Before: Ruben Armendariz

In the Matter of the Arbitraiton

Between

American Postal Workers Union
Mineral Springs, AR

And

United States Postal Service
Mineral Springs, AR

CLASS ACTION
Mineral Springs, AR
G98C-4G-C 99172535

AMERICAN POSTAL WORKERS UNION POST HEARING BRIEF

Robert D. Kessler
National Business Agent
American Postal Workers Union
1001 E. 101st Ter., Suite 390
Kansas City, MO 64131

APWU Post-Hearing Brief
G98C-4G-C-99172535

BACKGROUND AND INTRODUCTION

The issue of Postmaster Relief/Leave Replacement (hereafter referenced as PMR's) being utilized in violation of the applicable rules and regulations in the Arkansas District, which encompasses the entire state of Arkansas, begins in March, 1998. Grievances were filed in Devalls Bluff and Star City, AR. which were appealed to step 3 in the Southern region on March 19,1998. On April 6, 1998 A.P.W.U. Arkansas State President Dennis Taff wrote Larry Hensley, Senior Labor Relations Specialist, a letter with "cc" to Randy Hamlin, Manager, Human Resources, outlining his discovery that PMR's were being utilized in violation of the National Agreement and asking that these violations immediately cease and desist.(JT. 2, p.14)

On April 9, 1998 Mr. Hensley responded by requesting the names of the offices involved and the dates on which the alleged events occurred.. Mr. Taff responded on April 13, 1998 informing Mr. Hensley that he would call with the names of the offices involved, informed him that he believed that other offices yet unidentified were involved, and informed Hensley that his intent was simply that all postmasters be made aware of the proper use of PMR's to help eliminate future complaints and grievances. (Jt. 2, pgs. 15 & 16)

On April 15, 1998 Post Office Operations Manager (POOM) Martha Dean sent a cc. mail message to the Postmasters under her jurisdiction informing them that the improper utilization of PMR's must be discontinued immediately. (Jt. 2, p.27)

In June, 1998 the previously mentioned grievances were resolved at step 3 with cease and desist language in one case and payment for the senior clerk in the other office where bargaining unit clerks existed. (Jt. 2, pgs. 28, 29)

On September 28, 1998 the union was forced to pursue this issue through the grievance procedure in *thirteen* offices when all of the previous efforts had failed to correct the matter. In March, 1999 those thirteen grievances (hereafter referenced as "round one") were pre-arbed with payment to the union for all hours worked from Sept. 14, 1998 until the hiring of a career PTF clerk in those offices. That pre-arb was dated March 2, 1999 and was sent unsigned or dated to this advocate for signature on June 2, 1999.(Testimony of N.B.A. Kessler) It was returned to Hamlin in June, 1999. A copy with Hamlin's signature bearing the date of March 19, 1999 was not provided the union (To either Kessler or Taff) until it arrived with the agreed to payment to the Union. (Testimony of Taft and Kessler)

On *March 26, 1999* grievances were filed at Step 1 in nine additional offices (hereafter referenced as "round two") including Mineral Springs, which is the grievance currently before the Arbitrator for resolution. (Jt. 2, p.10). (Management's opening statement incorrectly references the grievance as having been filed on April 3, 1999)

On April 3, 1999 "round two" grievances including Mineral Springs were appealed to Step 2 where they were discussed several times. Discussions were held between Mr. Taff and Ms. Chappell on "round two" grievances simultaneously with their discussions concerning the amount of hours involved in implementing the pre-arb settlement of "round one" grievances, as each party's designated agent. (Testimony of Taff and Chappell)

"Round two" grievances were eventually denied on July 26, 1999 (Jt.2, p.28) and were appealed to Step 3 on 8/4/99 (Jt.2, pgs.6,7). At some unknown date after being appealed to Step 3 they were returned to the Arkansas District for a like settlement as "round one" grievances (Testimony of Taff). This return was by *oral* agreement, not reduced to writing, between the Step 3 parties (Kessler and Stracner) who were aware of the yet to be implemented pre-arb settlement.

On May 11, 2000 Mr. Taff outlined his understanding of the conditions agreed to in implementation of the pre-arb to Mr. Hamlin. (U #5) On June 26, 2000 Ms. Chappell confirmed the conditions and referenced a request for assistance from the Data Center in wording the lump sum payment letter as payment is "generally made to individuals rather that (sic) to the union itself." (U#5) On July 1, 2000 Mr. Taft responded that... "payment to the Union is not prohibited and I am of the understanding that the Postal Data Center has clarified this issue with your office." (U#5)

Mr. Taff was subsequently contacted by Mr. Hensley in order to get the Union's Tax Identification Number. (TIN) (Testimony of Taff) On August 18, 2000 Mr. Taff received a letter from Mr. Hensley which included a Remittance Advice letter from the Data Center listing the Union's TIN 23-7339156 and notification that any tax liability was that of the union; the check; and a copy of the signed pre-arb settlement which Mr. Hamlin had backdated 3/19/99. (U#1)

In October 2000, David Lehans (POO) sent a letter to the postmasters under his jurisdiction advising them that any improper utilization of PMR's must be discontinued. (U#2) On June 1, 2001 Ms. Chappell returned the "round two" grievances to Step 3 for meeting and discussion per instructions from Ted Faulkner. (Jt.2, p.3)

On October 3, 2001 the grievances were denied at Step 3 and subsequently appealed to arbitration on October 17, 2001.

The hearing was held on January 8, 2003 at the Little Rock GMF with post-hearing briefs to be postmarked on or before February 10, 2003.

Issue

What should be the remedy when management utilizes PMR's in offices (Mineral Springs) in violation of applicable rules and regulations.

Position of the Union

It is the position of the A.P.W.U. that the willful, deliberate, blatant, and ongoing violations regarding the improper utilization of non-career, non-bargaining unit PMR's to perform bargaining unit work in lieu of hiring career clerks demonstrated by the background, facts, and circumstances in this case requires a monetary payment to the Union as the *only* remedy which will bring the service into compliance with the contract and enable the Union to enforce its contractual entitlements.

Argument

The rules and regulations regarding the use of PMR's is not in dispute. They are non-career, non-bargaining unit employees that may only *replace* the postmaster and perform the duties *normally* performed by the postmaster in his/her *absence.* If the postmaster in a small office is unable to perform all of the duties in that office and needs additional help, that help must be a career bargaining unit employee. Hiring PMR's and utilizing them at the same time the postmaster is present in lieu of hiring career PTF clerks for that office to perform that bargaining unit work is a clear violation of the Contract.

In the case at bar the violation is uncontested; although their Step 3 decision contains illogical and nonsensical rhetoric regarding the merits of the case which were not pursued at the hearing. The only question to be resolved is the appropriate remedy.

The Service prays for "any" remedy other than a monetary one. In other words they seek a meaningless "go and sin no more" admonition from the arbitrator --- at a time when the evidence established at the hearing clearly demonstrates a *continued* defiance toward contract compliance in that they have refused to hire career employees in at least two offices covered by "round two" grievances (Gould and Caraway) not before the arbitrator, as well as at least two others (Winslow and Plainview) not yet in the grievance procedure.(Testimony of Taff and U#4) Although these offices are not before the arbitrator they serve to demonstrate that any remedy other than monetary will not bring them into contract compliance.

The Union is entitled to a remedy which enables us to enforce our rights. In that regard, Hill and Sinicrop: in "Remedies in Arbitration" at page 23 (copy enclosed) states the following:

Arbitrator William Eaton has observed:

It is often the case in industrial disputes...that the fashioning of a remedy appropriate to a right is required. The necessity for this is founded in the common law maxim that where there is a right, there is a remedy. That maxim, in turn, is derived from the simple realization that where a right is purportedly granted, but where no remedy is awarded when that right is violated, the right itself is meaningless.

If the arbitrator would grant their request for "any remedy other than monetary" in the case at bar it would be a meaningless remedy which would in turn make our contractual rights meaningless.

This issue is not unlike the issue of Postal Management hiring non-career, non-bargaining unit casuals in violation of the National Agreement to perform bargaining unit work in lieu of hiring career employees. Only in this case they are hiring non-career, non-bargaining unit PMR's to perform bargaining unit work in lieu of hiring career clerk craft employees.

It should be noted that this willful, deliberate, blatant, and ongoing violation is perpetrated by the same Arkansas District Mangers involved in the casual cases previously addressed by the arbitrator at bar. Those managers ignored and defied two previous arbitration decisions that failed to provide a monetary remedy; before coming into compliance with the National Agreement upon receipt of the arbitrator's monetary award decision. Without such a monetary award decision in this PMR case they will not come into compliance with the National Agreement and will continue to ignore and defy their own rules and regulations regarding the proper utilization of PMR's.

They have offered no valid reason for the arbitrator to accept their "we don't want to pay the Union" plea, and no valid reasons exist. The rules and regulations are clear and not in dispute as evidenced by regional and headquarter instructions, Step 3 and Step 4 grievance decisions, and joint contract application agreements. (Jt.2, pgs.17-31 & 34) The violation is uncontested with no claims that they were unintentional , inadvertent, or for any other reason beyond their control.

At Step 3 they claimed the Union's request to be compensated was "not supported by contract language". That is simply a hollow observation. Contracts seldom spell out the remedy for violations in the contract language itself. The union would offer the same observation-nothing in the contract language prohibits payment to the union where there are no bargaining unit employees available to be paid for the loss of bargaining unit work because the service has refused to hire them.

In their opening, they refer to such payments as "grossly inappropriate as well as punitive" but offered nothing to support that argument. The Union had been paid for "round one" where no bargaining unit employees existed and "round two" cases were returned to the parties at the District for similar resolution-but were returned to Step 3 to be denied at the instruction of the new Southwest Area Manager, Labor Relations.

Their only attempt to offer an explanation of why payment to the union under the circumstances of this case would be inappropriate came in the self-serving, unsupported assertions of Ms. Chappell. She claims the previous payment caused "tax problems", but was unable to clarify or identify those "problems" or to refute Mr. Taff's testimony that there were no tax or any other kind of problems.

She also claimed that Mr. Hamlin failed to consult anyone prior to entering the pre-arb-implying that this somehow is evidence that it was inappropriate for him to do so. Without offering any foundation for the implied inappropriateness, she suggested the only reason payment was eventually made to the union was because Hamlin had agreed to do so, therefore they felt they had no choice but to comply. While it may be true that they had no choice but to honor the pre-arb, it does not follow "**ipso facto**" that the agreement was inappropriate in the first place.

It should also be noted that Ms. Chappell was present at the meeting with Hamlin and this advocate at which Hamlin agreed to pay the union *at Mr. Hamlin's request and in her capacity as a Labor Relations Specialist.* She voiced no concern regarding payment to the union at that meeting, outlines no attempt on her part as his consultant to "consult" anyone else regarding payment to the union, yet comes before the arbitrator and rattles off the names of several persons who allegedly were not consulted, implying that they should have been! On cross-examination she had to admit she was not a party to all of Hamlin's telephone conversations and therefore could not know who he may or may not have talked to regarding payment to the union. She certainly was not party to numerous telephone conversations between Hamlin and this advocate which took place prior to the pre-arb meeting.

She also testified that it was her understanding that the agreement to pay the union was a one-time only agreement, suggesting that a like payment for "round two" would be inappropriate, yet offers nothing to rebut Mr. Taff's testimony that "round two" cases were returned for a like settlement-the discussion of which took place between him and Ms. Chappell before she was instructed not to pay the union and return the cases to Step 3 by Mr. Faulkner. (Jt.2, p.3) Ms. Chappell's testimony was the only thing offered to support their claim that payment to the union under the circumstances of this case would be inappropriate. Her assertions do not make it inappropriate, much less "grossly" inappropriate.

Payment to the union is not inappropriate under the circumstances of the instant case and the arbitrator's inherent power to formulate such a remedy is so well established that it needs no embellishment here. In fact, the stipulation of the issue at bar empowers the arbitrator to grant the remedy sought by the union, or that of the employer.

A number of arbitrator's have formulated remedies involving payment to the union. Although the examples which follow involve different facts and issues they serve to demonstrate that it is not inappropriate to pay the union in certain circumstances-such as those in the instant case where there are no bargaining unit clerks available to be paid for the loss of bargaining unit work because the violation is management's refusal to hire them.

In case G90C-4G-C 95010403 arbitrator Plant orders payment to the Alexandria APWU, AFL-CIO local. (Copy enclosed)

In case G94C-1G-C 96068981 arbitrator Durham made the union the recipient of back pay for overtime associated with a detail assignment. (Copy enclosed)

In case G90C-1G-C 95066791 arbitrator Eisenmenger awarded payment to the union for an improper detail. (Copy enclosed)

In case H94C-4H-C 98066681 arbitrator Lurie directed the service to pay the union exemplary damages for bad faith conduct. (Copy enclosed)

Their argument that payment to the union would be "punitive" must also be rejected under the facts and circumstances of the case. In Article 1 the union has contracted entitlement to its clerk craft bargaining unit for the work in question. The violation is giving bargaining unit work to non-bargaining unit PMR's in lieu of hiring bargaining unit employees. For this clear violation we do not seek a "punitive" monetary award such as "one million dollars" or some other large amount *for the violation itself,* but for a monetary award commensurate with the number of hours involved as compensatory damages. That's what we seek-no more, no less! A remedy which restores to the injured party that which was "lost" and cannot be returned is not "punitive". It draws its essence from the contract. It is in keeping with the principles that the party deprived of a contract benefit should be made whole to the extent practicable. If there were bargaining unit employees working in these offices it would be practicable to compensate them for the loss of work opportunities. Since there are none present because the service refuses to hire them, payment to the union is practicable and warranted. It simply comes down to the fact that if they do not have to pay the union then they do not have to honor the contract. If they do have to pay the union then they do have to honor the contract. That certainly is not "punitive."

They also take the position that there is no reason to "enrich" the APWU in a punitive remedy. Payment to the union in the circumstances of this case does not constitute "enrichment." All the union has ever sought in this matter is voluntary compliance with the contract. All the service had to do to avoid paying a *single penny* to *anyone*, individual or the union in the absence of an individual, was to honor Mr. Taff's request of April 6, 1998 to "cease and desist." (Jt.2, p.14) The service's response was to "feign ignorance" regarding the violations. (Jt.2, p.15) All they had to do was to enforce the proper use of PMR's per Mr. Taff's April 13, 1998 letter (Jt.2, p. 16). They chose not to do so by giving us "lip service" in the form of Ms. Dean's cc mail, with NO follow up to ensure enforcement.

All they had to do to limit their liability to the union in "round one" was to implement the March 2, 1999 pre-arb agreement to hire career employees in the affected offices. They chose instead to delay, linger, and stall the hiring of career clerks for **over one year**-increasing their liability from a few thousand dollars to over $200,000.

All they had to do in the Mineral Springs, AR case specifically before the arbitrator was to correct the violation in a timely manner by hiring a career clerk and ending the violation. They chose instead to delay the hiring until *February 10, 2001*, **ALMOST TWO YEARS** after the step 1 filing. Evidence provided by Mr. Taff proves they still have not hired in two (2) of the offices involved in "round two" along with Mineral Springs. It is not the union's fault that we are forced into the grievance procedure seeking contract compliance through monetary compensatory damages or our fault for the amount of those damages.

Whatever amount received does not constitute "enrichment." The union incurs considerable costs in enforcing our contractual entitlements in this matter. Our state union officers and stewards are not "on the clock" when investigating and processing grievances. The service has forced us to travel throughout the state to "ferret" out violations. In spite of the previous "round one" settlement and the current "round two" cases yet to be remedied, Mr. Taff and his stewards have found additional violations in at least two offices where "round three" grievances will be filed. We will have to continue to comb the state seeking out these offices where they continue to "hide" violations until we find them among the approximate one hundred and fifty (150) level 15 and below offices. That costs the State organization a lot of money and will continue to cost the organization a lot of money-not to mention the loss of additional union members where they have refused to hire or continue to refuse to hire. The compensation received in "round one", as well as any received in the case at hand has been and will continue to be used to defray the cost of enforcing our rights under the contract. There is no "enrichment" here!

The Service's reliance on an *out of context* quote by arbitrator Mittenthal in case H7C-NA-C 36, 132, 28 to support their argument regarding a monetary payment to the union being "punitive" and/or "unjust enrichment" is ***TOTALLY MISPLACED***—as that award actually supports the union in this matter!

In that case ***the union*** was seeking a monetary remedy under the doctrine of "unjust enrichment". The Postal Service ***argued against*** that concept as having "little relevance to Postal Labor relations". (AT pg.14) Arbitrator Mittenthal ***rejected*** the concept of unjust enrichment ***argued by the union***, but never-the-less provided a monetary remedy.

In the case at bar the service advances an argument "borrowed" from the Mittenthal case at page 15, to wit :"the postal service asks that any remedy the arbitrator may chose to invoke should be non-monetary in nature." It is indeed interesting to note that in the cited Mittenthal case the issue was the Service's ***continued*** violation of the National Cap on the percentages of casuals permitted under the terms of the contract *even after Mittenthal* himself *had issued a cease and desist non-monetary award previously!* They continue the same pattern here. They continue to knowingly and willfully violate the contract while "begging" for permission to continue to do so by asking for a meaningless remedy that will be ineffectual and allow them to continue to refuse to comply with impunity.

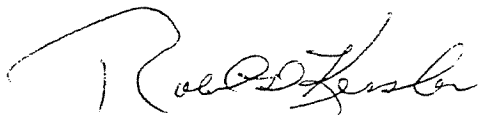
The service also relies on a quote from arbitrator Mittenthal in case H1C-NAC-97, 123,124 at page 6. We would suggest that based on the background, facts, circumstances, and evidence presented, this quote likewise supports the union's position in this matter rather than that of the employer.

In addition, we would offer Mittenhal's comments on page 5 of that award as support for our position in this matter. ".....the *purpose* of a remedy is to place employees (and management) in the position they would have been had there been no contract violation. The remedy serves to restore the *status quo ante*." The question for the arbitrator to decided is which remedy is more likely to restore the *status quo ante*; a monetary payment to the union commensurate to the hours of bargaining unit work improperly performed by non-bargaining unit PMR's in Mineral Springs, Ar. from March 12, 1999 through February 9, 2001 or a "go and sin no more" cease and desist or "any" other non-monetary award the arbitrator my choose? Which would be more fair, equitable, or warranted under the facts and evidence of the case? Which remedy is more likely to correct the violation and discourage future violations rather than endorse and encourage future violations? The answer to these thereoical questions should be obvious!

The background, facts, and evidence of this case leads to the inescapable conclusion that the remedy sought by the union must be granted as such a remedy will be the only means by which the union can enforce its contractual entitlements regarding the use of Postmaster Reliefs.

We respectfully request you find in favor of the union by ordering a monetary payment to the union at the appropriate beginning salary rate for the total number of hours improperly worked by PMR's in Mineral Springs beginning 14 days prior to the Step 1 filing and until the career PTF was hired on February 10, 2001.

Respectfully submitted,



Robert D. Kessler
Nat'l Business Agent

February 7, 2003

References Submitted

Addendum #1–Remedies in Arbitration	Hill & Sinicropi

National Awards

Arbitrator	Case Number	Location	Date of Award
Plant	G90C-4G-C 95010403		October 16, 1997
Durham	G94C-1G-C96068981		November 10, 1997
Eisenmenger	G90C-1G-C95066791		August 24, 1998
Lurie	H94C-4H-C 98066681 H94C-4H-C 98026643 H94C-4H-C 98009432		March 3, 2000
Mittenthal	H7C-NA-C 36 H7C-NA-C 132 H0C-NA-C 28		January 29, 1994
Mittenthal	H1C-NA-C 97 H1C-NA-C 123 H1C-NA-C 124		February 3, 1989