C-24015

REGULAR ARBITRATION PANEL

In the Matter of Arbitration between UNITED STATES POSTAL SERVICE and NATIONAL ASSOCIATION OF LETTER CARRIERS	)	Grievance: Class Action Post Office: Reno, Nevada Case No.: E94N-4E-C 97099062 709 GTS No. 43598

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the Postal Service: Mr. Joseph Huotari

For the Union: Mr. Randal Pocock

PLACE OF HEARING: Reno, Nevada

DATE OF HEARING: October 8, 2002

POST-HEARING BRIEFS: November 19, 2002

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REGULAR ARBITRATION PANEL

IN THE MATTER OF ARBITRATION	)	
BETWEEN	)	
UNITED STATES POSTAL SERVICE	)	ANALYSIS AND AWARD
AND	)	Carlton J. Snow Arbitrator
NATIONAL ASSOCIATION OF LETTER CARRIERS (Grievance: Class Action Case No.: E94N-4E C 97099062 709 GTS No. 43598)	)	

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from 1994 through 1998. A hearing took place on October 8, 2002 in a conference room of the postal facility located at 2000 Vasser in Reno, Nevada. Mr. Joseph H. Huotari, Labor Relations Specialist, represented the United States Postal Service. Mr. Randal Pocock, Local Business Agent, 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, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The arbitrator tape-recorded the proceeding as an extension of his personal notes. The advocates fully and fairly represented their respective parties.

The parties agreed that the matter properly had been submitted to arbitration and that there were no issues of substantive or procedural arbitrability to be resolved. They authorized the arbitrator to retain jurisdiction in the matter for 90 days after a decision. The parties elected to submit the matter on the basis of evidence presented at the hearing as well as post-hearing briefs, and the arbitrator officially closed the hearing on November 19, 2002 after receipt of the final brief in the matter. An ear infection delayed production of a report.

II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

> Did the Employer violate the parties' National Agreement when it changed the break time from 15 minutes to 10 minutes? If so, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 5 - PROHIBITION OF UNILATERAL ACTION

The Employer will not take any action affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violates the terms of this Agreement or are otherwise inconsistent with its obligations under law.

ARTICLE 30 - LOCAL IMPLEMENTATION

A. Presently effective local memoranda of understanding not inconsistent or in conflict with the (current) National Agreement shall remain in effect during the term of this Agreement unless changed by mutual agreement pursuant to the local implementation procedure set forth below.

B. There shall be a 30 day period of local implementation to commence 45 days after the effective date of this agreement, on the 22 specific items enumerated below, provided that no local memorandum of understanding may be inconsistent with or vary the terms of the (current) National Agreement.

IV. STATEMENT OF FACTS

In this case, the Union challenged the decision of the Employer to reduce break periods for letter carriers from 15 minutes to 10 minutes. A memorandum of April 9, 1997 from Postmaster Jack Wilkins informed employees that, effective May 10, 1997, authorized break times would be

reduced from 15 minutes to 10 minutes. This was not the first time that such a decision had been made at the Reno facility. In March of 1988, management a decade earlier had taken the same action. The Union grieved the 1988 decision.

When the Union grieved the earlier reduction in break time, the end result was a Step 4 decision issued on June 29, 1989 which noted that "management's position at the National Level is consistent with the interpretation offered by the Union in this case." (*See* Joint Exhibit No. 2, p. 10.) The Step 4 decision returned the matter to the Step 3 level where, on November 21, 1989, the parties reached a negotiated settlement according to which management agreed to apply the Step 4 decision allowing longer break periods where they had been used in the past as provided by prior local negotiations. The Step 3 decision went to the local parties in this dispute at the Step 2 level, where oral agreement was reached to use 15 minutes for each of the two break periods. There was never any express language in the Local Memoranda of Understanding between the parties regarding the length of break time. Both parties believed, at the time of the 1989 grievance and for some time thereafter, that such language existed. They were simply mistaken.

Fifteen minute breaks were in use following the 1989 grievance and continued in use through 1997, at which point management reduced breaks to 10 minutes. When the Union grieved this decision and argued that this precise issue already had been grieved and resolved almost a decade earlier, management responded by relying on language in the M-39 Handbook instructing that breaks were to be 10 minutes in duration. The Employer also pointed to the absence of any locally negotiated agreement to the contrary. When the parties were unable to resolve their differences, the matter proceeded to arbitration.

V. POSITION OF THE PARTIES

A. The Union

The Union argues that management is collaterally estopped from reducing break time of letter carriers from 15 to 10 minutes due to the 1989 Step 4 resolution of the same issue between the parties. Since the parties at the national level already resolved this issue, the Union maintains that the arbitrator is precluded from modifying or amending a term arrived at by the parties at the national level. In fact, the Union asked the arbitrator to validate

the Step 4 decision that resolved the 1988 grievance and to apply that resolution to the 1997 grievance now under review in this arbitration proceeding.

The Union also alleges that the long-standing past practice of 15 minute breaks at the Reno facility is binding on the parties. According to this alternative theory, the Union maintains that the parties at the national level recognized this past practice when they issued the Step 4 decision in 1989 and allowed longer break periods than those contemplated by the language of the M-39 Handbook. The Union, then, argues that this past practice cannot be changed unilaterally either by management or by an arbitrator.

Based on either theory of the case, the Union concludes that it must prevail and that the grievants must be made whole for the harm they have suffered since May, 1997. The Union proposes either that a monetary remedy be fashioned or that letter carriers be given administrative leave in an amount equivalent to the extra time worked each day since management wrongfully reduced their break time.

B. The Employer

The Employer maintains that, although the parties believed at the time the issue was initially grieved in 1988, the 15 minute breaks had been negotiated locally, there, in fact, is no such language in any Local Memorandum of Understanding between the parties. In the absence of such express language, the Employer maintains that the asserted past practice does not withstand scrutiny because it clearly contradicts express language of the M-39 Handbook which provides for only two 10-minute breaks a day. In support of this conclusion, the Employer relies on the "zipper" clause found at the beginning of every Local Memorandum of Understanding between the parties since 1985. The "zipper" clause, in the opinion of the Employer, precludes the Union from asserting that there is any local agreement between the parties regarding the length of the break period to be given letter carriers in Reno.

The Employer concedes that it has no knowledge of why 15 minute breaks were reinstituted after the 1989 Step 4 decision. But the Employer asserts that the change must have been due to a continuation of a misunderstanding between the parties about the nature of the Local Memorandum of Understanding between them. Management contends that, when it scrutinized the Local Memoranda of Understanding in 1997

and discovered the absence of any express language covering the length of break periods for letter carriers, it gave bargaining unit members the requisite 30 days of notice before unilaterally changing the length of the break period to comply with terms of the National Agreement. Absent any evidence that the longer break period was, in fact, locally negotiated between the parties, management believes it is required only to give carriers two 10-minute break periods in accordance with the parties' nationally negotiated agreement. Accordingly, the Employer concludes that it must prevail in this matter and that no remedy is due the Union because no contractual violation occurred.

VI ANALYSIS

A. An Arbitrator's Role Revisited

The U. S. Supreme Court has made clear that an arbitrator's decision has legitimacy only as it draws its essence from the parties' collective bargaining agreement. An arbitrator is denied the luxury of implementing his or her own brand of justice and fairness. It is not an arbitrator's role to evaluate the fairness or prudence of a bargain struck by the parties but, rather, to determine the nature of their bargain and to apply their contractual intent. (*See United Steelworkers of America v. Enterprise Wheel and Car Corp.,* 363 U.S. 593, 597 (1960).) Absent evidence of some contractual defense such as fraud or unconscionability or mistake, it is not an appropriate role of an arbitrator to evaluate the relative equivalence of a negotiated bargained-for exchange between parties to a collective bargaining agreement.

The Employer is correct in its statement that the arbitrator in the past has ruled on the issue of carrier break time. Such prior decisions, however, cannot automatically be applied to the dispute in this case, even though the issue was similar. Such prior regional decisions should not be ignored, but they are not dispositive. At the regional or area level, the parties have not designed a precedential arbitration system; and prior decisions

would be dispositive in only a narrow range of cases not relevant in this proceeding. If the facts of this case are different from prior cases, earlier decisions might provide a source of guidance but would not be dispositive.

The point is that a dispute of the sort at issue in this particular proceeding requires an arbitrator to engage in both the process of contract interpretation as well as balancing interests of the parties. Terms of the relevant agreement must be explicated, and interests of the parties, especially as represented in prior decisions, must be balanced with any unique facts and circumstances at work in this particular dispute. This particular case also requires an assessment of any relevant past practice that may have arisen between the parties with an eye on whether or not such a past practice actually has been incorporated into a Local Memorandum of Understanding that binds the parties. Relying on the significant foundational work of Professor Aaron and Arbitrator Mittenthal on the topic of past practice, the arbitrator earlier concluded that:

> The collective bargaining agreement should not be interpreted as a rigid, lifeless document but . . . should be seen as a responsive, living constitution in the relationship between the parties. The interpretive focus should be on the contractual relationship between the parties and not on a literal, dysfunctional interpretation of a document that does not mirror the actual intent of the parties. (*See* Case No. W4N-5F-C 4666, p. 12 (1987).)

In order to give deference to a past practice, it must be clear that the parties themselves intended to do so. As the highly regarded common law summary of contract principles states, "The primary search [in contract interpretation] is for a common meaning of the parties, not a meaning imposed on them by the law." (*See Restatement (Second) of Contracts,* §201, comment c, 84 (1981).)

B. Reliance on Technical Doctrine

The Union would have the arbitrator go no further than rely on the technical doctrines of *res judicata* and collateral estoppel. The doctrine of *res judicata* (the particular claim has already been arbitrated) as well as collateral estoppel (the particular issue has already been arbitrated) are technical doctrines used by the judicial system to promote the finality of judgments. According to the doctrine of *res judicata*, if a party could have raised a claim in a previous lawsuit but failed to do so, the party should be precluded from raising the claim in a future lawsuit. According to the doctrine of collateral estoppel if an issue already has been decided in a previous lawsuit, it should not be redecided in a subsequent lawsuit. The

doctrines evolved out of a highly complex common law legal system with multiple layers of appellate review. Although some arbitrators apply these doctrines willy nilly in arbitration, they should be transferred from the common law legal system to the common law of the shop with considerable caution. Policy objectives in the two arenas are not always the same. *(See, e.g.,* Hill and Sinicropi, *Evidence in Arbitration* 369 (1987).)

Although the two doctrines of *res judicata* and collateral estoppel are distinct, underlying goals of each are the same; and the two are often conflated into a single idea, as did the Union in this case. The Union, relying on the doctrine of collateral estoppel, argued that the issue of reducing break time from 15 to 10 minutes already has been decided in a previous arbitration award involving the same parties who now are in disagreement before this arbitrator.

If the doctrine of collateral estoppel were being applied in a court of law, the court would search for four factors to justify premising a decision on the doctrine, namely, (1) whether the same issue is involved; (2) whether the issue actually was litigated and determined in the previous action; (3) whether the issue was essential to the prior judgment; and (4) whether the same parties are involved. (*See Restatement (Second) of Judgments,* § 27.) In recent years, however, courts have permitted the

assertion of collateral estoppel even without meeting the requirement of a mutuality of parties. (*See, e.g., Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979).) It is important to stress that these legal doctrines are not set in stone and are constantly evolving, a fact that helps explain the vibrancy of any decision-making process.

Assuming for sake of discussion that these technical principles from civil litigation are applicable in an arbitrable forum, the Union is correct in its contention that (1) the same issue (a reduction in break time) was decided previously in a Step 4 decision, (2) that the same issue was essential to resolving the earlier conflict, and (3) that it involved the same parties as those now in disagreement before this arbitrator. No evidence submitted to the arbitrator showed a subsequent change in terms of the parties' National Agreement that would mandate a reexamination of the issue in dispute. In fact, evidence submitted by the Employer during this arbitration hearing established that relevant language of Article 30 in the parties' National Agreement has remained largely unchanged since at least 1973. (*See* Employer's Exhibit No. 5.) Likewise, language of the M-39 Handbook relevant in this dispute has remained unchanged since its implementation in 1978.

Regrettably, however, the issue is not as straightforward as either advocate's theory of the case might suggest. The Employer ignored the past, and the Union ignored the future. The main thrust of the Union's theory of the case--that the parties already decided the issue in a 1989 Step 4 decision--ignores subsequent history. The Union's theory of the case ignores a subsequent discovery that the longer break period, in fact, was not locally negotiated between the parties in their Local Memoranda of Understanding at any time. The main thrust of the Employer's argument--that a strict application of the National Agreement allows it to implement 10-minute breaks because nothing to the contrary has been locally negotiated--completely ignores the 1989 Step 4 decision as well as the long-standing practice of providing 15 minute breaks at this facility. The pivotal issue, then, is whether or not there was a locally negotiated understanding between the parties with regard to the length of the break time for letter carriers. The question is what has been the common meaning of the parties as objectively manifested by their words and conduct. Recall the comment by the court in *Thompson v. Fairleigh*, "Show me what the parties did under the contract, and I will show you what the contract means." (See 187 S.W. 2d 812 (Ky. 1945).)

C. The Meaning of "Locally Negotiated"

The language of the parties' National Agreement, the M-39 Handbook, and the 1989 Step 4 decision are consistent in their use of the phrase, "local negotiation." The National Agreement in Article 30 allows existing Local Memoranda of Understanding to remain in effect as long as they are not inconsistent or do not conflict with the National Agreement. (*See* Employer's Exhibit No. 5.) The M-39 Handbook provides for two 10-minute breaks, and this document has been clarified and interpreted by management at the national level to allow longer break periods if they have been previously negotiated at the local level. (*See* Employer's Exhibit Nos. 7 and 8.) The 1989 Step 4 decision directed the parties to use longer break periods in installations where they were provided by past local negotiations. (*See* Joint Exhibit No. 2, p. 10.)

Common law principles of contract interpretation mandate that these three documents be read together. As Section 202 of *Restatement (Second) of Contracts* makes clear, "a writing is interpreted as a whole, and all writings that are a part of the same transaction are interpreted together." (*See* p. 86 (1981).) Rarely is it appropriate to separate one contractual document from another and to read it in isolation. A Local Memorandum of

Understanding is not a free-standing document. As *Restatement (Second) of Contracts* makes clear:

> Meaning is inevitably dependent on context. A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph. A longer writing similarly affects the paragraph, other related writings affect the particular writing, and the circumstances affect the whole. Where the whole can be read to give significance to each part, that reading is preferred; if such a reading would be unreasonable, a choice must be made. (*See* comment b, 88 (1981), emphasis added.)

All three documents at play in this dispute support a conclusion that, if preexisting negotiations lengthened the time of break periods, the longer break periods are not inconsistent with or in conflict with the National Agreement and the M-39 Handbook. Management conceded in this proceeding that Step 4 decisions consistently have held that, if the longer break period was locally negotiated between the parties, it will withstand contractual scrutiny even though seemingly in contradiction with the parties' National Agreement. The concession is a recognition that past practice can trump the express language of the National Agreement, at least as it relates to the length of break time. The Employer responded, however, (and the Union concedes) that the longer break period was never locally negotiated between these parties, as revealed by Local Memoranda of Understanding in effect from 1985 to 1998. (*See* Employer's Exhibit Nos. 1-4).

According to the Employer's theory of the case, the implementation of the 1989 Step 4 decision by the parties in Reno did not constitute a local negotiation and, therefore, never fell within the accepted exception to the 10-minute break policy established by the M-39 Handbook, and it is an eloquently crafted response because it cannot be denied that the parties never actually sat down and negotiated express language to be a part of the Local Memoranda of Understanding between them with regard to that precise issue. In this narrow sense, the break periods are not the product of local negotiation between the parties. It is also correct that there are no written references to re-implementing the 15 minute breaks after the local Step 3 meeting, other than a letter drafted by a managerial representative in 1992 making reference to the 15 minute break periods then in place. (*See* Joint Exhibit No. 2, p. 8.)

This is reminiscent of an aged gopher that spends most of its time burrowing tunnels underground and only occasionally surfaces to find a universe at once strange but also familiar. A dispute in Tulsa is instructive. The facts of the case before this arbitrator are similar to those that arose in Tulsa, Oklahoma in 1979. (*See* Case No. NC-S-18037/S8N3TC679.) In Tulsa, management in 1975 wrote a letter discussing the "coffee break" policy at the Tulsa Post Office. It indicated that carriers were to receive one

10-minute and one 15-minute break. After three and a half years, the Employer notified the Union of its intent to reduce the 15-minute break to 10 minutes because "the policy established by the letter of March 10, 1975 is a unilateral management policy and not a negotiated break and does not appear in our Local Memorandum of Understanding." At a Step 4 level, parties at the national level instructed management in Tulsa to reinstitute the policy of March 10, 1975. Although the Step 4 decision is brief, the fact that the "break time" policy did not appear in the Local Memorandum of Understanding between those parties was not cited as a reason to disallow the longer break period.

A party can never negotiate away an obligation to perform a contract in good faith. The 1989 reinstitution of 15-minute break periods in Reno resulted from a negotiated settlement between the parties at the local Step 3 level and came in response to a Step 4 decision. As such, it is reasonable to assume that the parties reached agreement in good faith, each believing the other to be bound by the resulting settlement. As the parties know, a statutory duty to negotiate in good faith permeates the relationship between the parties. Likewise, a common law duty to perform a contract in good faith cannot be avoided. In this dispute, the Employer theorized that a negotiation and a settlement agreement are not one and the same. Since,

according to the Employer, the 1989 settlement agreement did not constitute a negotiation, it is not binding on the parties. The Union argued, in effect, that the settlement agreement exists outside the Local Memorandum of Understanding and remains binding on the parties as much as any locally negotiated agreement. If the Employer's argument is to be accepted at face value, a union would have little incentive to enter into any settlement with management at any time. On the other hand, if the Union's argument is accepted at face value, the potential arises for any number of extraneous matters to exist outside the Local Memorandum of Understanding. Neither theory is precisely correct in this case.

The language of the parties' National Agreement states that, "At each level of the dispute resolution process, a union representative has authority to settle or withdraw a grievance; and the Employer's representative has authority to grant or settle a grievance in whole or in part." Neither party intended for those words to be devoid of meaning, which would be the case if the authority to settle a grievance did not also include recognition that such a settlement would be binding on the parties.

The dilemma is that, if the Employer's argument fails, what happens to the competing consideration, namely, that any one of a number of extraneously discussed matters could be considered valid even though outside

the purview of the Local Memorandum of Understanding? Fortunately, the dispute before this arbitrator is distinguishable on a number of points. First and foremost, the practice at issue in this dispute (15-minute breaks versus 10-minute breaks) has been a long-standing practice at the Reno installation. Testimony from two veterans of the Reno facility established that the practice of having a 15 minute break existed in this locale for approximately four decades. Mr. Gottschalk, a veteran employee of approximately 26 years, testified that the practice of taking a 15 minute break was already at least 20 years old when he began working for the Employer in 1976. Mr. Higgins, who in 1973 began as a letter carrier in Reno, testified that 15 minute breaks were the standard when he began 30 years earlier. The sheer length of this particular practice alone would distinguish it from most extraneously discussed matters not reflected in the actual written language of the Local Memorandum of Understanding.

At the arbitration hearing, the advocates stipulated that the length of the break period had become embedded in the Local Memorandum of Understanding. At the time the parties reached a Step 4 decision in 1989 at the national level and remanded the matter to the local parties, first, at Step 3 and, then, at Step 2, nothing was reduced to writing. Neither party produced any documents from the Step 2 meeting that reduced the promise to

writing. But the Employer, acting on its belief that the 15 minute break period was the rule at the Reno installation, later issued a written memorandum in 1992 reminding all employees where their 15 minute breaks could be taken. The important point is that an oral contract is just as enforceable as a written contract, but a writing makes the contract easier to prove. In 1992, the Employer merely validated its belief that a promise had been made and that the parties had bound themselves by a promise.

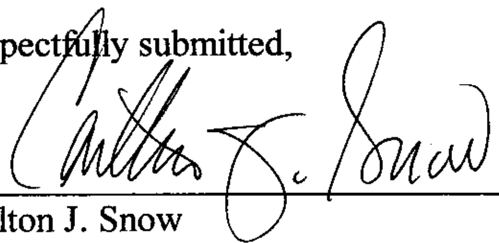
After nearly 40 years of allowing carriers two 15-minute breaks, the Employer decided in 1997 to give 30 days of notice that management intended to reduce the break periods to 10 minutes. As a justification, the Employer argued that there was nothing in writing in the Local Memorandum of Understanding preventing such a unilateral change. To reach such a conclusion, however, would ignore the reality that a person who implicitly or explicity makes a promise causes expectations to arise in the other party and, likewise, causes the other party to rely on the promise. Such promises give rise to expectations about what will happen in the future. It, then, becomes a promisor's obligation to make sure that his or her statement comes true until parties negotiate a different course of action. The binding force of such promises is justified because of the positive impact on the efficiency of a workplace as well as on the inextricable weave between the workplace and

society itself. It is hard to have soundness in one without the other. If the Employer now wishes to reduce the length of break periods from 15 to 10 minutes, it must do so through good faith negotiations with the Union and not through unilateral action in violation of Article 5 of the parties' National Agreement.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer violated the parties' National Agreement when it changed break times from 15 minutes to 10 minutes. Since the parties never explored the scope of a remedy during the arbitration hearing and its impact could be significant, they shall have 90 days from the date of the report in order to attempt to negotiate an appropriate remedy in this matter. During that time period, either party may activate the arbitrator's jurisdiction to fashion a remedy, at which time an evidentiary hearing may be necessary. The arbitrator shall retain jurisdiction in this matter for 90 days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Respectfully submitted,



Carlton J. Snow
Professor of Law

Date January 31, 2003