitrator, the first Mittenthal principle is not satisfied. The 1991 decision is not determinative because the intervening

union did not attempt to refer the dispute to Step 4. Consequently, it is not a useful source of guidance in establishing an intervening union's right of referral. The remaining two decisions, however, are useful in unraveling the issue presented to the arbitrator. In both situations, an intervening union referred a dispute to Step 4. Although the disputed right is defined with clarity, it has not been applied with consistency. The 1987 case relied on by the NALC was referred to Step 4 by the Employer over NALC reservations with respect to the scope of intervention rights. The attempt in 1987 to keep the arbitration referral "as procedurally clean as possible" by having the Employer refer the matter to Step 4 (instead of the intervening union accompanied with the NALC's qualified approval) stands in contrast to the wholesale adoption of the policy referred to in the 1991 settlement agreement. (*See* NALC's Exhibit No. 1 and APWU's Exhibit No. L.). Moreover, in a case on which the NALC did not rely in this proceeding, the past practice was rejected by both the APWU as well as a regional arbitrator. (*See* APWU's Exhibit No. Q.) Additionally, no national-level case cited by the NALC presented a wholesale adoption of the principle. At best, the cases cited represented an ambiguous application of the right, ranging from a qualified approval (where an original party referred a dispute

to Step 4) to adoption of an uncontested right, while also including an example of a rejection of the right altogether.

Mittenthal also taught that an alleged past practice should be tested by its longevity and repetition. No bright line separates conduct or activity that has longevity and is consistent from conduct that is not. Often whether the conduct of parties satisfies this particular criterion is a reflection of the equitable discretion of an arbitrator. As Mittenthal taught:

> 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. Just how frequently and over how long a period something must be done before it can be characterized as a practice is a matter of good judgment for which no formula can be devised. (P. 32, emphasis added.)

It is the conclusion of this arbitrator that two instances over a seven year period are not sufficient to satisfy this test of a past practice.

The final lens through which an alleged past practice should be viewed is that the activity or conduct must be acceptable to both parties to the agreement and mutually consented to by them. Evidence submitted to the arbitrator made clear that any alleged practice in this case, although accepted at various points in time by each party, has not been consistently accepted by them. Although the Employer always has supported the right of an intervening union to refer a dispute to Step 4 of the grievance procedure,

both the APWU and the NALC have been wavering in their support and have espoused the right only if it served their interests. Thus, in 1987 the APWU supported the right of referral, while the NALC allowed it to occur but reserved the right to reject it in future proceedings. At other times, the APWU has objected to the NALC's motion, as an intervening union, to refer a matter to Step 4. An arbitrator sustained the objection and denied the intervening union any right of referral, although the case was subsequently referred to Step 4 of the grievance procedure pursuant to the Employer's motion of referral.

Such an inconsistent pattern of conduct hardly satisfies the definition of a past practice as activity that is "shown to be the understood and accepted way of doing things over an extended period of time." On the contrary, each party has attempted to make the best use of such an alleged right of referral to serve immediate organizational interests. The consequence of such an approach has produced an inconsistent application of the alleged right. It would be inappropriate to allow the doctrine of past practice to be used like a dowser's hazel twig "to witch" an area of land for water with all of its uncertainty and "hit or miss" characteristics.. The concept of past practice, when evidence supports its use, is a reasonably

predictable tool of contract interpretation and should be used in a way that helps stabilize the meaning of the parties' collective bargaining agreement.

D. The Matter of Bargaining History

An invaluable source for understanding the meaning of a labor contract is the bargaining history of the parties. Evidence of bargaining history in this case is rooted in testimony by Mr. William Burrus, Executive Vice-president of the American Postal Workers Union. Years ago, he served as president of the Cleveland, Ohio Local as well as a member of the bargaining advisory committee. He acted as a liaison between his geographical area and national negotiators for the national contract. Although often briefed about the substance of national negotiations, he participated in no joint meetings in the early years of his career. (*See* Tr. 61.)

With regard to the right of an intervening union to refer a matter to Step 4 of the grievance procedure, Mr. Burrus testified that:

> The information I was provided by the negotiators in 1978 [was that the] right to refer was limited between the Postal Service and the grieving union . . . . (*See* Tr. 63.)

He understood that only the original two parties to the dispute had a right of referral.

Coming forward in time to 1994, Mr. Burrus had been promoted to the position of Executive Vice-president of the American Postal Workers Union. He served in contract negotiations as the APWU's chief spokesperson on noneconomic contractual issues. At this point in time, the NALC and the APWU were in transition from a period of joint bargaining to bargaining separately with the Employer. According to Mr. Burrus, it was necessary after the NALC's departure to "sanitize" contractual language by removing all references to the NALC from the APWU collective bargaining agreement. This insured that the agreement would reflect promises between only the Employer and the APWU.

Mr. Burrus testified that the parties did not modify language in Article 15.5.B.5 (the referral provision) because the understanding of the parties made it unnecessary to do so. He testified as follows:

> The language in question was not changed because it was understood by the parties in the 1994 negotiations as accurately reflecting the existing parties to the 1994 agreement. It was our understanding even before the breakup of the joint bargaining committee, NALC and APWU, that the language in Subsection 5 applied to the grieving union and the U.S. Postal Service. (*See* Tr. 66-67.)

Mr. Burrus contended that the meaning attributed to the language in 1978 was retained by the parties in subsequent agreements. Hence, it was unnecessary to make any change in that particular contractual provision after the two unions discontinued joint bargaining.

In 1998, the Employer and the APWU made changes to Article 15 of the collective bargaining agreement. The language at issue in this proceeding, however, was not changed. Prompted by concerns of efficiency, the parties removed from regional representatives any power to refer a case to national arbitration. They vested such power in representatives at the national level. Although the issue of referral by an intervening union was a subject of discussions in negotiations between the Employer and the APWU, the parties in their wisdom elected not to share such evidence with the arbitrator. (*See* Tr. 75.)

The theory espoused by the APWU was that the meaning of language adopted by the parties in 1978 was intended to apply only to the grieving union and the Employer. According to the APWU, such language and its meaning never changed in subsequent agreements. As a result, the APWU argued that this meaning infused the disputed language before the arbitrator in this proceeding.

The evidence, however, failed to be persuasive in several ways. First, Mr. Burrus, whose verisimilitude is unchallenged, was never present during the joint discussions in 1978. He based his understanding on the perceptions shared with him by APWU negotiators, and there was no suggestion that their understanding reflected the mutual intent of the parties. Moreover, the evidence was clear that discussions Mr. Burrus held with APWU negotiators did not directly concern referral in the context of a union which already had intervened in an arbitration proceeding. *(See* Tr. 71-72.) The limited nature of discussions he held with negotiators about the subject in dispute before the arbitrator failed to be persuasive with respect to their intent to restrict application of Article 15.5.B.5 to only the original grievant and the Employer.

Second, the meaning attributed to Article 15.5.B.5 by Mr. Burrus has not been handled in a manner by the parties that is consistent with a mutual agreement to restrict the right of referral to only the original parties to a grievance. Initial conduct by the parties under the collective bargaining agreement demonstrated that its meaning was unclear with respect to the right of an intervening union to refer a matter to Step 4. In 1987 (when the issue first arose), neither the NALC, the APWU, nor the Employer had a ready answer with respect to whether the collective

bargaining agreement allowed an intervening union to refer a matter to Step 4 of the grievance procedure. (*See* NALC's Exhibit No. 1.) In the class action grievance of 1987, the APWU, as an intervening union, attempted to refer a case to Step 4 of the grievance procedure. A NALC memorandum described the response to the situation as follows:

> The file will reflect that the APWU intervened at regional level arbitration in this case and requested that the case be submitted to Step 4.
>
> Subsequently, because it is unclear whether the contract allows an intervening union to submit a case to Step 4 and in order to keep this matter as procedurally clean as possible, the Postal Service decided to submit the case to Step 4 as indicated by the enclosed. (*See* NALC's Exhibit No. 1, p.5, emphasis added.)

Even though the APWU asserted a right of referral as an intervening union, all three parties apparently recognized that the collective bargaining agreement was unclear with respect to the scope of an intervenor's rights.

Whatever meaning may have been given to Article 15.5.B.5 in 1978, it is no longer conclusive in 1999. The most recent set of negotiations between the parties addressed the meaning of this disputed provision as well as whether an intervening union may refer a matter to Step 4. The parties determined, however, that such discussions should be characterized as "off-the-record" and should not be shared with the arbitrator. It seems reasonable to conclude that, during those discussions, the parties asserted

contrary positions. Since 1994, the Employer has strongly supported the right of referral by an intervening union. (*See* APWU's Exhibit No. L.) Since at least 1997, the APWU has refused to acknowledge an intervening union's right of referral. (*See* APWU's Exhibit No. K.) Despite the disagreement, off-the-record discussions failed to produce any alteration in Article 15.5.B.5 of the parties' agreement. Despite years of conflicting decisions, the parties failed to resolve the issue by clarifying the language in their collective bargaining agreement. (*Compare* Case No. 91N-412 (1992) with Case No. G90C-4G-C 92040749 (1994).) It is reasonable to conclude from the totality of the record submitted to the arbitrator that the bargaining history of the parties failed to provide a definitive source of guidance with respect to the meaning of the disputed language before the arbitrator. The parties have left it to the arbitrator to fill the gap in their agreement by following other well-established rules of contract interpretation.

E. Design of the Parties' Dispute Resolution System

The APWU argued that it would violate the parties' collective bargaining agreement and clearly exceed an arbitrator's authority to interpret the labor contract as giving an intervening union broader rights than those provided under the agreement itself. (*See* APWU's Post-hearing Brief, p. 23.) The argument is wide of the mark, however, because the parties' collective bargaining agreement has left a gap to be filled with respect to rights of an intervening union. Arbitral jurisprudence calls on rules of contract construction to capture any ambiguous or silent meaning inherent in language selected by the parties to express their bargain. Such gap-filling procedures are a fundamental aspect of contract interpretation and long have been recognized not only by arbitrators but by courts of law as well. While it is not the role of an arbitrator to make contracts for parties, decision-makers for almost two hundred years have accepted the role of defining the scope of language in a contract. (*See, e.g., Gardiner v. Gray,* 171 Eng. Rep. 46 (K.B. 1815).) It is an arbitrator's duty to defer to the agreement of the parties, but applying established methods of filling contract gaps constitutes a legitimate aspect of determining their contractual intention. The eminent Justice Learned Hand once observed that, "as courts become increasingly sure of themselves, interpretation more and more

involves an imaginative projection of the expressed purpose upon situations arising later, for which the parties did not provide and which they did not have in mind." (*See L. M. Jackson & Co. v. Royal Norwegian Government*, 177 F.2d 694, 702 (2nd Cir. 1949), *cert. denied,* 339 U.S. 914 (1950).)

Arbitrators within the parties' own arbitration system, likewise, have been compelled to engage in the gap-filling process. As Arbitrator Mittenthal recently stated, an arbitrator must "listen to what is left unsaid." (*See* 54 Dispute Resolution Journal 40, 41 (1999).) Over a decade ago, a national level arbitrator observed that "arbitrators are frequently required to address matters raised by the parties without having the benefit of an express contract provision upon which to base their judgment." (*See* Case No. H4N-4J-C 18504, (1989), p. 9.).) It is not unusual for an arbitrator to use principles of contract interpretation as a source of guidance in filling gaps in a contract as long as the meaning is drawn from the parties' collective bargaining agreement. As the U.S. Supreme Court made clear, an arbitrator may "look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." (*See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 595 (1960).)

Another useful building block of contract interpretation is the doctrine of reasonable expectations. The doctrine of reasonable expectations often is a helpful tool when an ambiguous provision in a contract must be interpreted. A contractual provision is ambiguous if it admits of more than one plausible interpretation and if the plausible interpretations have contrary effects on rights of the parties. Using the doctrine of reasonable expectations to determine common expectations and to clarify contractual ambiguity is bedrock arbitration law. It is using the language of the parties' contract itself to infer that the parties shared a common expectation. It is assuming that woven into their common expectation is a standard of fairness. The U. S. Supreme Court has said that an arbitration award must draw its essence from the parties' collective bargaining agreement. In searching for the "essence of the agreement," an arbitrator seeks the essence of a fair agreement. As the parties well understand, every contract includes an implied covenant of good faith and fair dealing. *(See Restatement (Second)* of Contracts §205, 99 (1981).)

The totality of the parties' agreement makes it reasonable to conclude that an efficient, speedy dispute resolution system constituted a shared expectation of the parties. The parties are presumed to have understood the impact of principles governing the right of intervention on

the efficiency of their dispute resolution system. They implicitly understood that intervention is a device that balances competing interests of the parties. On one side of the balance is the interest of an existing party in controlling the course of an arbitration proceeding it initiated. On the other side of the balance is the interest of a union in entering an arbitration if the outcome will have an effect on its bargaining unit members. In addition, the union seeking to intervene might possess some expertise or additional information that could help an arbitrator make the best decision. Finally, the parties implicitly understood that an arbitrator has an interest in resolving controversies efficiently and that such efficiency is advanced by deciding related disputes in a single proceeding. While arbitrators generally defer to the right of original parties to control the arbitration proceeding, an appropriate balance occasionally must be struck between conflicting goals. As one scholar observed, "the basic problem of intervention practice is the adjustment between the need [for protection of third parties] and the traditional view that an [arbitration proceeding] is a private controversy in which outsiders have no place." (*See* Berger, 50 Yale L.J. 65 (1940).) Courts have struggled with finding the same balance. As one court stated, "the decision whether intervention of right is warranted thus involves an accommodation between two potentially conflicting goals: to achieve

judicial economies of scale by resolving related issues in a single lawsuit and to prevent the single lawsuit from becoming fruitlessly complex or unending." (*See Smuck v. Hobson,* 408 F.2d 175, 179 (D.C. Cir. 1969); *see also Tobias, "Standing to Intervene,"* 1991 Wis. L. Rev. 415 (1991).)

In designing their system of dispute resolution, the parties chose arbitration as their enforcement mechanism. As a quick and efficient means of dispute resolution, private arbitration proceedings are a logical alternative to traditional litigation. Both the APWU and the Employer (as well as the NALC in a nearly identical design) have recognized the importance of an efficient dispute resolution system by recognizing the possibility of arbitrating any "dispute, difference, disagreement, or complaint between the parties related to wages, hours, and conditions of employment." (*See* Joint Exhibit No. 1, p. 91.) Concerns of efficiency, speed, and expense permeate the parties' collective bargaining agreement, and the parties made clear their commitment to an informal, speedy disposition of grievances. (*See* Joint Exhibit No. 1, p. 91-108.) Indeed, society generally has recognized benefits of arbitration by narrowly restricting judicial review of arbitration decisions. Some courts have gone so far as to ordering parties to pay their opponent's legal fees if they disingenuously assert that an arbitration award failed to draw its essence

from the contract. (*See Teamsters Local No. 579 v. B.&M Transit, Inc.,* 882 F.2d 274 (7th Cir. 1989); and *Dreis and Krump Mfg. Co. v. Int'l Association of Machinists,* 802 F.2d 247 (7th Cir. 1986).) Even in public policy matters, the U. S. Supreme Court has been clear about the enforceability of an arbitration award unless it violates "some explicit public policy that is well-defined and dominant and is to be ascertainable by reference to the laws and legal precedents and not from general considerations of supposed public interests." (*See United Paperworkers Int'l Union v. Misco, Inc.,* 484 U.S. 29, 33 (1987).)

Strong evidence of the parties' intent to capture these benefits of a relatively informal and speedy dispute resolution system is found in Article 15.5.A.9 itself. The "right of intervention" set forth in Article 15.5.A.9 recognizes competing interests that arise when an employer deals with a number of collective bargaining representatives. Disputes, for example, between the American Postal Workers Union and the Employer with regard to allocation of work, elimination of existing jobs, cross-craft transfers, and interpretations of the collective bargaining agreement often implicate interests of the National Association of Letter Carriers and possibly other unions. Under Article 15.5.A.9, a union whose "interests may be affected " can protect those interests by intervening in the arbitration

proceeding, instead of filing its own grievance under its labor contract with the Employer. This aspect of the dispute resolution system advances goals of efficiency and economy by consolidating what inevitably would have been two or more proceedings into a single undertaking. By designing their dispute resolution system in this way, the parties also reduce the risk of conflicting arbitration awards. Should conflicting awards be issued, it no doubt would prompt protracted litigation between the parties.

Advancing efficiency and economy by consolidating arbitration proceedings is a value mirrored in American case law. Even though the concept of intervention is a relatively recent development in the law and is vested in the civil law of Louisiana, strong policy reasons for its adoption have led to its rapid growth. For example, the U. S. Court of Appeals for the Ninth Circuit has recognized that "compelling all three parties to submit their grievance to the same arbitration is practicable, economical, convenient, and fair. It not only avoids the duplication of effort, but also avoids the possibility of conflicting awards." (*See U.S. Postal Service v. American Postal Workers Union,* 893 F.2d 1117, 1121 (9th Cir. 1990).) Other courts have concluded that benefits of consolidated hearings outweigh concerns about the inability of parties to agree on an arbitrator. (*See, e.g., U.S. Postal Service v. National Rural Letter Carriers,* 959 F.2d

283 (D.C. Cir. 1992).) As a general rule, the U.S. Supreme Court has elevated the goal of efficiency when addressing the issue of consolidated arbitration proceedings. (*See, generally, Volt Information Sciences, Inc. v. Leland Stanford University*, 489 U. S. 468 (1989).) Recognizing potential tension between the goal of promoting efficiency and violating a party's contractual right, it becomes the burden of the party objecting to the consolidation to demonstrate prejudice to a substantial right. Merely desiring to have one's dispute heard in a separate proceeding is not a sufficiently substantial right to prevent consolidation. If, on the other hand, one contract called for disputes to be resolved in litigation and another related contract called for disputes to be resolved in arbitration, it arguably would prejudice a substantial right of a party to construe the agreement as imposing an arbitral forum.. The parties impliedly intended their agreement to be construed in a way that struck an appropriate balance which gives respect to competing interests of the parties. As one scholar stated, "throughout the history of the intervention doctrine, the traditional *raison d'etre* of intervention of right--minimizing the injury to third parties caused by judicial processes--has conflicted with court concern about prejudice to existing parties and impairments of orderly judicial

processes." (*See* 89 Yale L.J. 586, 591 (1980).) No prejudice to a substantial right has been shown in the dispute before this arbitrator.

In this case, substantial harm to the goals of efficiency and economy would result by denying an intervening union a right to refer a dispute to Step 4. First, denial of such a right would deter future interventions. A union that sought to intervene in a dispute in an effort to compel a national interpretation would be narrowly restricted in its ability if the APWU's construction of Article 15.5.A.9 was adopted as the correct one. Instead, the union that desired to intervene would be required to file its own grievance under a similar collective bargaining agreement or might initiate a judicial proceeding against the Employer. Absent resolution of the interpretive issue, repeated arbitration proceedings, with potentially inconsistent results, likely would be the consequence. Such a conclusion would cause the parties to waste valuable resources. To avoid such waste some courts have permitted intervention. (*See Matter of Arbitration between Office and Professional Employees*, 1998 WL 226160 (S.D.N.Y., May 5, 1998); *See also Emergy Airfreight Corp.,* 1998 WL 720180 (E.D.N.Y., October 8, 1998).)

Another important reason supports a conclusion that the parties intended to permit an intervening union to refer a dispute to Step 4. It is

reasonable to expect that parties will qualify contractual language which is not in accord with their expectations, and the absence of unambiguous qualifying language in this case suggests the Employer and the APWU recognized that it would clutter the landscape of risk if such qualifying language were added to the agreement. The risk would be that such language would have created a climate of greater uncertainty and would have risked driving various collective bargaining units with whom the Employer dealt further apart. When the parties made promises to each other in their collective bargaining agreement, it is reasonable to assume their expectation was that they were designing a system which would work; and both parties committed themselves to making the system work economically and efficiently. To apply the APWU's construction of the agreement in this case would deprive the parties of some of the essential value of making the grievance-arbitration system serve its purpose, namely, to make the relationship with the Employer work more efficiently.

Although rights of clerks and letter carriers are no longer determined jointly, both unions retain a common past; and their futures are inextricably enmeshed. By retaining similar collective bargaining agreements, the APWU and the NALC remain tightly connected not only by the common mission of the Employer but also by a plethora of arbitration

awards that have given their agreements a shared meaning. Creating two separate galaxies of unrelated, independent arbitration proceedings involving closely similar issues would pose a threat to each galaxy and undermine the overall efficiency of the Employer with its work force.

At a minimum, the APWU's proposed design for the dispute resolution system would undermine an incentive for cooperation between the APWU and the NALC. Such a design would further tax resources of the Employer and would impede its ability to resolve conflicts within its overall work force. A common tradition has the potential of bringing the parties closer together and making it easier for the Employer to streamline workplace processes. Building an impregnable firewall between segments of the work force inevitably will increase tensions between the parties and require more resources to protect similar, but separate interests. It advances the interests of all parties for their galaxies not to diverge irrevocably. Allowing an intervening union a right to turn an area-level arbitration into a national-level one advances the goal of cooperation between the parties by requiring collective bargaining representatives and the Employer to remain in constant communication with each other and by compelling the interpretation of similar agreements in one setting.

Believing that this entire line of argument burns itself out like a supernova, the APWU argued that greater, not less, efficiency would be promoted by denying an intervening union the right of referral. According to the APWU, giving a third party a right to refer a matter to Step 4 would waste resources by creating procedural uncertainty in the grievance process. As the APWU saw it, such uncertainty was highlighted by the Monroe arbitration. (*See* APWU's Exhibit O.) In the Monroe case, the NALC intervened in an area-level arbitration between the APWU and the Employer. The dispute was sent to Step 4 where, without allowing the NALC to participate in the Step 4 proceeding, the original parties to the dispute issued a resolution to the effect that there was no interpretive issue and referred the matter back to area-level arbitration. On remand, the arbitrator concluded that:

> Either (1) this matter has not been properly remanded to regional level arbitration because the Intervenor NALC was not a party to the Step 4 resolution; or (2) if the remand is proper, the Intervenor has the same rights now as before under Article 15 to intervene and again, as before, to refer the matter to Step 4. (*See* Case No. G90C-4G-C 92040749 (1994), pp. 4-5.)

The APWU concluded that such a result from the arbitrator demonstrated the procedural limbo that disputes will undergo as the parties try to define rights of the intervenor after the matter has been referred to Step 4.

First, the APWU's concern can be addressed by clarifying the procedural posture of the case after it has been remanded. Although this decision does not define those rights, it is reasonable to believe that future awards would allow the interventor, who had referred the matter to Step 4, to participate in those negotiations. Participation in the Step 4 proceedings, as contemplated by the arbitrator in the Monroe decision, would minimize procedural uncertainty by allowing all parties to participate in determining how the dispute should proceed. Striking the appropriate balance in that part of the process must await another day and another arbitrator.

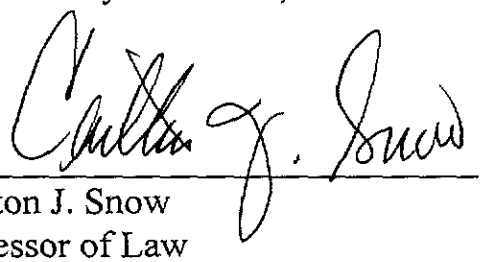
Moreover, even if increased time and resources were expended as disputes bounce back and forth between Step 4 and area-level arbitration, the loss would be minor compared to the loss associated with a decrease in tripartite grievance arbitration. To a certain extent, any loss associated with procedural uncertainty ought to be mitigated by the parties' own good judgment and economic incentive to minimize resources spent on allowing a dispute to bounce around needlessly in a procedural limbo. In short, economic and efficiency concerns should drive the parties toward a mutual resolution of any procedural uncertainty, as the ultimate disposition of the case in Monroe, Louisiana demonstrated. If the parties, however, are regularly required to initiate two grievances in order to address disputes that

arise from a single set of circumstances, the waste of resources cannot be similarly mitigated. Irrevocably trapped in separate proceedings, the parties would be unable, or at least have less incentive, to resolve the dispute in a three-party setting. The result would be a proliferation of arbitration proceedings, potentially conflicting interpretations of similar language in contracts with the same Employer, and a deleterious impact on the ability of the Employer to plan and to manage its workforce. A shared expectation of the parties was that their agreement would advance the Employer's efficient management of the workforce, and that expectation supports a conclusion that the parties to the agreement intended an intervening union to enjoy the right to withdraw a dispute from area-level arbitration and to submit it to Step 4 of the grievance procedure.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the National Association of Letter Carriers, when it has intervened in an area-level arbitration case, has the right to refer the case to Step 4 of the grievance procedure. It is so ordered and awarded.

Respectfully submitted,



Carlton J. Snow
Professor of Law

Date: January 1, 2000