

**REGULAR ARBITRATION PANEL**

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**In the Matter of the Arbitration** ) **Grievant: Class Action**  
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**Between** ) **Post Office: Fort Dodge, IA Center**  
 )  
**UNITED STATES POSTAL SERVICE** )  
 )  
**And** )  
 ) **USPS Case No. E06C-4E-C 08059272**  
**AMERICAN POSTAL WORKERS** )  
**UNION, AFL-CIO** ) **APWU No. 07-129**  
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**BEFORE: Carrie Belle Washington, Arbitrator**

**APPEARANCES:**

**For the USPS: Ms. Janet S. Ades  
Labor Relations Specialist**

**For the APWU: Mr. Robert D. Kessler  
National Business Agent**

**Place of Hearing: Fort Dodge, IA**  
**Date of Hearing: October 7, 2008**  
**Date of Award: November 4, 2008**  
**Contract Provision: Article 5**  
**Contract Year: 2006**  
**Type of Grievance: Contract**

**AWARD:**

The grievance is sustained. The Employer violated Article 5 of the CBA by unilaterally changing a binding past practice and must immediately reinstate the past practice of no lunch or one unit lunch as the practice was prior to the Employer's unilateral change.



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**Carrie Belle Washington, Arbitrator**

## **BACKGROUND INFORMATION**

Pursuant to the Collective Bargaining Agreement (Agreement or CBA) between the United States Postal Service (USPS or Employer) and the American Postal Workers Union (APWU or Union), the Union filed a class action grievance on behalf of regular employees in the Clerk Craft at the USPS in Fort Dodge, Iowa. The grievance stems from the Employer's posted notice on November 20, 2007, that effective December 22, 2007, all craft employees are expected to clock out for a minimum 30-minute lunch break. There is testimonial evidence that since 1983, employees were allowed the option of not taking lunch and to leave work early. On March 8, 1991, a notice was posted to employees in the Clerk Craft stating that "Starting with Tour 1, Friday 3-8-91, on a trial basis, if you desire not to take lunch, you must do the following: You will, **during your break only**, clock out to lunch and wait one (1) unit of time and then clock back in from lunch." [Original Emphasis]. (JX4, p7).<sup>1</sup> Employees wishing to exercise that option signed the sheet. On May 24, 1993, all employees were notified of a Breaks and Lunch Punch and Clocking-in Policy." *Id.* at p8. Among other information, the policy informed employees that the one-minute lunch punch is to be exercised during their break only. To resolve issues relating to timekeeping, employees were required to clock out for one unit and immediately clock back in. Between 1983 and 1991 there were challenges by the Union to aspects of the lunch waiver policy. Both parties agree that the option to waive lunch is a binding past practice; however, they disagree on whether or not the CBA is silent on the issue.

The grievance was filed at Step 1 on December 4, 2007, challenging the Employer's posted notice to employees. The grievance was denied at Step 1 as well as subsequent steps of the grievance procedure. The matter was appealed to arbitration where it was heard by the undersigned on October 7, 2008. The parties were given ample and full opportunity to submit evidence, examine witnesses and argue their respective positions, and both put forth well-presented cases based on the information at hand. In support of its positions, the Union presented the testimony of Thomas Doyle, President, APWU Local 317, and Clerks Kelly Albrecht, Patrick Harvey and David Soppeland. The

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<sup>1</sup>. The decision herein will refer to Joint Exhibit as "JX", Union Exhibit as "UX", and Employer Exhibit as "EX", with corresponding exhibit and page number as appropriate. Page will be referred to as "p".

Employer presented the testimony of Wendy Berg, Postmaster, Fort Dodge Center. The parties opted for closing arguments and submitted arbitral authorities to support their respective positions.

### **ISSUE**

The Union states the issue as: Did the Postal Service violate the National Agreement when it implemented a lunch policy at Fort Dodge? If so, what is the remedy? The USPS frames the issue as: Did Management violate the National Agreement when they posted a notice to employees that they were expected to clock out for a minimum 30 minute lunch break? The arbitrator frames the issue as follows:

Whether the Employer violated the CBA by unilaterally changing a binding past practice between the parties? If so, what is the remedy?

### **RELEVANT CONTRACT PROVISIONS**

#### **ARTICLE 3 MANAGEMENT RIGHTS**

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

- A. To direct employees of the Employer in the performance of official duties;
- B. To hire, promote, transfer, assign, and retain employees in the positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;
- C. To maintain the efficiency of the operations entrusted to it;
- D. To determine the methods, means, and personnel by which such operations are to be conducted ...

#### **ARTICLE 5 PROHIBITION OF UNILATERAL ACTION**

The Employer will not take actions 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.

## **ARTICLE 19**

### **HANDBOOKS AND MANUALS**

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to the Postal Service Manual and the F-21, Timekeeper's Instructions.

### **THE POSITIONS OF THE PARTIES**

#### **The Position of the Union**

It is the Union's position that the Employer unilaterally changed a past practice of the parties in violation of Article 5 of the CBA and contrary to provisions of the Joint Contract Interpretation Manual (JCIM). The Union also contends that the unilateral change violates past practice as defined by authorities on the matter. The Union argues that because the CBA is not silent on mealtime, the contractual language must be changed or Employer must bargain with the Union to change the past practice. Therefore, according to the Union, notice to the Union that the Employer is changing the practice is insufficient to make a unilateral change. However, the Union argues that even if the CBA is silent on mealtime, the Employer must still bargain in good faith over the impact of the change. The Union contends that the Employee Labor Relations Manual (ELM) 18 at Section 432.33 provides for mealtime for employees who work more than 6 continuous hours and that employees are electing not to take lunch and they are not required to do so.<sup>2</sup> The Union submits that since March 8, 1991, employees have been allowed to waive their right to take lunch. According to the Union, the Employer is relying on a March 7, 2006 District SOP to initiate the change, but did not act on the SOP for at least a year and was not implemented until 2008.<sup>3</sup> The Union submits that the Employer's failure to act on the SOP for at least a year and that some employees are still allowed to take no lunch indicate that the Employer's action is arbitrary and capricious. The Union offers that the November 20, 2007 notice of the change had nothing to do with

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<sup>2</sup> Section 432.33 is located at ELM 18 in the June 2007 version and ELM 12 in the May 1989 version of the ELM.

<sup>3</sup> SOP is Standard Operating Procedure.

safety. According to the Union the past practice is a mutual agreement and a benefit to both parties – the Employer has the benefit of more work hours and the employees can go home earlier. The Union submits that the Employer failed to bargain as required and requests the grievance is sustained. As a remedy, the Union requests the Employer to cease and desist its efforts to unilaterally change a past practice, that the Employer will allow all APWU employees to waive their right to take lunch as has been the practice since 1991 and that the Employer compensates all APWU employees by payment of out of schedule premium for all hours they are required to clock out for lunch.

#### The Position of the Employer

It is the position of the Employer that the Union failed to demonstrate a contractual violation in this matter. According to the Employer, employees were allowed to take a one unit lunch on a trial basis starting on March 8, 1991. The practice continued until September 6, 2008. The practice of the short lunch/no lunch became a past practice over the years. The Employer agrees that due to the longevity and mutually accepted nature of the practice it has become binding. Recognizing the practice, the Employer contends that Postmaster Wendy Berg did not take immediate action on the 2006 District SOP. According to the Employer, the Postmaster first discussed the matter with the unions on March 23, 2006 where the new policy was introduced and discussed numerous times with Union representatives. The Postmaster had planned to negotiate if possible. The Employer offers that in changing the short lunch/no lunch practice that the Postmaster considered additional machines at the facility and employees needed to be alert while on the work room floor. Additionally, accident reports between December 2006 and December 2007 showed that the number and frequency of accidents had increased. Thus, the Employer contends that the Postmaster decided that based on the accident rate, the practice of “one unit lunches” would be discontinued effective December 22, 2007 and the notice was posted at time clocks on November 20, 2007. In discontinuing the practice, the Employer offers that taking a 30 minute lunch break is one way for employees to be rejuvenated and to stay focused and alert while working. The Employer submits that the practice did not end on December 22, 2007 as planned but that the Postmaster continued to discuss the matter with the unions at labor-management meetings. A new notice was posted on August 22, 2008 with an effective discontinuance

date of September 6, 2008 when employees began taking lunch breaks. The Employer states the JCIM under Article 5 outlines how a past practice may be changed. According to the Employer, it did not act unilaterally when it discontinued the no lunch practice and took the proper steps to break the past practice after recognizing the practice was no longer efficient or economical. The Employer submits that the Union did not carry its burden and requests that the grievance is denied.

## **DISCUSSION AND OPINION**

### **Relevant Testimony**

The parties agree that by allowing employees to take no lunch or a one unit lunch, and thus leave work early, a binding past practice has been established. The parties did not dispute that the change in the past practice affected the hours and other conditions of employment. By changing the practice, not only would employees not be allowed to take the no lunch or one unit lunch, the employees who did so would not longer be able to have a shorter workday. Therefore, the issue to be resolved is whether the Employer had the authority to unilaterally change the established and binding past practice. A brief review of relevant testimony follows.

Thomas Doyle and several other employees offered testimony to support the Union's position. Doyle, who has been with the USPS and at the Fort Dodge, Iowa, facility since 1981, testified that issues regarding employees taking or waiving lunch have been raised as far back as 1983 with the Union successfully filing grievances on the matter. According to Doyle, since 1983, employees have been allowed not to take lunch and most employees did not. Doyle testified that in 1991, on a trial basis the Employer began requiring employees to take a one unit lunch to remedy a timekeeping problem. Employees who desired to signed onto the one unit break. (See also JX4, p7). In 1993, the postmaster at the time issued another policy regarding clocking in, again to assist timekeeping according to Doyle. (See also JX4, p8). Subsequently, with a new timekeeping system, some employees reverted back to not signing out for lunch because the errors in timekeeping no longer occurred under the new system. However, the no lunch or one unit lunch was continued. According to Doyle, supervisors were not in favor of employees taking lunch because with the change, work backs up. Doyle testified

that the no lunch practice benefits both management and employees because the Employer has more work hours and employees can spend more time with family. Doyle testified that the issue of changing the no lunch policy at the Fort Dodge facility first arose in March 7, 2006 SOP issued by the USPS Hawkeye District which also references the lunch policy at ELM Section 432.33. (See also JX4, p7). The change was not due to efficiency, economical or safety reasons and that no official notice was provided to the Union at the time of the May 15, 2008 labor-management meeting contrary to a statement in the minutes of the meeting. (See JX10). Doyle testified that safety was first raised by the Employer in response to the grievance and that no explanation was given for graphs and charts submitted or correlation between accidents, the no lunch policy and the Clerk Craft. Doyle testified that at the first labor-management meeting where the change was first mentioned, Postmaster Berg said that the change would take at least 125 hours from mail processing. (See also JX9). According to Doyle, although the change was mentioned by the Postmaster at two labor-management meetings that he attended, there were no negotiations over the change. As the person to negotiate for the Local Union, according to Doyle, no negotiations were proposed to him.

Mail Processing Clerk Kelly Albrecht, Clerk Patrick Harvey and Distribution Clerk David Soppeland all offered testimony that the no lunch policy is continuing and that employees are allowed to utilize various means to do so such as taking vacation time or completing Form 3971.

Postmaster Wendy Berg, who has been with the USPS for 26 years and the Postmaster of Fort Dodge since 2005 testified for the Employer. Berg testified about problems that had been caused for timekeeping and overtime with the no lunch policy. According to Berg, the change in past practice was initiated because of the District SOP. Upon receiving the March 7, 2006 District SOP, she was instructed to raise the matter at the labor-management meeting which she did on March 23, 2006. At the time, to familiarize herself with the history of the policy, she requested any information the unions might have. She received information on the 1991 trial signed by employees and the May 24, 1993 one punch policy from Doyle and asked if he had more information; he informed her he had given her all information he had on the matter. Berg testified that she talked to Doyle periodically and received no feedback except that the policy was a

past practice. Berg acknowledged that a past practice had been established but testified that the no lunch policy was a silent agreement; there was no separate agreement and no LMOU. Berg wrote the January 4, 2008 Step 2 decision. In her testimony and in the decision, Berg acknowledged that the no lunch policy had become a binding past practice. (JX3, pp5-7). As noted in the Step 2 decision, Berg stated that there were numerous employees who did not sign onto the 1991 trial waiver and the employees were not following the guidelines for proper one unit lunch punch. She testified that at the end of the shift, employees were in the break room and she needed them on the workroom floor getting the work out. According to Berg, she was also concerned about safety because upon her arrival at the Fort Dodge facility in June 2005 to December 2007, the accidents increased which was another reason for the change. The accident rate went from one in December 2006 to eight in 2007. Since her arrival at Fort Dodge, the facility purchased new machinery for mail processing; she was concerned about the alertness of employees working with the equipment. She submitted charts to demonstrate the increase in accidents. (JX6). According to Berg, she informed the unions that she was going to initiate the change but did not do so in December 2007 as planned because the National Association of Letter Carriers (NALC) informed her they were going to grieve the change. Thus, she waited to implement the change for NALC as well as APWU. Postmaster Berg acknowledged that she did not ask Doyle to negotiate over change but did ask him to discuss the matter; she approached the Union about the change after receiving the District SOP; she never discussed the safety issue at the labor-management meetings; she raised the safety issue and gave the Union the graph for the first time at Step 2; and that the new timekeeping system causes fewer problems.

#### Analysis of the Evidence and Arguments

In accordance with the CBA at Article 5, the Employer will not take actions, such as changing a past practice, affecting terms and conditions of employment that will violate the CBA or otherwise inconsistent with its obligations under the law. Regular fulltime employees work an eight hour shift over an eight and a half hour time period. During that time, the employee is entitled to a one-half hour meal or rest break after six continuous hours of work. In this matter, over time and mutual acceptance, a practice was established which allows the employee to take no lunch or a one unit lunch, i.e., sign

out for lunch and after about a minute sign back in; at the end of the eight hours, the employee could then leave work. In other words, the eight and a half hour work day span was compressed to eight hours for employees who did not take lunch.

Both parties argued the applicability of the JCIM. The JCIM, which according to the introductory page, provides a mutually agreed to explanation on how to apply the contract to the issues addressed. The JCIM's explanation of Article 5, prohibition of unilateral action, contains the parties' general agreement and guidance on past practice. In that regard, the parties reference a paper by Arbitrator Richard Mittenthal before the National Academy of Arbitrators as a guide in determining whether a past practice exists and other considerations.<sup>4</sup> The JCIM based on Arbitrator Mittenthal's paper lists three functions of past practice that are useful in the manner by which the practice may be changed. The functions are: to implement contract language, to clarify ambiguous language or to establish separate conditions of employment. Obviously, the first two cited functions are rooted in or linked to specific contractual language itself. However, the third function – to implement separate conditions of employment – indicates no emanation from a specific contractual provision but as the JCIM states the contract is “silent” and there is no LMOU provision concerning the issue.<sup>5</sup> A binding past practice that implements or clarifies contract language cannot be changed except by changing the contract language or through bargaining. If such is not the case, to change the practice, the Employer is otherwise obligated to provide proper notice to the Union and bargain in good faith over the impact of the change. As explained in the JCIM, where the Agreement is silent on the issue, the parties have agreed that the Employer is not in violation under three conditions, one of which the Employer contends is applicable to the instant matter: the practice is no longer efficient or economical. In this matter, the Union contends that the CBA is not silent on the lunch policy and therefore the Employer was obligated to bargain over the change or change the language of the Agreement. On the other hand, the Employer contends that because the Agreement is silent and the practice is no longer efficient or economical and due to safety concerns, the Employer needs only to provide notice to the Union - which the Employer did.

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<sup>4</sup> The document – Past Practice and the Administration of Collective Bargaining Agreements by Richard Mittenthal - was also submitted by the Union to support its argument.

<sup>5</sup> LMOU is Local Memorandum of Understanding.

The Union believes that the crux of the matter lies with the language of the ELM at Section 432.33 which states the following:

**Mealtime**

Except in emergency situations or where service conditions preclude compliance, no employee may be required to work more than 6 continuous hours without a meal or rest period of at least ½ hour.

The Union contends that the language is incorporated in the CBA at Article 19 and therefore the contract is not silent on the issue. Indeed, there is no disagreement between the parties that Section 432.33 is incorporated in the CBA by Article 19. Additionally, both the District SOP and the Step 2 decision acknowledge this fact. So, the question becomes whether the no lunch or one unit lunch clarifies or implements the language of Section 432.33 and therefore the contract is not silent on the issue. As argued by the Union in *USPS and APWU*, No. I94C-11-C 98028258 (Stallworth, 1999), Section 432.33 does not preclude the employee from working through the lunch period. However, the language in Section 432.33 is clear and unambiguous and does not require clarification. Further, as to implementing Section 432.33, all that is required is for the Employer to comply with the clear language of the Section by simply not requiring employees to work more than six continuous hours without a meal or rest period for a half hour. The past practice at issue herein does not and is not needed to clarify or implement Section 432.33. Therefore, the undersigned cannot make the leap that because Article 19 of the CBA incorporates the mealtime policy of Section 432.33 of the ELM, Article 19 also incorporates the “no lunch or one unit lunch” policy. The Union submitted several arbitration awards to support its position; however given the explanatory language in the JCIM, upon a review of those cases, they are not particularly useful in determining whether or not the CBA is silent on the matter herein. However, those cases may be useful as a guide on whether or under what circumstances may a binding past practice be changed. Generally, the cases stand for the proposition that once a binding past practice has been established, the Employer may not unilaterally change the practice except under very narrow circumstances such as health and safety. For example, in *USPS and APWU*, No. C1C-4K-C 18134 (Dworkin, 1984), the arbitrator determined that a binding past practice was established and the Employer could not unilaterally change the practice because the Employer did not establish that the practice was a safety hazard which

violated Article 14 of the contract.<sup>6</sup> In a later decision by Arbitrator Dworkin involving the elimination of a table and chairs in a hallway area, he determined that a binding practice cannot be unilaterally altered or amended so long as conditions supporting it do not change. *USPS and APWU*, No. C1C-4H-C 32988 (Dworkin, 1986). Hard evidence is needed to sustain the position that the practice unacceptably affected safety. *Id.* In *USPS and APWU*, No. W8C-5D-C 21237 (Levonthal, 1983), the arbitrator held in part that where contract language is clear and unambiguous as with the bar stool issue which had been bargained into the CBA, the Employer cannot argue “efficiency of operation” and to prevail on health and safety the arguments must be compelling. In a case involving an issue similar to the subject herein, Arbitrator Kessler determined that the Employer cannot unilaterally rescind an action that settled a grievance on a “no lunch” policy. *USPS and APWU*, No. I98C-41-C 00155000 (2000). The settlement had been reached by the Labor-Management Committee because there was no understanding that the change was for a trial period. *Id.* See also *USPS and APWU*, No. WAC-5S-C 36608 (Williams, 1988) and *USPS and APWU*, No. A98V-1A-C 98086542 (Talmadge, 2000). Further, upon a thorough review of the JCIM, *USPS and APWU*, No. C98C-4C-C 01163232 (Newman, 2002) submitted by the Employer was likewise unhelpful in resolving this matter.

Nonetheless, while the evidence does not warrant a finding that the binding past practice of the no lunch or one unit lunch policy clarifies or implements a contract provision or LMOU, the evidence does warrant a finding that the practice created a separate enforceable condition of employment. The Employer contends that under the management rights provision of Article 3 of the CBA, the Employer need only to provide notice to the Union and unilaterally change the practice because safety reasons and thus the practice was no longer efficient or economical. Based on the provisions of the JCIM, the above-reference cases and the evidence, the Employer is incorrect in its conclusions. In that regard, the JCIM states that prior to making such a change unilaterally, the Employer must provide notice and engage in good faith bargaining over the impact of the

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<sup>6</sup> Some of the conclusions made by Arbitrator Dworkin seem to be contrary to the past practice provisions in the JCIM particularly since under the JCIM, all past practices although binding may not implement or clarify contract language and therefore from the undersigned’s perspective are not part of the “whole contract.”

change on the bargaining unit. In this matter, while arguably, the Employer did provide notice to the Union, the Employer did not engage in bargaining with the Union. Postmaster Berg specifically acknowledged such during the hearing. As to the purported reasons for the change, the reasons range from a mandate from the District to safety. The matter was first raised with the Union in a labor-management meeting on March 23, 2006 but was not implemented until September 2008. Berg testified that when she first decided on November 20, 2007 to initiate the change, safety was not the stated reason but it was due to the March 7, 2006 District SOP. The District SOP is also the reason noted in the May 15 and June 12, 2008 labor-management meetings and the January 4, 2008 Step 2 decision. There are broad and general statements in the District SOP about “employees performing more effectively and efficiently when they have a sufficient period to eat and rest”, and “management’s obligation of employee safety”. The SOP however states the purpose of the instruction is to ensure consistency in the application of the rules and regulations. The Step 1 response notes the change was needed for efficiency. It was not until the Step 2 decision where Berg was the designee that safety was emphasized. In that decision and in her testimony, Berg stated her concern for safety was based on the rise in accidents particularly with new machinery in the work area. Berg used a graph first submitted at Step 2 to demonstrate the accident rise. As noted by Arbitrator Dworkin, health and safety is a legitimate reason for unilaterally changing a past practice. No. C1C-4K-C 18134. *Supra*. However, there is no evidence linking the accidents to the Clerk Craft or the no-lunch or one-unit lunch practice. Further, there was no corroborative evidence at all on which to base the accidents. Also, there was no evidence supporting how the elimination of the past practice would improve the effectiveness and efficiency of employee performance and be more economical. In fact, according the Employer’s labor-management meetings, Berg believed the change would take 125 hours per week out of mail processing at the facility.

The Employer’s contention that the 1991 sign-up was on a trial basis and not all employees signed up is irrelevant to the resolution of this matter because the Employer acknowledged that due to the longevity and mutual acceptance, the practice had become binding. Certainly, the past practice was memorialized in the 1991 notice and sign-up

and the 1993 notice to employees, and the practice continued until September 2008 - seventeen or so years.

Regarding the Employer's legitimate concern that employees were not following the guidelines, if such is the case, the Employer has a process by which those issues may be addressed on an individual basis. Additionally, the fact that individual employees are not following the guidelines or rules is no reason to change a binding past practice.

In conclusion, based on the above discussion and evidence herein, it is the undersigned's opinion that the CBA is silent on the no lunch or one unit lunch practice. However, the binding past practice created a separate enforceable condition of employment with no proven and excusable rationale for changing the practice. Therefore prior to unilaterally changing the practice, the Employer was obligated to not only provide proper notice to the Union, the Employer was also required to bargain over the impact of the change on the bargaining unit. By failing to do so, the Employer violated Article 5 of the CBA.

For a remedy, the Union requests that the employees be allowed to waive their right to take lunch as has been the past practice since 1991 and that the Employer compensate all employees by payment of out of schedule premium pay for all hours they were required to clock out for lunch. The undersigned is in agreement with Arbitrator Stallworth that monetary compensation is not an appropriate remedy in that no compensation was lost as a result of the Employer's unilateral action. However, the Employer must immediately reinstate the past practice of no lunch or one unit lunch as the practice was prior to the unilateral change.

### **AWARD**

The grievance is sustained. The Employer violated Article 5 of the CBA by unilaterally changing a binding past practice and must immediately reinstate the past practice of no lunch or one unit lunch as the practice was prior to the Employer's unilateral change.

  
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Carrie Belle Washington, Arbitrator