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REGULAR REGIONAL ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION, AFL-CIO

GRIEVANT: Class Action

POST OFFICE: Des Moines, IA

CASE NO.: I90V-1I-C 93050171 (Unilateral change - rustproofing shuttling duties)

BEFORE: **EDWIN H. BENN, Arbitrator**

APPEARANCES:

For the U. S. Postal Service:	Richard Snider, Labor Relations Specialist
For the Union:	Barb VerSteegh, President, Des Moines IA Area Local
Place of Hearing:	Des Moines, Iowa
Date of Hearing:	August 5, 1994
Dates Briefs Filed:	September 9, 1994 (Service); September 13, 1994 (Union)

AWARD: The grievance is sustained. By entering into an agreement with Ziebart Tidy Car in Urbandale, Iowa which allowed Ziebart employees to perform the work of shuttling long life vehicles from the Des Moines VMF to Ziebart Tidy Car for rustproofing rather than allowing VMF employees to perform that shuttling work as they had in the past to another Ziebart location, the Service violated Article 5 of the Agreement by unilaterally changing the existing past practice. As a remedy, the work of shuttling long life vehicles for rustproofing shall be returned to the employees at the VMF. Inasmuch as the VMF employees had been employed on a full time basis after the removal of the shuttling work, the loss of the shuttling work amounted to a loss of potential overtime opportunities. The affected employees shall therefore be made whole at the appropriate overtime rate for the number of missed shuttles. Given that there was a dispute between the parties concerning how long it takes to drive from the VMF to the Ziebart Tidy Car location in Urbandale, the matter is remanded to the parties to initially determine the amount of time that the trip to the Ziebart Tidy Car location takes and to further determine which VMF employees are entitled to monetary relief under this award.

Edwin H. Benn
Arbitrator

Date of Award: October 13, 1994

I. ISSUE

Did the Service violate Articles 3 and 5 of the National Agreement and Item 22, Section 3(b) of the Local Memorandum of Understanding when it allowed Ziebart Company to shuttle long life vehicles?

II. FACTS

This dispute arises at the Des Moines, Iowa facility. Prior to June, 1993 employees at the Vehicle Maintenance Facility at Des Moines (the "VMF") shuttled long life vehicles between a railhead, the VMF and a privately owned Ziebart rustproofing facility located at 18th and Grand in Des Moines where the vehicles were rustproofed. Automotive Mechanic Daniel Duff testified that the VMF employees did this work on an exclusive basis and the trip took .6 hours or approximately 36 minutes. Supervisor Vehicle Maintenance Walter Scharlau testified that the trip only took up to 19 minutes.

Supervisor Scharlau testified that just prior to June, 1993 rustproofing of the vehicles was discontinued after funding ran out. Further, the Ziebart contractor at 16th and Grand went out of business. Additionally, the floods of the Summer of 1993 in Des Moines washed out the railhead where the vehicles were formerly delivered. The vehicles were then trucked in and were delivered directly to the VMF. As a result, VMF employees no longer shuttled the long life vehicles to Ziebart for rustproofing.

Around June, 1993 another Ziebart location (Ziebart Tidy Car) opened in Urbandale, Iowa at 10500 Hickman Road—a greater distance from the VMF than the former Ziebart location at 16th and Grand. Funds were again available for rustproofing and the Service entered into a contract with the new Ziebart facility. *See* Jt. Exh. 9. The rustproofing of long life vehicles began again. However, VMF employees were not used to shuttle the vehicles to the Ziebart facility in Urbandale. Rather, in accord with the contract between the Service and Ziebart, Ziebart employees drove the vehicles at a cost to the Service of $5.00 per vehicle. According to Duff, it takes approximately .8 hrs or 48 minutes to shuttle a vehicle to the Ziebart location in Urbandale. According to Scharlau, it takes approximately one hour and involves more than one employee because it is necessary for another employee to drive the employee who is to drive the shuttle to the Ziebart location.

The employee complement at the VMF did not change after the VMF

employees ceased performing the shuttling work.

As a result of the Ziebart employees performing the shuttling work, the Union brought the grievance in this matter.

III. DISCUSSION

As a threshold matter, it is first necessary to discuss what this case is *not* about. The parties agreed at the commencement of the hearing that this dispute does not involve the question of whether the Service improperly subcontracted the shuttling work. I therefore express no opinion on the propriety of permitting Ziebart employees to perform the shuttling of the long life vehicles under the doctrines governing the subcontracting of work. *See* Article 32 of the Agreement. This case was progressed through the grievance procedure under the theory that the Service's actions were to be assessed under the provisions of Articles 3 and 5 of the Agreement. I am therefore bound by that limitation.

Article 5 states:

> **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 violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

Based upon the manner in which this case was progressed, I agree with the Union that by allowing Ziebart employees rather than VMF employees to perform the shuttling work, the Service violated Article 5 of the Agreement.

A. Did The Removal Of Shuttling Work Constitute An Action "Affecting Wages, Hours And Other Terms And Conditions Of Employment"?

The removal of shuttling work formerly performed by VMF employees and the assignment of that work to strangers to the Agreement (the Ziebart employees) clearly is an action "affecting wages, hours and other terms and conditions of employment." The shuttling of long life vehicles provided VMF employees with work opportunities. Entering into a contract which assigned that work to the Ziebart employees precluded the VMF employees from performing that work. Although due to the contract between the Service and Ziebart Tidy Car the employee complement at the VMF was not affected in terms of layoffs or excessing, it is fair to conclude that in light of the new location of Ziebart and the increased travel times resulting from the greater distance of Ziebart Tidy Car in Urbandale from the VMF that VMF employees lost overtime oppor-

tunities when the Service removed that work from that performed by the VMF employees.[1]

B. Did The Action Of Removing Shuttling Work "Violate The Terms Of This Agreement"?

But, merely because the Service's actions "affect ... wages, hours and working conditions", the Union's burden has not yet been met. As required by its burden, under Article 5 the Union must also show that the Service's actions "violate the terms of this Agreement."

There is no express provision in the Agreement governing the performance of shuttling work. To meet its burden, the Union focuses upon an asserted past practice.

1. The Status Of A Past Practice As A "Term ... Of This Agreement"

Bona fide past practices rise to the level of explicit terms of the Agreement. *See Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416, 2419 (1960):

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practice of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.

See also, C7C-4A-C 9937 (Nathan, 1989) at 12-13 ("... [I]n cases where past practice is grounded in ambiguous or general contract terms, it has a status equal to written provisions of the contract ... [and] any unilateral effort to discontinue such practice during the term of the contract constitutes a breach of contract.").[2]

Therefore, if a past practice existed whereby the VMF employees performed the shuttling work, that practice rose to the level of terms of the Agreement. A unilateral change of that practice would therefore "violate the terms of this Agreement" under Article 5.

2. Was There A *Bona Fide* Past Practice?

It is well-accepted that to be a past practice, the conditions in dispute must be "(1) unequivocal; (2) clearly enunciated and acted upon;

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[1] That conclusion is buttressed by Supervisor Scharlau's testimony that employees at the VMF are busy performing their work to the extent of actually having eight hours of work per day irrespective of any guarantees.

[2] Further, *see Fairweather's Practice and Procedure in Labor Arbitration* (3rd ed.), 182 ("... the so-called practice is considered an actual contract enforceable apart from any other provision, ... [t]he practice becomes elevated to the status of a contractual right ...."); *Metal Specialty Co.*, 39 LA 1265, 1269 (Volz, 1962) ("Day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are not at variance with any written provision negotiated into the contract by the parties and where they are of long standing and were not changed during contract negotiations.").

(3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties".[3] With respect to the performance of shuttling long life vehicles to an outside firm for rustproofing, those three factors are present in this case. For a substantial period of time, VMF employees at Des Moines exclusively drove the vehicles to and from the rustproofing company.[4] Further, Management recognized that such work was performed because it made the assignments to the employees. Also, prior to the actions giving rise to this dispute, Management complied with Postal Operations Manual Section 713.1 (Jt. Exh. 5—"... *only* postal personnel should operate postal-owned vehicles serviced by commercial service stations or repair shops" [emphasis added]) thereby showing that the practice met the above factors.[5] Similarly, the Service followed the assignment order found in the July 28, 1992 memo from Manager, Vehicle Operations Ron Bice concerning "Shuttling of vehicles" (Jt. Exh. 4—"The shuttling of vehicles for maintenance will be done in the following order ....") and applied that order to the shuttling of long life vehicles for rustproofing again showing that the practice was known and followed.

C. Conclusion On The Union's Showing

I therefore find that the Union has shown under Article 5 that the Service's actions of entering into an agreement with Ziebart Tidy Car to permit Ziebart employees rather than VMF employees to perform the shuttling of long life vehicles for rustproofing was an "action affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor

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3 *Celanese Corp. of America*, 24 LA 168, 172 (Justin, 1954).

4 Although not entirely clear, it appears as though the work of shuttling long life vehicles commenced after the rustproofing of vehicles was contracted out in 1988 due to safety concerns.

5 POM Section 713.1 also provides following the sentence stating that "only postal personnel should operate postal-owned vehicles serviced by commercial service stations or repair shops" that "The Field Division General Manager/Postmaster or the manager may give approval when repairs or road testing are necessary". At the hearing, the question came up as to whether rustproofing amounted to "repairs" so as to permit the authorization of non-postal employees to perform shuttle driving. While it may be questionable whether rustproofing of new long life vehicles constitutes "repairs", the question here is not whether rustproofing amounts to "repairs". The question is whether there was a past practice. Given that VMF employees did the shuttle work in the past, it is fair to conclude that in the past Management at Des Moines did not consider rustproofing as a "repair" so as to permit non-postal employees to do the driving. In other words, the Service cannot now rely upon the argument that rustproofing is a "repair" so as to defeat the Union's past practice argument.

Relations Act". Because past practices rise to the level of terms of the Agreement and because the Union has shown the existence of a *bona fide* past practice where VMF employees performed the shuttling work, that additional showing and the fact that the Service no longer used VMF employees to perform the shuttling work demonstrates that the Service's actions "violate the terms of this Agreement" under Article 5. Stated differently, the Union has demonstrated a unilateral change prohibited by Article 5. The Union has therefore made a *prima facie* demonstration of a violation of the Agreement. That showing shifts the burden to the Service.[6]

D. The Service's Arguments

The Service's arguments do not rebut the Union's *prima facie* case.

First, the fact that "No employees in the VMF had lost any work hours" (Service Brief at 3) does not change the result. The critical inquiry is whether there were lost work opportunities resulting from the Service's allowing the Ziebart employees to perform work that had for a long period of time been performed by the VMF employees. Clearly, there was—particularly given the increased travel time resulting from the utilization of the new Ziebart facility in Urbandale.

Second, the Service argues (Service Brief at 3):

> A practice is no broader than the circumstances out of which it arose and others develop[ed] from choices made by the employer in the exercise of its managerial discretion without any intention of a future commitment.

That argument is not persuasive. Article 3 gives the Service very broad managerial prerogatives. However, Article 3 states that those managerial rights are "subject to the provisions of this Agreement and consistent with applicable laws and regulations". Article 5 therefore serves as a limitation upon the Service's broad prerogatives under Article 3. *See* N8C-1Q-676 (Collins, 1981) at 4 ("The National Agreement recognizes the Postal Service's managerial rights, but also clearly states that those rights do not override provisions of the Agreement. One such provision, in Article V, appears to incorporate the unilateral change doctrine under the National Labor Relations Act."). As discussed above, the showing of the violation of the past practice of VMF employees performing shuttling work serves to demonstrate a violation of Article 5. Therefore, Article 3 cannot serve as a

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6 In light of the above, the Union's argument that the Service also violated Item 22, Section 3(b) of the Local Memorandum of Understanding is moot.

defense to the allegations in this case.

Third, nor can the Service argue that the past practice no longer exists because the location of the Ziebart facility changed. *See* Service Brief at 3. The demonstrated past practice is the performance of shuttling work. It is not material that the location of the Ziebart facility changed. The nature of the work and the identity of the employees who formerly performed that work did not change.

Fourth, the fact that it may have been more economical for Ziebart to perform the shuttling work rather than having VMF employees do so (*see* Service Brief at 3-4) is likewise not persuasive. The past practice is clear—VMF employees performed this type of shuttling work. As discussed above, past practices rise to the level of terms of the Agreement—in this case clear terms of the Agreement. Clear "language" must be enforced irrespective of the harshness of the result.[7] Moreover, inasmuch as this case has not been considered in terms of subcontracting which, under Article 32.1 would consider matters such as "cost" and "efficiency", the fact that it is less expensive to have the Ziebart employees perform the driving is not determinative.

E. The Remedy

After a violation has been shown, the function of a remedy in a contract case is to restore the *status quo*. Therefore, the work of shuttling long life vehicles for rustproofing shall be returned to the employees at the VMF. According to the Union, 203 shuttles were performed by Ziebart employees.[8] That was work that should have been performed by VMF employees. The affected employees shall therefore be made whole for the lost work opportunities. The evidence also shows that during the period that Ziebart employees performed the shuttling work, the affected VMF employees were employed on a full time basis. Therefore, it must be presumed that had the VMF employees been permitted to perform the shuttling duties as required, they would have done so over and above the full time work performed by them during the period at issue. Compensation for the lost

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7 *See* Elkouri and Elkouri, *How Arbitration Works* (BNA, 4th ed.), 349-350:

> ... [T]he clear meaning of language may be enforced even though the results are harsh or contrary to the original expectations of one of the parties. In such cases the result is based upon the clear language of the contract, not upon the equities involved.

8 The contract between the Service and Ziebart Tidy Car calls for 200 shuttles. *See* Jt. Exh. 9 at 2.

work opportunities shall therefore be at the appropriate overtime rate. For the number of shuttles performed by Ziebart employees, that compensation shall be determined by multiplying the length of time it takes to drive from the VMF to the Ziebart facility in Urbandale and return by the affected employees' overtime rates. Given that there was a dispute between the parties concerning how long it took to drive from the VMF to the Ziebart location in Urbandale, the matter is remanded to the parties to initially determine the amount of time that each trip to the Ziebart location would have taken and to further determine which VMF employees are entitled to monetary relief under this award.

IV. AWARD

The grievance is sustained. By entering into an agreement with Ziebart Tidy Car in Urbandale, Iowa which allowed Ziebart employees to perform the work of shuttling long life vehicles from the Des Moines VMF to Ziebart Tidy Car for rustproofing rather than allowing VMF employees to perform that shuttling work as they had in the past to another Ziebart location, the Service violated Article 5 of the Agreement by unilaterally changing the existing past practice. As a remedy, the work of shuttling long life vehicles for rustproofing shall be returned to the employees at the VMF. Inasmuch as the VMF employees had been employed on a full time basis after the removal of the shuttling work, the loss of the shuttling work amounted to a loss of potential overtime opportunities. The affected employees shall therefore be made whole at the appropriate overtime rate for the number of missed shuttles. Given that there was a dispute between the parties concerning how long it takes to drive from the VMF to the Ziebart Tidy Car location in Urbandale, the matter is remanded to the parties to initially determine the amount of time that the trip to the Ziebart Tidy Car location takes and to further determine which VMF employees are entitled to monetary relief under this award.

Edwin H. Benn
Arbitrator

Dated: October 13, 1994