

**NATIONAL ARBITRATION PANEL**

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IN THE MATTER OF THE ARBITRATION.

between	.
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<b>UNITED STATES POSTAL SERVICE</b>	.
	.
AND	.CASE NO.: Q98C-4Q-C 00062970
	.
<b>AMERICAN POSTAL WORKERS UNION</b>	.
<b>AFL-CIO</b>	.
	Annual Leave
	Exchange Option
	PTF Employees
	.

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BEFORE: Linda S. Byars

APPEARANCES:

For the APWU: Richard S. Edelman

For the USPS: Mary Hércules

Place of Hearing: Washington, D.C.

Date of Hearing: May 13 and July 29, 2008

Post-Hearing Briefs: Post-Marked October 28, 2008

Award Summary

The Parties' MOU regarding ALEO applies to all APWU career employees. The Postal Service violated the National Agreement in its application of the ALEO MOU when it excluded PTF employees from the benefit. As requested by the APWU, the Arbitrator remands the question of remedy to the Parties and retains jurisdiction to decide the remedy if necessary.

## BACKGROUND

Since approximately 1991 the Postal Service has provided eligible non-bargaining unit employees the opportunity to receive a lump sum payment in exchange for a portion of the annual leave they would otherwise receive at the beginning of the leave year. [Transcript p. 94 and Postal Service Exhibit No. 3.] In 1993 the National Postal Mail Handlers Union (NPMHU) negotiated an annual leave exchange option for its represented employees. [Postal Service Exhibit No. 2.]<sup>1</sup> During the negotiation of the 1998-2000 Agreement, the Postal Service and the APWU reached agreement on an annual leave exchange option (ALEO), which states in a Memorandum of Understanding (MOU):

The Parties agree that APWU career employees will be allowed to sell back a maximum of forty (40) hours of annual leave prior to the beginning of the leave year provided the following two (2) criteria are met:

- 1) The employee must be at the maximum leave carryover ceiling at the start of the leave year, and
- 2) The employee must have used fewer than 75 sick leave hours in the leave year immediately preceding the year for which the leave is being exchanged. [Union Exhibit No. 1 and Joint Exhibit No. 1, pp. 307-308.]

Following the negotiation of the provision, a dispute arose over the ALEO as it applied to Part-Time Flexible (PTF)

employees. By letter dated December 16, 1999, the APWU initiated a Step 4 Grievance protesting the decision of the Postal Service to exclude PTF employees under the negotiated ALEO. [Joint Exhibit No. 2, pp. 6-7.] By letter dated March 13, 2000, the Postal Service denied the Grievance, and by letter dated March 28, 2000 the APWU appealed the dispute to arbitration. [Joint Exhibit No. 2, pp. 1, 4-5.]

The Grievance came before the Arbitrator at hearing on May 13 and July 29, 2008. At the request of the Parties, the record remained open for post-hearing briefs. The Parties agreed to extend the deadline for filing post-hearing briefs until October 28, 2008. [Unmarked Letter dated October 10, 2008 signed by Richard S. Edelman for the APWU.]

The Parties agree that an earlier issue over timeliness is withdrawn. [Transcript p. 10.] The following issue is properly before the Arbitrator for decision and award.

#### STATEMENT OF ISSUE

Did the Postal Service violate the National Agreement in its application of the Memorandum of Understanding regarding the Annual Leave Exchange Option and, if so, what is the remedy? [Transcript p. 8, Joint Exhibit No. 2, p. 4.]<sup>2</sup>

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<sup>1</sup> Other bargaining units also have similar agreements with the Postal Service.

<sup>2</sup> The APWU asked the Arbitrator to retain jurisdiction to decide the remedy should it prevail on the primary issue.

## OPINION

Turning first to the language of the MOU, there is no dispute that the term, "APWU career employees," is mutually understood by the APWU and the Postal Service to include Full-time, Part-Time Regular, and Part-Time Flexible employees. The ALEO provision contains no exception for PTF employees, for those who are not advanced annual leave, or any other exclusion than those expressed as part of the criteria listed, i.e., the employee must be at the maximum leave carryover ceiling at the start of the leave year, and the employee must have used fewer than 75 sick leave hours in the leave year immediately preceding the year for which the leave is being exchanged.

The Postal Service submits that the Parties understood at the time the provision was negotiated that PTF employees would be excluded from the ALEO because they do not receive advanced annual leave. There is no dispute that PTF employees earn annual leave based on the number of hours they work and do not receive advanced annual leave, as is advanced to full-time and part-time regular employees. [Postal Service Exhibit No. 6.] However, contrary to the position of the Postal Service, these facts do not necessarily preclude including PTF employees in the ALEO benefit.

The Postal Service maintains that because full-time employees and part-time regular employees have set schedules, "You can more or less project what they're expected to earn through the year based on the work schedule." [Transcript p. 125.] It is the position of the Postal Service that PTF employees are excluded from the ALEO because they "have a flexible schedule, and it would be difficult to determine how much leave to advance them at the beginning of the leave year." [Transcript p. 125.] However, as the testimony of Benefits and Compensation Manager Ellen Snyder demonstrates, the regulations provided in Postal Service Exhibit No. 3 do not state that PTF employees are ineligible for participating in the ALEO and the regulations could be changed to say that PTF employees get advance leave. [Transcript pp. 123 and 126.]

Eligible career employees may exercise their option to sell back leave prior to receiving the advanced leave, which is not credited to them until the beginning of the next leave year. By advancing leave to PTF employees, all eligible APWU career employees will be able to exercise the option to sell back a maximum of forty hours of annual leave prior to the beginning of the leave year in which they receive it.

As the Postal Service maintains, articles written by APWU National President William Burrus, who was Executive Vice President and responsible for negotiating the ALEO

benefit for the 1998 Collective Bargaining Agreement, demonstrate that he understood the distinction between those who receive advanced annual leave and those who accrue leave as they earn it, as with PTF employees. However, the record does not demonstrate that Mr. Burrus understood that PTF employees were excluded from the ALEO because they did not receive advanced leave. To the contrary, Mr. Burrus' statement in the same article cited by the Postal Service includes:

Part-time flexible employees who are not advanced annual leave and who meet the eligibility criteria will be paid for 80 hours of annual leave which will be deducted from the 440 hours carryover.  
[Union Exhibit No. 5, p. 3.]

Although there is no dispute that the regulations cited by the Postal Service prevent exchanging accumulated or earned leave due to the regulations of the Internal Revenue Service, the Postal Service is not precluded by anything other than its own regulation from advancing leave to PTF employees.

The record is undisputed that due to Internal Revenue Service "constructive receipt" regulations, it is necessary for employees to receive credit for leave in advance in order to avoid the negative tax consequences of exercising the ALEO on leave already earned. However, the record fails to demonstrate that the Parties mutually understood, at the time the ALEO was negotiated, that the IRS regulation precluded PTF employees benefiting from the Option. Moreover, the

record demonstrates that leave can be advanced to PTF employees in order to comply with the contractual language while meeting the IRS regulations.

The Postal Service maintains that the nearly identical language in the memorandum of understanding between the NPMHU and the Postal Service is demonstrative of its position on the exclusion of PTF employees. The record demonstrates that the APWU was aware of the NPMHU annual leave exchange option at the time of negotiation, as the Postal Service contends. However, there is no dispute that implementation and application were not discussed during negotiations.

[Transcript pp. 159 and 169.] Even if the Parties agreed to the annual leave exchange option language that the Postal Service negotiated with the NPMHU, it does not necessarily follow that they were aware of or agreed to the identical application under the NPMHU contract.

Contrary to the position of the Postal Service, the record fails to demonstrate that Postal Service witness Sam Pulcrano, who negotiated the annual leave exchange option in the contract with the NPMHU, is the only person competent to talk about the contract provision. Mr. Pulcrano was not involved in the negotiation of the ALEO MOU between the Postal Service and the APWU, and the "chief spokesperson at

that subcommittee who worked on it" did not testify for the Postal Service. [Transcript pp. 160 and 161.]<sup>3</sup>

When asked during direct-examination to focus his attention on the first paragraph of the MOU language in the NPMHU contract and explain what employees were eligible to participate in the annual leave exchange option, Mr. Pulcrano stated:

It was all career mailhandler employees who would receive and be eligible for advanced annual leave, so that would only apply to full-time regulars and part-time regulars. [Transcript p. 151.]

There may have been an understanding between the NPMHU and the Postal Service during the negotiation of their contract or even later that the MOU regarding the annual leave exchange option would apply only to full-time and part-time regular employees, but the contractual language does not convey such an understanding. As the APWU stated in an objection to the question posed to Mr. Pulcrano concerning the meaning of the provision in the Mail Handler contract, "The document speaks for itself." [Transcript p. 152.]

The language of the MOU negotiated by the Postal Service and the APWU also speaks for itself, and the record fails to demonstrate that the APWU understood during negotiation or agreed during or following negotiation that the language would not apply to all APWU career employees.

<sup>3</sup> Mr. Sgro agreed during cross-examination that it was probably former USPS Labor Relations Vice President Anthony Vegliante who negotiated the

Mr. Burrus, who testified that he “was involved in the direct negotiations that resulted in the agreement on the annual leave exchange option,” provided undisputed testimony that during negotiation the Postal Service did not take the position that PTF employees were excluded or that the practice of the NPMHU contract was to be applied. [Transcript pp. 28, 64-65.] As Mr. Burrus testified, “We know how to say if there are exclusions, we know how to say except for part-time flexible employees, or we know how to say except for employees who do not receive advance leave, we know how to write that language.” [Transcript pp. 53-54.] The Parties did not write such language, and the APWU relied on the language as written.

Citing How Arbitration Works, the APWU reasonably maintains that, “...when terms are adopted without discussion during negotiations, an arbitrator may resort to an objective standard and interpret the terms in accordance with the ordinary meaning of the words used.” [Elkouri & Elkouri, How Arbitration Works (Alan M. Rubin, 6<sup>th</sup> ed. 2003) pp. 448-449.] The ordinary and mutually understood meaning by the Parties of the term, “career employees,” includes PTF employees. Therefore, as the APWU maintains, the language is enforceable even if the results are contrary to the expectations of the Postal Service.

The correspondence between the Parties following negotiation of the ALEO provides further support for the APWU position that the MOU is clear on its face and that the ambiguity created by the practice under the contract negotiated with the NPMHU was not recognized during negotiations. Postal Service witness Peter Sgro participated in the 1998 negotiations with the APWU but did not participate in the negotiation of the ALEO MOU. [Transcript p. 163.]<sup>4</sup> However, the testimony and correspondence indicates that sometime prior to December 15, 1999, Mr. Sgro, based on advice from the Compensation Department, advised Mr. Burrus that PTF employees would be included in the ALEO. [Transcript p. 170 and Union Exhibit No. 7.] Mr. Sgro "corrected that statement in a telephone conversation" he had with Mr. Burrus. [Union Exhibit No. 7.] However, his initial understanding and agreement with Mr. Burrus is consistent with the clear language of the ALEO MOU.

Contrary to the position of the Postal Service, it is not a reasonable and fair conclusion that the APWU agreed to the same benefit that was previously negotiated and implemented with the Mail Handlers' Union and implemented with non-bargaining unit employees. The Parties agree that implementation and application was not discussed during negotiations, and the numerous discussions after the fact

<sup>4</sup> He participated in negotiating the ALEO Addendum signed by him on May

over implementation are not relevant to the understanding at the bargaining table. Absent recognition, discussion, and agreement at the bargaining table to exclude PTF employees, the clear language is controlling.

As the Postal Service contends, custom and practice is one of the standards used for interpreting ambiguous contract language. However, the contract language is clear in this case. That PTF employees have not previously been advanced leave does not preclude advancing leave to them, as advanced to other career employees, in order for them to participate in the ALEO benefit. The possibility that PTF employees could elect to sell more leave than they actually earn and the burden on the Postal Service to recoup any unearned exchanged leave does not override clear contractual language. The Parties have agreed to measures to avoid unintended negative tax consequences in other circumstances and can do so for PTF employees.<sup>5</sup>

The Postal Service compares a similar grievance decided by Arbitrator Ira Jaffe on June 5, 2002 involving the Postal Service and the Fraternal Order of Police. A dispute over the meaning of the criterion that the employee must be at the maximum leave carry-over ceiling at the start of the leave

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10, 1999 and by Mr. Burrus on May 11, 1999.

<sup>5</sup> In May 1999 due to the delay between the acceptance and ratification of the 1998-2000 Collective Bargaining Agreement and the missed opportunity to exercise the ALEO option for leave year 1998, the Parties agreed that eligible employees would have the opportunity to sell back a

year, which is also contained in the contract between the Postal Service and the APWU, was resolved in favor of the Postal Service. Arbitrator Jaffe's decision is based in part on his finding that there was no basis to adopt an interpretation of the language which was at odds with the well established interpretation given to the language in the other agreements, practice, or published annual bulletins predating the benefit negotiated for employees represented by the FOP. However, Arbitrator Jaffe's decision also includes an analysis of the contractual language that concludes with the following:

If the Parties desired to divorce eligibility for ALEO from being at the maximum leave carry-over ceiling and to instead state that all employees who possessed 440 hours or more of annual leave at the start of the leave year (including leave hours credited at the start of the leave year for leave to be earned during the remainder of the leave year) were eligible for ALEO, they could easily have done so. They did not. [Case No. NAT-00-107-C, p. 12.]

Likewise in the instant case, if the Parties had intended to exclude some career employees from the ALEO benefit, they could easily have done so. Absent an agreement between the Postal Service and the APWU, the Arbitrator is without authority to amend the clear language of the MOU in order to make it consistent with the application of agreements between

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maximum of 80 hours of annual leave in order to makeup for the missed opportunity.

the Postal Service and another union. Accordingly, the Arbitrator finds for the APWU and makes the following Award.

AWARD

The Postal Service violated the National Agreement in its application of the Memorandum of Understanding regarding the Annual Leave Exchange Option. Therefore, the Grievance is sustained. The issue of the remedy is remanded to the Parties, and the Arbitrator retains jurisdiction to decide the remedy if the Parties are unable to reach agreement.

DATE: November 30, 2008

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Linda S. Byars, Arbitrator