



## American Postal Workers Union, AFL-CIO

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1300 L Street, NW, Washington, DC 20005

October 8, 2010

**To:** Local and State Presidents  
Regional Coordinators  
National Business Agents  
Resident Officers

**From:** Greg Bell, Director   
Industrial Relations

**Re:** Annual Leave Exchange Option, PTF Employees – Remedy

Enclosed you will find a copy of a recent national-level award by Arbitrator Byars on the remedy for depriving part-time flexible employees of the Annual Leave Exchange Option (ALEO). The arbitrator granted the union a remedy in an amount equal to interest, at the Federal Judgment Rate, on what the Postal Service would have paid to 26% of eligible PTF employees for each year they were excluded from the ALEO benefit. (*USPS #Q98C-4Q-C 00062970; 9/30/2010*)

This case arose after a Step 4 dispute was initiated by the APWU on December 16, 1999 challenging the decision of the Postal Service to exclude PTF employees from application of the Memorandum of Understanding on ALEO. Following arbitration hearings, Arbitrator Byars ruled that the MOU applies to all APWU career employees and management violated the National Agreement in its application of the ALEO MOU when it excluded PTF employees from the benefit. She also remanded the issue of remedy to the parties, but retained jurisdiction to decide the remedy if necessary. (The first ALEO award was issued on 11/30/2008.) After the parties were unable to reach agreement on a remedy, the Postal Service sent the APWU a letter indicating that it intended to implement the ALEO for APWU-represented PTF employees for leave year 2010. Thereafter, the union and Postal Service scheduled a hearing for the purpose of presenting evidence and arguments concerning remaining issues on the remedy in this case.

The Postal Service contended that the only appropriate remedy for this dispute is to provide eligible PTF employees an opportunity to participate in the ALEO, which it already has done beginning in leave year 2010. It asserted that there was no harm warranting a monetary remedy in this case since even without participation in ALEO, employees retained the right to use leave that was subject to forfeiture.

The union countered that prospective compliance was insufficient to compensate PTF employees for damages that occurred because of the contract violation. We argued that eligible PTF employees were harmed monetarily during the period they were denied the ALEO benefit and are entitled to a monetary remedy.

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Arbitrator Byars agreed with the APWU's argument that "those eligible PTF employees, who would have preferred cash in advance of earning leave, were harmed" and that the right to exchange leave for cash is a "valuable one." She accepted our arguments that leave taken under "pressure of forfeiture" isn't equivalent to leave taken when employees want or need to use it, that employees who had 440 hours of banked leave and accrued an additional 240 hours of leave wouldn't have been able to use all the leave at times they desired or needed to use it, and employees who had to use leave to avoid forfeiture were deprived of earning an additional week of pay which they would have earned had they been given the opportunity to exchange leave for cash. Arbitrator Byars also found that, as the APWU maintained, employees "who would have chosen cash instead of leave would have done so for a variety of reasons including, e.g., making a major purchase, contributing to college tuition or paying off debt." "Such opportunities were lost as a result of the violation, and the fact that such employees used leave because they would otherwise forfeit leave is not an adequate substitute for the lost opportunity to work and receive cash," according to the arbitrator.

Arbitrator Byars concluded that awarding a monetary remedy in this case wouldn't be "punitive" because compensation is warranted due to "harm done to eligible PTF employees." However, she accepted the Postal Service's argument that "awarding a monetary remedy to every eligible PTF employee constitutes unjust enrichment to those who would have chosen leave over cash even if they had been included in the ALEO benefit ...." The arbitrator determined that "[e]stimating the monetary loss includes estimating the number of employees who would have chosen to receive cash and the amount of cash they would have elected to receive" and the "only estimate in the record of the rate at which eligible PTF employees would have chosen cash each year they were eligible is the rate at which they chose it the first year they were permitted to participate in the ALEO program" which equaled approximately 26% of PTF employees in 2010. Arbitrator Byars then noted that "[t]he parties agree that they cannot recreate the past and determine what employees would have done for make-whole purposes" and "it is not possible in the instant case to determine the value of the wrong done to individual employees" since "it is not possible to identify individual PTF employees who would have chosen cash each year they were denied the ALEO ...." On this basis, she decided that "[a] monetary award to the APWU is the only reasonable mechanism for protecting the integrity of the Agreement in the instant case ...."

Arbitrator Byars finally determined that "[i]f 26 percent of eligible PTF employees had chosen the cash option each year and earned interest on the case, an interest payment of that amount to the APWU serves the purpose of protecting the parties' Agreement while also recognizing the nature of the program."

Enclosure

GB/MW:jm  
OPEIU#2  
AFL-CIO

**NATIONAL ARBITRATION PANEL**

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IN THE MATTER OF THE ARBITRATION.

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

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BEFORE: Linda S. Byars

APPEARANCES:

For the APWU: Richard S. Edelman, Esq.

For the USPS: Mary Hércules, Esq.

Place of Hearing: Washington, D.C.

Date of Hearing: June 15, 2010

Post-Hearing Briefs: Received August 30, 2010

Award Summary

There were eligible PTF employees harmed monetarily as a result of their exclusion from the ALEO benefit. The estimate of the number of eligible PTF employees harmed by the contract violation is based on the number of eligible PTF employees electing the benefit for 2010. Those harmed by the contract violation cannot be identified, but an adequate remedy is necessary to protect the integrity of the parties' Agreement. Therefore, the Postal Service shall pay the interest, at the Federal Judgment Rate, to the APWU on an amount equal to what it would have paid to 26 percent of eligible PTF employees for each year they were excluded from the ALEO benefit. The Arbitrator retains jurisdiction for the purpose of deciding any dispute arising over the interpretation and/or implementation of the remedy.

## BACKGROUND

The Award dated November 30, 2008 states:

The Postal Service violated the National Agreement in the 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. [Joint Exhibit No. 3.]

By letter dated August 31, 2009, the Postal Service notified the APWU in pertinent part as follows:

Although the parties have been unsuccessful in reaching a mutually agreeable remedy for alleged missed opportunities in prior years, this letter serves as advance notification of the manner in which the Postal Service intends to implement the Annual Leave Exchange Option for APWU-represented PTF employees for leave year 2010.

Specifically, eligible PTF employees will be afforded the opportunity to receive a lump sum payment in exchange for a portion of the annual leave the PTF employee is expected to earn in leave year 2010. [Postal Service Exhibit No. 14.]

Because the parties were unable to reach agreement on the remedy, they scheduled a hearing for June 15, 2010 for the purpose of presenting evidence and arguments concerning the remedy. The parties submitted their post-hearing briefs dated August 27, 2010.

## POSITIONS OF THE PARTIES

It is the position of the Postal Service that the only appropriate remedy for this national level dispute is the remedy already implemented, i.e. providing eligible PTF employees the opportunity to participate in the ALEO beginning in leave year 2010. The Postal Service points out that the ALEO is an opportunity to exchange leave for cash, an even exchange, where there is no loss of monetary value. The Postal Service maintains that its reasonable and good faith interpretation of the ALEO MOU makes a monetary remedy unreasonable and unnecessary.

The APWU disagrees that compliance prospectively is sufficient to compensate for the damage done by the violation. The APWU submits that denying a monetary remedy in this case would be inconsistent with the basic principle that where there is a wrong, and harm suffered as a result of that wrong, there must be a remedy. It is the Union's position that eligible PTF employees were harmed monetarily during the period that they were denied the ALEO benefit and therefore are entitled to a monetary remedy.

## OPINION

As the parties recognize in their post-hearing briefs, there are national-level arbitration decisions that set forth

the governing principles for remedies. For example, Arbitrator Richard Mittenthal opined:

Arbitrators have an extremely large measure of discretion in determining how a contract violation should be remedied. They can and should consider the nature of the wrong done, the damage (or lack thereof) to the employees, the practical impact of the remedy sought, the nature of the bargaining relationship, and other such matters. [Case Nos. H1C-NA-C 97/123/124, p. 6.]

As the cases cited by the parties also demonstrate, punitive damages are generally unavailable as a remedy for a contract violation in arbitration.<sup>1</sup> The opinion that remedies should correspond to the harm suffered has been expressed in many arbitration decisions including one by Arbitrator Carlton J. Snow (Case No. W1C-5F-C 4734), cited by the Postal Service.

In the instant case, the Postal Service maintains that there is no monetary damage due to employees who were not afforded the opportunity to exchange annual leave. As the Postal Service points out, the ALEO is an exchange program; the employee gives up future annual leave for pay. Eligible PTF employees, who were not permitted to sell their leave, had leave available to them. However, as the APWU contends, those eligible PTF employees, who would have preferred cash in advance of earning the leave, were harmed. The right that

<sup>1</sup> Arbitrator M. David Vaughn expressed such a conclusion in the case cited by the APWU, *United States Postal Service and National Postal Professional Nurses, Work Jurisdiction Grievances Phase IV (Remedies)* as did Arbitrator Daniel G. Collins in *United States Postal Service and Fraternal Order of Police, NAT-96-016C*, cited by the Postal Service.

should have been available to them is a valuable one. As the APWU contends, it cannot be assumed that employees would fail to avail themselves of that right.

As the Postal Service maintains, the evidence demonstrates that there are career employees who forfeit some of their leave irrespective of their ability to participate in the ALEO. However, the evidence demonstrates that slightly less than half of the career employees who were permitted to participate in the ALEO during the 2000 to 2009 time period (when PTF employees were excluded from the benefit) chose cash instead of using some of the leave they earned for the year. [Transcript p. 84, Testimony of Larry Cruse, Manager of Headquarters Payroll.] As the APWU maintains, forfeited leave is not a measure of damages because it underestimates the damage to those eligible PTF employees, who used leave they would have forfeited but would have chosen to exchange such leave for cash.

As the APWU also contends, the analysis concerning the value of banked leave is not relevant to the issue of remedy. The analysis and testimony of Labor Economist Joseph Alexandrovich demonstrates that the value of annual leave increased during the period 2000-2009, and therefore the value of banked or carryover leave increased. [Transcript p. 104.] However, the employees eligible for the ALEO had already banked the maximum carryover leave. As the APWU

submits, the only available option to them was to use the leave during the current leave year to avoid forfeiting leave at the end of the leave year.

There is no dispute that once an employee reaches the 440-hour maximum carryover amount, the available option is to use the leave during the current leave year to avoid forfeiting leave at the end of the leave year. Therefore, the Postal Service's conclusion that eligible employees who saved their leave benefited over time and will be able at the time of separation to cash out in terminal leave up to the 440 maximum carryover amount, at the higher rate of pay or use it later at a higher rate of pay than when earned, is not relevant to the issue of remedy.

The APWU points out that the intent of the ALEO program is to allow employees with large leave balances to receive cash for part of their leave. Employees who are unable to bank more leave, as is the case when an employee is eligible for the ALEO, sometimes prefer cash to using leave or forfeiting the leave. As the APWU contends, leave taken under pressure of forfeiture is not equivalent to leave used when an employee wants or needs to use it. While eligible PTF employees may have chosen to use their leave to avoid losing it, their right under the ALEO MOA was to receive cash instead.

For a variety of reasons, employees are often unable to take leave when it is needed or desired. As the Postal Service maintains, management's discretion to approve or disapprove leave is not unlimited. However, as the APWU maintains, employees' right to use leave is also not unlimited. That an employee with 440 hours of banked leave, who could earn as much as an additional 240 hours of leave the next year, would be able to take all of that leave at the time it was needed or desired is unlikely, as the APWU contends. Having the opportunity to exchange leave for cash under such circumstances is valuable to the employee, and not having such an opportunity constitutes a monetary loss. While the Postal Service may not have gained monetarily by denying eligible PTF employees the exchange of leave for cash, eligible PTF employees, who would have chosen to exchange leave for cash, were harmed monetarily by the contract violation.

Contrary to the assertion by the Postal Service, the circumstances are not similar to those in regional case G90N-4G-C 94066246, where there was no evidence of monetary loss to individual employees or to the bargaining unit and therefore unnecessary and inappropriate to order a monetary remedy. In the instant case, there is a monetary loss if the PTF employee uses leave that is of less value to him than the

cash he should have been able to receive or if he forfeits leave.

When employees used leave they did not necessarily desire, in order to avoid forfeiture, they were paid for the time off, as the Postal Service points out. However, as the APWU points out, they received one week of pay when they could have earned two weeks of pay. They would have worked for one of those weeks; they would have exchanged their work for pay. Contrary to the Postal Service argument, compensation for employees denied the opportunity to exchange work for additional pay through the ALEO is similar to cases involving missed work opportunities, where the employee is willing to exchange work for pay but is improperly denied the opportunity.

For example, Arbitrator Richard Mittenthal found that a make-whole remedy was in order, even where the basis for it was speculative, but where some work performed by excess casuals could have been performed by career employees on the overtime desired list and probably would have been in the absence of such casuals. [Case Nos. H7C-NA-C 36/132/28, p. 17.] Arbitrator Mittenthal also rejected the Postal Service argument that no money remedy should be ordered because of the difficulty of identifying the injured employees and the extent of their injury. [Case Nos. H7C-NA-C, pp. 17-18.] Although Arbitrator Mittenthal remanded the remedy question

to the parties and retained jurisdiction, his decision made clear that the APWU was entitled to a money remedy. The fact that the Postal Service would pay twice for the work performed, once to casuals and again to compensate employees who did not work the overtime they probably would have worked, did not prevent a monetary remedy.

Similarly, compensating for harm done to eligible PTF employees, who probably would have worked instead of using leave in order to receive additional pay, is not punitive.<sup>2</sup> However, as the Postal Service maintains, awarding a monetary remedy to every eligible PTF employee constitutes unjust enrichment to those who would have chosen leave over cash even if they had been included in the ALEO benefit, and such a remedy would not be fair to the Postal Service.

As the Postal Service maintains, it is unreasonable to conclude that all eligible PTF employees would have chosen to exchange leave for cash each year they were denied the opportunity to choose. The APWU's remedy request fails to recognize that participating in the ALEO program does not

<sup>2</sup> The Postal Service cites a regional case decided by National Arbitrator Howard G. Gamser, Case No. AB-E-2703, as instructive. However, the facts of the case include the failure by the union to ask for monetary damages until its post-hearing brief as well as the union's contention in the grievance and during discussion that the appropriate remedy would be solely to reestablish the benefit at issue before Arbitrator Gamser. Arbitrator Gamser's conclusion that providing overtime pay "under these circumstances for time worked during a regular eight hour tour would be to provide punitive damages" is also not on-point in the instant case. Arbitrator Gamser's conclusion that the remedy proposed by the union was inappropriate because not all employees were denied the benefit is consistent with the conclusion in the instant case.

necessarily mean choosing to exchange leave for cash. Eligible employees decide each year which is more valuable, the additional annual leave or the cash value of some or all of the 40 hours of such leave they are permitted to exchange. Estimating the monetary loss includes estimating the number of employees who would have chosen to receive cash and the amount of cash they would have elected to receive.

The parties agree that they cannot recreate the past and determine what employees would have done for make-whole purposes. The only estimate in the record of the rate at which eligible PTF employees would have chosen cash each year they were eligible is the rate at which they chose it the first year they were permitted to participate in the ALEO program. When eligible PTF employees were given the opportunity to participate in the ALEO for 2010, approximately 26 percent of them chose to exchange leave for cash. [Transcript pp. 84-85, Testimony of Larry Cruse, Manager of Headquarter's Payroll.]

Although the APWU maintains that the data concerning the PTF employees' choice for 2010 is of limited utility, given the exclusion of PTF employees over the years of the contract violation, the APWU produced no other basis for an estimate of those who would have chosen to exchange leave for cash each year that they were excluded from the benefit. The only evidence in the record demonstrates that approximately 74

percent of eligible PTF employees preferred leave over cash in the first year they were permitted to participate in the ALEO.

The Postal Service maintains that to award outright payment without the exchange of the corresponding annual leave puts the eligible PTF employee in a far better position than *staus quo ante*, would not be fair to the Postal Service, and would result in an unintended windfall. However, without the ability to identify individual employees harmed by the contract violation, it is not possible to fashion a remedy that includes the exchange of leave for the cash payment. The Postal Service's suggestion for a remedy that includes future exchange of leave for cash would not necessarily compensate the same eligible PTF employees, nor compensate them at the time that the cash was of more value to them than the leave, and could have negative tax consequences as well.

As the APWU maintains, employees who would have chosen cash instead of leave would have done so for a variety of reasons including, e.g., making a major purchase, contributing to college tuition or paying off debt. Such opportunities were lost as a result of the violation, and the fact that such employees used leave because they would otherwise forfeit leave is not an adequate substitute for the lost opportunity to work and receive cash. The circumstances are not unlike an employee who is denied the opportunity to

work a holiday, and a future opportunity to do so is insufficient to compensate for the lost opportunity.<sup>3</sup> The employee receives the time off for the holiday; he receives the holiday pay; and he receives a monetary remedy because of the contract violation. As the cited cases demonstrate, the fact that remedies are harmful to the employer when it must pay twice for the same work, and employees receive payment for work they did not perform, is insufficient reason to preclude a monetary remedy.

Unlike a case decided by Arbitrator Richard Mittenthal (Case No. H1C-NA-C 97/123/124) and cited by the Postal Service, neither remedy proposed by the Postal Service in the instant case restores the status quo ante.<sup>4</sup> There was a monetary loss to the eligible PTF employees who would have chosen the cash each year they were excluded from the benefit. Such loss is not fully restored by allowing eligible PTF employees to enjoy the benefit in the future nor

<sup>3</sup> Arbitrator Paul J. Fasser, Jr. found reason to order monetary compensation, rather than a makeup opportunity, for a missed opportunity to work a holiday in a case cited by the APWU, Case No. NC-C-6085.

<sup>4</sup> Arbitrator Mittenthal denied the APWU's request for expunging all discipline and making employees whole as remedy for employees who were issued discipline under a unilaterally imposed "Positive Attendance Control" (PAC) program. He found that employees who were disciplined pursuant to the unilaterally imposed program were awaiting a judgment of their grievances, as they would have been if the implementation of the program had been delayed while the parties negotiated. Restoring the status quo ante, required that employees disciplined under PAC be exposed to a management judgment, and an arbitral judgment, that was PAC-free.

Arbitrator Mittenthal found that nullification of all discipline taken in reliance on PAC, as the APWU had requested, went far beyond the notion of a status quo ante. [Case No. H1C-NA-C 97/123/124, pp. 5-6.]

is it fully restored by permitting the future exchange of more than the 40 hours of leave allowed by the ALEO.

As the Postal Service points out arbitrators sometimes reject monetary damages that are "unduly speculative," as Arbitrator Daniel G. Collins did when he found that the Postal Service violated Article 19 of the parties' agreement by instructing Postal Inspectors in Charge (INCs) that they had no discretion to grant administrative leave to Postal Police Officers. Arbitrator Collins discussed the union's request for monetary remedy and stated, ". . . in order for [the arbitrator] to grant monetary relief he would have to conclude that there was some reasonable basis for believing that had such discretion not been removed INCs would have exercised discretion to grant such leave." [Case No. NAT-96-016-C, p. 8.] Arbitrator Collins concluded that, based on the testimony by the Postal Service lead negotiator that he knew of no instances in which such leave had ever been granted, there was no basis for believing that such leave would have been granted. [Case No. NAT-96-016-C, p. 8.]

Arbitrator Collins's Award is distinguishable from the instant case on the facts. The record demonstrates in the instant case that there would have been eligible PTF

employees choosing to exchange leave for cash during the period of the contract violation.<sup>5</sup>

As the parties recognize, it is not possible in the instant case to determine the value of the wrong done to individual employees. However, there is, as the APWU maintains, arbitral precedent for assessing compensatory damages against the Postal Service when monetary losses are difficult to calculate or where there are no identifiable employees to receive back pay. Instructive in such circumstances, is the case decided by Arbitrator Mittenthal and cited by both the Postal Service and the APWU, in which he concluded:

It may not be easy to construct a money remedy or to identify the injured employees. But the parties have been confronted in the past by remedy problems every bit as complicated as this one and they have been able through hard work and imagination to find a mutually acceptable solution. [Case Nos. H7C-NA-C 36/132/28, p. 19.]

As the APWU maintains, there are many other cases, including other postal cases, where arbitrators have awarded compensatory damages to the union rather than to individual

<sup>5</sup> Also, contrary to the position of the Postal Service, a monetary remedy is not inconsistent with the opinion of Arbitrator Carlton Snow in Case No. W1C-5F-C 4734, where he discusses arbitral power to fashion a remedy, the principle that damages should correspond to the harm suffered, and the principle that damages should be compensatory and not punitive. Arbitrator Snow's decision in the case cited by the APWU is not on-point because it addresses the right to a monetary remedy of an employee who filed a regional grievance and the application of the decision to resolving individual cases. [Case No. 194N-4I-D 96027608.] The issue before Arbitrator Shyam Das, in a case cited by the Postal Service, was also not on-point. The issue before Arbitrator Das was not whether the monetary remedy proposed by the APWU was appropriate but whether it was

employees when that was the only effective remedy for the contractual violation. For example, Arbitrator M. David Vaughn awarded compensatory damages to the National Postal Professional Nurses, in a decision cited by the APWU. As part of his conclusions, Arbitrator Vaughn states:

I am convinced, as arbitrators have found in the cited awards, that the protection of the integrity of the Agreement is necessarily supported by the payment of compensatory damages to the Union where the Union is unable to adduce proof as to which specific identified employees, if any, suffered losses in earnings for which a back pay award would be appropriate.

A monetary award to the APWU is the only reasonable mechanism for protecting the integrity of the Agreement in the instant case, and it avoids the potential negative tax consequences the Postal Service maintains is an issue.

As with other compensatory remedies, the remedy here is not about penalizing the Postal Service for following what it believed to be the correct application of the ALEO MOU but is about upholding the integrity of the parties' negotiated agreement. Even where a party believes its interpretation of the contract is correct, the violation may require compensation for the harm done. As the APWU maintains, prospective compliance with a final and binding decision is expected and is not a substitute for correcting harm done during the period of the violation.

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the "only" appropriate remedy for a violation of Article 32.2. [Case No. Q94V-4Q-C 96044758, pp. 9-10.]

Because it is not possible to identify individual PTF employees who would have chosen cash each year they were denied the ALEO, and the remedy is awarded to the APWU, it is reasonable and fair to craft a remedy sufficient to protect the integrity of the parties' Agreement and the process without unduly harming the Postal Service. As stated, the only basis for an estimate of the number of PTF employees who would have elected cash each year they were eligible is the evidence concerning their choice the first year they were permitted to participate in the ALEO. If 26 percent of the eligible PTF employees had chosen the cash option each year and earned interest on the cash, an interest payment of that amount to the APWU serves the purpose of protecting the parties' Agreement while also recognizing the nature of the program. Accordingly, the Arbitrator makes the following Award.

AWARD

The Postal Service shall pay to the APWU an amount equal to the interest, at the Federal Judgment Rate, on what it would have paid to 26 percent of eligible PTF employees for each year they were excluded from the ALEO benefit. The Arbitrator retains jurisdiction for the purpose of deciding any dispute arising over the interpretation and/or the implementation of the remedy.

A handwritten signature in cursive script, appearing to read "Linda S. Byars".

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Linda S. Byars, Arbitrator

DATE: September 30, 2010