



## American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

To: National Business Agents  
Regional Coordinators  
Resident Officers

From: Greg Bell, Director   
Industrial Relations

Date: January 27, 2006

Re: Award on Applicability of TCOLA to Anomaly Payments

Enclosed is a national-level award holding that the Memorandum of Settlement (MOS) for the Promotion Pay grievance requires that ongoing anomaly or ABC lump-sum payments made in accordance with paragraph 6 of that agreement include the Territorial Cost of Living Allowance (TCOLA) that is applicable to employees working outside the continental United States. (*USPS #E98N-4E-C 02081672; 1/6/2006*) Arbitrator Das ruled that the issue of remedy and other issues relating to the grievance filed by NALC's Anchorage Alaska Branch should be addressed by the parties, consistent with the determination in this case. This case arose as a result of a class action grievance filed by the NALC's Anchorage, Alaska Branch in February 2001, and the APWU intervened in support of the NALC's position. Please note that the APWU and the Postal Service agreed to changes in the 1999 National Agreement that eliminated the anomaly for APWU-represented employees.

After the Anchorage, Alaska Branch of the NALC learned in February 2001 that the Postal Service was not including TCOLA in ongoing quarterly anomaly payments made in accordance with the Promotion Pay Settlement, it filed a class action grievance. The anomaly payments were a result of the Memorandum of Settlement made in case # H7C-NAC-39 on June 13, 1990 by the Postal Service, the APWU, and the NALC.

The 1990 Memorandum of Settlement provided in paragraph 2 that “[n]o employee will, as a consequence of a promotion, at any time be compensated less than that employee would have earned if the employee had not been promoted ....” Paragraph 3 of the settlement stated that “[a]ffected employee will be paid in accordance with the following principle: For each pay period following the promotion the employees’ basic salary will be compared to the basic salary the employee would have received for that pay period if the employee had not been promoted” and “[f]or those periods when the latter amount is higher the difference will be paid to the employee in a one-time lump-sum payment.” Paragraph 6 of the settlement provided that “[p]romoted employees, whether promoted before or after the expiration of the 1987 National Agreement, who experience pay anomalies after the term of the 1987 National Agreement will be entitled to a remedy (or remedies) in accordance with the principles stated above ....”

After this agreement was signed, three lump-sum payments were made to different sets of employees from an \$80 million fund. In calculating the difference in pay that affected these employees, the Postal Service assumed that all affected employees were paid 80 hours straight time in each pay period, regardless of actual hours. Calculations for payments out of the fund did not take into account overtime, shift differential, Sunday premium pay or other premium or special pay.

Following the 1987-1990 Agreement, since the pay anomaly problem had not been corrected, the Postal Service was required to make ongoing payments to affected individuals. Ongoing payments were based on actual hours and pay received by employees. In making its calculations, management included, in addition to straight-time pay, overtime pay, night differential, Sunday premium, holiday-worked pay and out-of-schedule premium pay. However, such calculations did not include TCOLA.

The NALC indicated that it was unaware that the Postal Service was not including TCOLA until shortly before the filing of this grievance in February 2001, and the APWU stated that it only learned that the TCOLA was not included after this case was appealed to national arbitration by the NALC.

The unions argued that paragraph 6 of the Promotion Pay Settlement is controlling in this case, and it prescribes that the remedies should be calculated in accordance with principles stated above in the agreement. The applicable principle in this case is set out in paragraph 2, the union said, which provides that “[n]o employee will, as a consequence of a promotion, at any time be compensated less than that employee would have earned if the employee had not been promoted ....” The unions asserted that exclusion of the TCOLA from computation of anomaly payments results in affected employees being “compensated less” than if they had not been promoted. The APWU joined in the NALC’s arguments.

The Postal Service countered that the unions failed to provide evidence that the 1990 settlement required it to calculate lump-sum payments to include TCOLA. It asserted that there never was an agreement for a full make whole remedy, and paragraph 3 specifically applies in this case and “plainly states the payments were to be based on a straightforward comparison of basic salary only” and TCOLA is not a part of basic salary. Management further argued that there was an “express agreement” between the parties on how ongoing anomaly payments should be made, and the unions never included the TCOLA difference when they unilaterally performed or reviewed calculations for the three rounds of payments from the settlement fund. With regard to the APWU, management contended that we lacked standing in this matter since the union cannot show injury during the time period covered by this grievance.

Arbitrator Das first of all found that “there is no evidence that [TCOLA] was ever discussed [by the parties] in the context either of anomaly payments from the \$80 million fund or ongoing ABC payments made after the term of the 1987-90 National Agreement.” Instead, the parties chose to adopt a formula for payment out of the settlement fund that “treated all employees alike, except for the difference in basic salary rates” and such “a simple, streamlined

methodology [was selected] to get the money in the fund paid out as quickly as possible to their members who had suffered reductions in compensation dating back to 1985.”

Following the 1987-90 National Agreement when ongoing payments had to be made, paragraph 6 of the settlement applied and “[u]nlike Paragraph 3 which applied to payments made from the \$80 million fund, paragraph 6 did not call for the parties to jointly determine how these payments were to be calculated,” the arbitrator said. Das then determined that the “testimony and documentary evidence in this record is not sufficient to establish that the JBC Unions expressly or implicitly agreed to a specific methodology or that TCOLA was not to be included.”

He also found that “JBC Union representatives involved in the implementation of the 1990 MOS credibly testified that they were not specifically aware that the Postal Service was not including TCOLA in calculating the ongoing quarterly ABC payments, and there is no evidence that the Postal Service ever told the Unions that TCOLA was not included in those payments.”

“Absent proof of an agreement to include or exclude TCOLA in ongoing ABC payments,” Das looked to principles agreed to by the parties to decide this case. He concluded that “[t]here is no question ... that not including TCOLA in the calculation of the ABC payments results in an employee being compensated less than if the employee had not been promoted, contrary to the basic principle agreed to in Paragraph 2 of the 1990 MOS.” The arbitrator concluded that paragraph 3 of the MOS relates primarily to payments from the \$80 million settlement fund. Moreover, he stressed that the parties “clearly did not limit the payment to the difference in basic salary” as evidenced by additional roll-up payments that were made “which is consistent with the principle they agreed to in Paragraph 2.”

Arbitrator Das then observed that the Postal Service never limited ongoing anomaly payments to a difference in basic salary but included “all elements of special pay included in compensation other than TCOLA.” He thus concluded the practice of the parties was not to “consider the ‘difference’ on which anomaly payments are to be based as limited to just the difference in basic salary ....” Das also found that management failed to supply any “principled reason why TCOLA, alone among all the elements of special pay associated with basic salary and compensation, should be excluded.” In addition, he noted that the Postal Service has not suggested “any practical reason” for not including the TCOLA in payments since its normal “retro” program automatically calculates and includes the difference in TCOLA along with other pay differences. “Indeed,” the arbitrator wrote, “the Postal Service currently has to back out the COLA differences after using the program.” Accordingly, Das sustained the NALC’s grievance.

He further stated there was no need, in ruling on the issue in this case, to address the Postal Service’s contention that the APWU has no standing because it cannot demonstrate injury during the time period covered by the underlying grievance.

Enclosure

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OPEIU #2  
AFL-CIO

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O'DS & A, PC

National Arbitration Panel

In the Matter of Arbitration )  
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 between )  
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 United States Postal Service ) Case No.  
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 and ) E98N-4E-C 02081672  
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 National Association of Letter )  
 Carriers )  
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 and )  
 )  
 American Postal Workers Union )  
 - Intervenor )

Before: Shyam Das

Appearances:

For the Postal Service: Nicole Wynn, Esquire  
For the NALC: Thomas N. Ciantra, Esquire  
For the APWU: Lee W. Jackson, Esquire

Place of Hearing: Washington, D.C.  
Date of Hearing: July 13, 2005  
Date of Award: January 6, 2006

Relevant Contract Provisions: June 13, 1990 Memorandum of Settlement for Case No. H7C-NA-C 39, and ELM \$422.231(c)

Contract Year: 2001-2006

Type of Grievance: Contract Interpretation

#### Award Summary

For reasons set forth in the above Findings, the June 13, 1990 Memorandum of Settlement for Case No. H7C-NA-C 39 requires that ongoing anomaly or ABC lump sum payments made pursuant to Paragraph 6 of that agreement include TCOLA. Remedy and other issues relating to the underlying grievance filed by the NALC's Anchorage Alaska Branch should be addressed by the parties, consistent with this determination.



Shyam Das, Arbitrator

This interpretive case arises out of a class action grievance filed by the Anchorage, Alaska Branch of the National Association of Letter Carriers (NALC) on February 2, 2001. The American Postal Workers Union (APWU) is an intervening party in this case.

The interpretive issue is whether the Memorandum of Settlement for Case No. H7C-NA-C 39 entered into on June 13, 1990 by the Postal Service, the APWU and the NALC (1990 MOS) requires that anomaly lump sum payments include the Territorial Cost of Living Allowance (TCOLA).

TCOLA is an allowance payable by statute to federal employees, including eligible postal employees, who are working outside of the continental United States or in Alaska. The amount of the allowance, which is not included in the employee's gross income for federal income tax purposes, varies from location to location. In Alaska, currently it is 25% of basic pay.

The 1990 MOS relates to the so called "promotion pay anomaly" which arose after pay scales were modified in the 1984 Kerr interest arbitration. In some instances, postal employees promoted to a higher pay grade could be paid less for certain periods of time than if they had remained in their former grade due to operation of the Postal Service's rules for step advancement within a pay grade. The 1984 interest arbitration award created new steps at the lower end of the pay grades and the differences in pay between those steps was greater than the differences that had previously existed between steps. The

anomaly arose because of the Postal Service's policy that an employee who is promoted begins a new waiting period for step increments within grade. The JBC Unions challenged that policy in Case No. H7C-NA-C 39, which ultimately was resolved in the 1990 MOS.

The 1990 MOS includes the following relevant provisions:

2. As a consequence of the current promotion practice, some employees promoted from steps A, B and C (referred to herein as affected employees), in some pay periods receive less compensation than if they had not been promoted and had remained in the former grade. To address this promotion pay anomaly, USPS, APWU and NALC agree to the following principle:

No employee will, as a consequence of a promotion, at any time be compensated less than that employee would have earned if the employee had not been promoted but had, instead, merely advanced in step increments in that employee's grade as a result of fulfilling the waiting time requirements necessary for step increases. This includes affected employees who are or were promoted to a higher grade and subsequently reassigned to their former grade.

3. Affected employees will be paid in accordance with the following principle:

For each pay period following the promotion the employee's basic salary will be compared to the basic

salary the employee would have received for that pay period if the employee had not been promoted. For those periods when the latter amount is higher the difference will be paid to the employee in a one-time lump sum payment.

Employees affected during the 1984-87 or 1987-90 National Agreements shall be paid a lump sum from a \$80 Million fund established for this special purpose. APWU and NALC will work directly with USPS to develop a method to determine on a mutual basis which affected promoted employees will share in the fund, the amount of the lump sum payment for each employee and the timing of its issuance. It is intended that these one-time lump sum payments will satisfy all employee entitlements which arise out of the employment relationship, including the 1984 and 1987 National Agreements due to the effects of the anomaly and this Memorandum of Settlement....

4. The USPS, APWU and NALC agree that promoted employees will continue to be placed in the grade level and step assigned in accordance with USPS's current practice with waiting time rules applied in accordance with current practice.

\* \* \*

6. Promoted employees, whether promoted before or after the expiration of the 1987 National Agreement, who experience pay anomalies after the term of the 1987 National Agreement will be entitled to a remedy (or remedies) in accordance with the principles stated above....

After the MOS was signed in June 1990 the parties, as provided in Paragraph 3, addressed how employees affected during the 1984-87 or 1987-90 National Agreements were to share in the \$80 million fund. Based on data provided by the Postal Service, the JBC Unions came up with lists of employees affected by the anomaly from 1985 to 1990 (some 7,000-8,000 NALC- and 40,000 APWU-represented employees). The Postal Service accepted the Unions' proposal to use a simple model -- designed to expedite the calculation and payment of the one-time lump sum payments -- which identified the periods of the pay anomaly for each employee and then calculated the difference between the employee's bi-weekly straight-time base rate and the higher bi-weekly straight-time base rate the employee would have received in the lower grade. In calculating the difference in pay for the periods in question, it was assumed that all affected employees were paid 80 hours straight time in each pay period, regardless of actual hours paid. This calculation did not take into account overtime, shift differential, Sunday premium pay or other premium or special pay or benefits. However, each employee received an additional uniformly calculated "roll up" amount equal to a fixed percentage of his or her straight time pay differential. Initially, this roll up was 10%.

The bulk of the employees entitled to lump sum payments from the \$80 million fund -- those who received one promotion and remained in the grade to which they were promoted throughout the relevant period -- were paid in December 1990. A second group, comprised of employees who had multiple promotions or movements from one grade to another, were paid in December 1991. A third group, comprised of employees whose service

histories had errors that had to be individually corrected, took a longer time to sort out. By the time the fund was liquidated in 1996, all of the affected employees ultimately received add-on payments equal to about 30% of their straight time payments.

When the parties negotiated the 1990 MOS they were hopeful that in the negotiation of the next National Agreement, they would be able to eliminate the promotional pay anomaly. That did not occur.<sup>1</sup> As a result, Paragraph 6 of the 1990 MOS had to be implemented and the Postal Service began to make ongoing payments to employees affected by the anomaly after the term of the 1987-90 National Agreement. Evidently, the first of these payments, which were retroactive to November 21, 1990, were not made until late 1992. Thereafter, affected employees have received quarterly lump sum anomaly payments. These payments identify only the total amount of the so called "ABC payment". The employees are not provided a breakdown showing the components or calculation of this amount.

In 1992, the Postal Service added a new subsection "c" to Section 422.231 of the ELM, which incorporates language from the "principles" in Paragraphs 2 and 3 of the 1990 MOS. ELM §422.231(c), which is essentially the same as when first adopted in 1992, provides:

No employee is at any time compensated less as a consequence of a promotion than that employee would have been if the employee had

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<sup>1</sup> In 1999 the APWU and the Postal Service agreed to changes in their National Agreement that eliminated the anomaly. It still exists in the NALC bargaining unit.

not been promoted but, instead, advanced in step increments in the lower grade by fulfilling the waiting time requirements necessary for step increases. This rule includes employees who were promoted to a higher grade and subsequently reassigned to their former grade. If, during any pay period following the promotion, the employee's basic salary is less than the employee would have received for that pay period if the employee had not been promoted, the difference is paid to the employee in a lump sum payment.

The ongoing quarterly lump sum anomaly payments are calculated in a different manner than the retroactive payments that were paid out of the \$80 million fund. These ongoing payments are based on actual hours and pay received by the employee. In each quarter in which the anomaly exists, the Postal Service calculates the difference between the pay actually received by the employee while the anomaly is in effect and what the employee would have received if he or she had remained in the lower grade. In making this calculation, the Postal Service includes, in addition to basic straight-time salary, overtime pay, night differential, Sunday premium, holiday worked pay and out-of-schedule overtime pay. It does not include TCOLA.

The NALC asserts that it was not aware that the Postal Service was not including TCOLA until shortly before the filing of this grievance in February 2001, when the Anchorage Branch of the NALC learned of this in the course of discussions with management regarding the remedy to be provided to an employee

affected by the anomaly who had not received any corrective payment.<sup>2</sup>

Robert Kenestrick, a now retired former compensation specialist at headquarters, testified regarding a meeting on anomaly payments in September 1991 between representatives of the Postal Service and the NALC and APWU. At this meeting, he stated, the Unions questioned the Postal Service about the delay in calculating and paying the retroactive payment to the second group of affected employees -- those with multiple job grade movements -- out of the \$80 million fund. By that time, he said, the Postal Service had reached a separate agreement with the National Postal Mail Handlers Union (NPMHU) regarding anomaly payments. The NPMHU agreement did not include payments from a fixed fund, but utilized an hours-based program -- actual hours paid -- to calculate both retroactive and ongoing anomaly payments. Kenestrick said the Postal Service proposed using a similar program to calculate the remaining payments to be made from the \$80 million fund, at least in part because it had discovered that a number of the JBC employees paid in the first round actually were undeserving of anomaly payments they received for pay periods in which they did not have actual paid hours. The JBC Unions did not agree to switch to an hours-based program. They wanted to continue to calculate the remaining payments from the \$80 million fund in the same manner as in first round. That is what happened, although the Postal Service did use actual payroll records to make sure employees did not

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<sup>2</sup> Intervenor APWU states it only learned that TCOLA was not included after this case was appealed to national arbitration by the NALC.

get a lump sum payment for periods in which they did not have a minimum number of paid hours.

Kenestrick also testified that there was discussion at the September 1991 meeting regarding how ongoing anomaly payments were to be made to affected employees after the term of the 1987-90 National Agreement. Perhaps not surprisingly, his recollection of this meeting almost 15 years later was not very precise. As he put it, he was "fuzzy" on what they agreed to regarding such ongoing payments, although he did not remember the Unions raising any objection to calculating them using an hours-based program like that used for NPMHU employees. He agreed on cross-examination, however, that there may not have been any "agreement" on how those payments were to be calculated.

The Postal Service introduced a document which appears to be notes of a meeting between the parties on September 11, 1991. This document lists the names of the persons at the meeting. It is unsigned and does not otherwise identify its author. Kenestrick testified he was sure he either wrote or had quite a bit of input into this document, although he agreed he usually signed his notes. This document includes the following:

PAYMENTS FOR RETROACTIVE PERIOD:

\* \* \*

- ° USPS will modify the hours based program to calculate the second round of payments similar to the method used by the JBC in the first round (12/07/90).

- Payments will be based on straight-time 40 hours per week. Overtime and premium pay to be excluded.
- Employees will receive payment for LWOP for a workweek provided he or she has a minimum of 4 paid hours within the workweek.

\* \* \*

ONGOING ANOMALY PAYMENTS:

- ° JBC informed that the hours-based methodology will be used on a pay period basis.
- ° Office of Payroll Systems is currently developing a system to provide for the payments.
- ° At least one retro payment from PP 26-90 to be made prior to the implementation of the new system.

Consistent with the above Postal Service document, James Sauber, then a research economist with the NALC who the document states was present at the September 1991 meeting, although he had no specific recollection of that, testified that the Postal Service initially contemplated that the ongoing anomaly payments would be bi-weekly. That turned out to be administratively too burdensome, he said, and the Postal Service ended up calculating the payments on a quarterly basis.

There was no testimony or other evidence that inclusion or exclusion of TCOLA payments, which apply to only a

very small portion of the NALC and APWU bargaining units (about 1.3% of APWU members), ever came up in any discussions between the parties regarding implementation of the 1990 MOS or at any other time prior to this grievance.

Kenestrick pointed out that the statutory TCOLA payments, which are provided under the direction of the Federal Office of Personnel Management, are an allowance, not an adjustment to pay. TCOLA payments are not part of basic salary. He said they also are not "premium pay", which is anything associated with basic salary, including overtime, Sunday premium and night shift differential. The Postal Service's data center applies TCOLA after calculating an employee's premium pay, although TCOLA is only paid on basic salary. Kenestrick also testified that when the Postal Service has negotiated other contractual lump sum payments, TCOLA has not been paid on those payments.

Section 421.44 of the ELM provides as follows in relevant part:

421.44 Salary Terms

The salary terms are as follows:

- a. *Basic salary* - the annual, daily, or hourly rate of pay provided by the applicable salary schedule for the employee's assigned position.
- b. *Compensation* - the same as an employee's basic salary plus special pay.

c. *Special pay* - pay and allowances for additional and premium hours. See 430 for special pay provisions, which include the following:

- (1) Overtime pay....
- (2) Night differential....
- (3) Sunday premium....
- (4) Holiday worked pay....
- (5) Out-of-schedule overtime....
- (6) Information service center on-call pay....
- (7) Territorial cost-of-living allowance - TCOLA....

Of the seven "special pay" items identified in ELM §421.44(c), item (6) is inapplicable to letter carriers. Kenestrick acknowledged that all of the remaining items -- except (7) TCOLA -- are included by the Postal Service in computing ongoing anomaly payments.

#### UNION POSITION

The NALC contends that Paragraph 6 of the 1990 MOS is controlling. Paragraph 6 states that employees who experience pay anomalies after the terms of the 1987-90 National Agreement will be entitled to "a remedy (or remedies) in accordance with the principles stated above". One of these "principles" set forth in Paragraph 2 directly resolves this case: "No employee will, as a consequence of a promotion, at any time be compensated less than that employee would have earned if the employee had not been promoted but had, instead, merely advanced in step increments in that employee's grade as a result of

fulfilling the waiting time requirements necessary for step increases."

Exclusion of TCOLA from the computation of anomaly payments results in affected employees being "compensated less". They receive less pay than if they had not been promoted. This pay difference, the NALC asserts, is a difference in compensation under both the Postal Service definition of "compensation" in ELM §421.44(c) and any ordinary definition of the concept.

The NALC argues that the Postal Service's reliance on language in Paragraph 3 of the 1990 MOS referring to a comparison of "basic salary" and payment of the "difference" in "a one-time lump sum payment" is doubly misplaced. First, Paragraph 3 specifically addresses the retroactive anomaly payments to be made from the \$80 million fund established for that purpose. Under Paragraph 3, the parties agreed to work together to determine who would be entitled to those payments, how much they would receive and when they would be paid. They also agreed that the one-time lump sum payments from the fund would resolve all anomaly pay claims under the 1984-87 and 1987-90 National Agreements. By contrast, prospective payments are addressed solely in Paragraph 6 which makes all "principles" of the 1990 MOS applicable, including Paragraph 2. Second, the NALC stresses, the Postal Service has never relied solely on differences in basic salary in calculating the prospective anomaly payments. On the contrary every element of ELM Section 421.44 compensation in addition to basic salary -- except TCOLA -- is and always has been factored into such calculations.

The APWU supports the NALC's position. The APWUU points out that while the 1990 MOS specifically provided that the parties were to negotiate regarding distribution of the \$80 million fund, it does not provide that they were to negotiate over calculation of any prospective remedy, nor does it provide that the calculation of such a remedy should be performed using the same formula as the parties used for distribution of the settlement pot. Instead, the 1990 MOS provides that any prospective remedy should be calculated in accordance with the principle set forth in Paragraph 2. This calculation is not an approximation which requires a negotiable formula, and the Unions were not involved in crafting the formula used by the Postal Service to calculate lost pay prospectively, when an exact calculation was entirely possible. There is no evidence that the Unions ever agreed to specifically subtract TCOLA, which would fly in the face of the principle in Paragraph 2.

#### EMPLOYER POSITION

The Postal Service contends that the Unions produced no evidence that the 1990 MOS now requires or ever has required that the calculation of lump sum payments include the TCOLA difference. The Postal Service asserts that initially the parties agreed lump sum payments were equal to the difference in basic salary only. Later they modified their agreement to provide that the difference in overtime and contractual premium pay also would be included.

The Postal Service points to testimony of NALC witness Sauber that there never was any agreement to include the TCOLA difference in the calculation of lump sum payments. The Postal Service also stresses that there never was any agreement for a full, make whole remedy. The lump sum settlement reached in 1990, even under the Unions' own calculations, paid some employees less and some more than the exact difference in total compensation they would have been paid if they had not been promoted. The 10% add-on hardly fully remedied potential losses by an employee, and there was no testimony that it was intended to compensate for TCOLA.

The Postal Service insists that in applying Paragraph 6 of the 1990 MOS, the principles set forth in both Paragraphs 2 and 3 are to be applied. Paragraph 3 is more specific regarding payment and calculation of the lump sum and plainly states the payments were to be based on a straightforward comparison of basic salary only. TCOLA is not part of basic salary. It also is not premium pay, which is included in the calculation of the lump sum payments. Premium pay is an adjustment to salary. TCOLA is special pay -- an allowance, more in the nature of a non-taxable stipend. Moreover, TCOLA is not considered as part of a promotion increase. ELM §439.12(c) states: "Payment of TCOLA does not constitute an equivalent increase for step increase purposes." Therefore, TCOLA should not be included in the equation to correct the promotion pay anomaly, which is based on the difference in pay between grades and steps resulting from a promotion.

The Postal Service asserts that Kenestrick gave unrebutted testimony that the parties negotiated basic salary schedules to pay all employees working in the same position the same pay without regard to where they work. He also testified that when the parties have negotiated an across-the-board lump sum payment in collective bargaining, TCOLA is not paid on the lump sum.

Although Postal Service regulations define "compensation" as "basic salary" plus "special pay", which includes TCOLA, the 1990 MOS does not state that the lump sum payment equals the difference in total "compensation" either as defined by the ELM or in its ordinary usage. Under the principle in Paragraph 3 only the difference in basic salary is to be included. The fact that the parties agreed in 1991 to modify the calculation to include overtime and premium pay, which are also elements of special pay, does not mean the Postal Service ever agreed to include the difference in all elements of special pay. Nor is the Postal Service contractually obligated to do so.

The Postal Service maintains that the current manner in which it calculates the lump sum payments is a result of an express agreement between the parties, as testified to by Kenestrick and as shown in his notes. The Unions did not include the TCOLA difference when they unilaterally performed or reviewed the calculations for not one, but for all three rounds of fund payments. The Postal Service insists the issue cannot be artificially limited to the Postal Service's conduct in making "ongoing payments" just to obscure the crucial fact that

there never was any intent to include the TCOLA difference for either the fund payments or the ongoing payments and that all the parties acted accordingly.

As the Unions did in calculating the lump sum payments from the fund, the Postal Service applies the same formula to each employee regardless of their work location. The Unions could have factored in TCOLA in the fund payments without much difficulty since they had the addresses of the affected employees and the calculation would have been relatively simple given the very simplistic calculation used in making those payments. Regardless of the reason, the JBC Unions decided to treat everyone the same, and they must now honor that decision.

The Postal Service points out that the promotion pay anomaly is not a true retroactive or back pay type payment initiated to actually change the employee's payroll records, wages, etc.; it is a lump sum payment the calculation of which includes some but not all the elements of a make whole payment. The agreement to resolve the promotion pay anomaly dispute with a lump sum payment may have benefited some employees more than others, but in the aggregate it provided appropriate relief to the group as a whole.

The Postal Service contends that the 2003 Joint Contract Administration Manual (JCAM) agreed to by the Postal Service and the NALC memorializes the parties' agreement that the current quarterly lump sum calculation includes the difference in paid straight-time, overtime and premium pay only. The JCAM states:

The lump sum payments provided by the settlement are calculated based on all paid hours, including paid leave. This includes straight-time hours, overtime hours and any applicable premium pay....

The Postal Service asserts the language of the JCAM is consistent with Section 422.123(a)(5) of the current ELM.<sup>3</sup>

Although not introduced as an exhibit at the arbitration hearing, the Postal Service also attached to its post-hearing brief excerpts from Postal Bulletin No. 20831, dated December 24, 1992, which includes an item on "ABC Promotion Pay Lump Sum Payments" that states in part:

On December 31, 1992 (Pay Period 27), regular paychecks will include lump sum payments for certain represented employees affected by the promotion pay anomaly after November 20, 1990. The calculation of these payments is the difference between the employees' pay in the grade of promotion, and the pay they would have received had they not been promoted, but had advanced in step increments as a result of fulfilling the waiting time requirements in the lower grade. The calculations are based on paid hours and include overtime and premium pay....

In conclusion, the Postal Service argues that the plain language of the 1990 MOS, the parties' mutual

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<sup>3</sup> This ELM provision appears to be identical to ELM §422.231(c), previously quoted, except that it uses the term "basic wage" instead of "basic salary".

interpretation as reflected in the JCAM, the ELM, and their course of dealing and performance under the 1990 MOS all evidence a lack of intent to include the TCOLA difference as part of the promotion pay calculus. In 1990, the Unions struck a deal -- a compromise -- which benefited them as much as it did the Postal Service. They should not now be permitted to repudiate the agreement.

With respect to intervenor APWU, the Postal Service further argues the APWU has no standing in this matter because it can show no injury within the applicable limitation period. Article 15, Section 2(a) of the National Agreement requires a grievance to be filed within 14 days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. In 1999 the APWU negotiated a new salary schedule that eliminates the pay anomaly for its members. This grievance was filed in February 2001, well outside of any date in 1999 when the last APWU anomalies would have been experienced.

#### FINDINGS

Although Postal Service and JBC Union representatives involved in implementing the 1990 MOS knew about the existence of TCOLA, there is no evidence that it ever was discussed in the context either of anomaly payments from the \$80 million fund or ongoing ABC payments made after the term of the 1987-90 National Agreement.

There is no question, however, that not including TCOLA in the calculation of ABC payments results in an employee being compensated less than if the employee had not been promoted, contrary to the basic principle agreed to in Paragraph 2 of the 1990 MOS. The loss is every bit as real as would be the exclusion of any other special pay item, all of which are included by the Postal Service in its calculation of ABC payments. An employee in Alaska affected by the promotion pay anomaly, for example, has a reduction in compensation due to the difference in TCOLA that is equal to 25% of the difference in basic salary.

Pursuant to Paragraph 3 of the 1990 MOS, the parties agreed on what would be included in the anomaly payments made from the \$80 million fund to cover employees affected during the 1984-87 or 1987-90 National Agreements. Due to lack of detailed pay records and/or the Unions' goal of expediting the calculation and payment of these retroactive amounts, the Unions proposed and the Postal Service agreed that they simply would calculate the difference in basic salary and assume that during the relevant periods the employee was paid 80 hours per bi-weekly pay period. They also agreed to an additional roll up payment -- showing there never was a mutual intent to limit those anomaly payments to only the difference in basic salary. At first, this roll up was 10% of the difference in basic salary. After the parties had completed the three rounds of calculating these anomaly payments and were ready to liquidate the fund, there was a sufficient balance to increase the roll up to about 30%.

For whatever reason, including the possibility they never thought of it, neither the Unions nor the Postal Service proposed calculating and including the difference in TCOLA for the relatively small number of affected employees working in TCOLA areas. As the Postal Service asserts, it might have been relatively simple to determine the difference in TCOLA, since all employees in Alaska or outside the continental United States receive TCOLA and it is paid only on basic salary. But the parties chose to adopt a formula that treated all employees alike, except for the difference in basic salary rates. In the overall picture, the difference in TCOLA sustained by one employee in Alaska who did not work overtime might have been less than what another employee in Pennsylvania "lost" in overtime pay. They each got a significant roll up payment to roughly compensate them for losses beyond basic salary.

It also is important to bear in mind that these anomaly payments were paid out from a predetermined negotiated \$80 million fund. The Unions chose, with the Postal Service's agreement, a simple, streamlined methodology to get the money in the fund paid out as quickly as possible to their members who had suffered reductions in compensation dating back to 1985. The Postal Service's obligation for the period through the end of the 1987-90 National Agreement was fixed at \$80 million, regardless of the methodology used to calculate individual payments. Moreover, under the 1990 MOS, employees could not grieve the payments they received (as opposed to having service records corrected), so that letter carriers in Alaska who might have felt they should have been paid the TCOLA difference had no recourse.

The situation changed significantly after the end of the 1987-90 National Agreement. The promotion pay anomaly was not eliminated in the new contract, as evidently had been hoped for. There no longer was a fund to be used to make ongoing payments. Instead, the Postal Service now was required to pay anomaly or ABC payments as a remedy to affected employees pursuant to Paragraph 6 of the 1990 MOS. Unlike Paragraph 3 which applied to the payments made from the \$80 million fund, Paragraph 6 did not call for the parties to jointly determine how these payments were to be calculated. Nor was there any requirement that this be done in the same manner as payments made from the \$80 million fund. The Postal Service's obligation was to provide "a remedy (or remedies) in accordance with the principles stated above [i.e., in Paragraphs 2 and 3]". Moreover, the evidence in this record does not support a finding that the parties reached agreement on the specifics of how the Postal Service was to calculate the ongoing ABC payments. At most it can be concluded that the Unions acquiesced in the Postal Service's determination that these would be hours-based payments. It is difficult to see why or on what contractual basis they would have objected to that approach with respect to prospective ABC payments.

The Postal Service may have informed the JBC Unions that it was going to utilize an hours-based methodology similar to the one it was using to pay NPMHU employees, which evidently compensated employees for the difference in straight-time pay, overtime and "premium pay", but the testimony and documentary evidence in this record is not sufficient to establish that the

JBC Unions expressly or implicitly agreed to a specific methodology or that TCOLA was not to be included.

Postal Service witness Kenestrick said TCOLA is not included in "premium pay", but neither he nor the Postal Service cited a contractual or ELM definition of that term.<sup>4</sup> Kenestrick's testimony was that: "Premium pay is anything that is associated with basic salary to include overtime, penalty overtime, Sunday premium, night shift differential, things of that nature." (Transcript at p. 139.) He also said TCOLA is an "allowance", not an "adjustment to pay". Yet, TCOLA clearly is associated with basic salary -- it is an allowance calculated on the basis of a statutorily determined percentage of basic salary. It also is the only element of "special pay" -- a term defined in ELM §421.44 as being included together with basic salary in "compensation" -- which Kenestrick said was not "premium pay".

Even if TCOLA is not considered "premium pay", there is nothing in the controlling principles agreed to in the 1990 MOS which suggests the parties agreed that only "premium pay", but not other "special pay" components of "compensation" (i.e., TCOLA), was to be included in prospective anomaly payments made pursuant to Paragraph 6. JBC Union representatives involved in the implementation of the 1990 MOS credibly testified that they

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<sup>4</sup> The term "premium pay" also is used in a provision in the 2003 NALC/USPS JCAM, cited by the Postal Service, which does not define the term. (It is not clear to me whether initial agreement on this JCAM provision postdates the filing of this grievance.)

were not specifically aware that the Postal Service was not including TCOLA in calculating the ongoing quarterly ABC payments, and there is no evidence that the Postal Service ever specifically told the Unions that TCOLA was not included in those payments.<sup>5</sup>

Absent proof of an agreement to include or exclude TCOLA in ongoing ABC payments, it is necessary to look to the principles agreed to in the 1990 MOS. As previously stated, there can be no question that under the principle stated in Paragraph 2, TCOLA should be included. The Postal Service points out that this is a general principle, whereas the principle in Paragraph 3 is more directly addressed to the payments to be made. It must be kept in mind, however, that Paragraph 3 primarily addresses payments to be made from the \$80 million fund pursuant to a methodology to be jointly developed by the parties. Moreover, in deciding how to make the payments from the \$80 million fund, the parties clearly did not limit payment to the difference in basic salary. Employees paid from the fund received an additional 10% roll up -- later increased to 30% -- to cover all other differences in compensation. In other words, from the outset the parties agreed that anomaly payments under Paragraph 3 would not be limited to the difference in basic salary, which is consistent with the principle they agreed to in Paragraph 2.

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<sup>5</sup> In context, I do not understand NALC witness Sauber's testimony, cited by the Postal Service, as acknowledging there was an understanding that TCOLA would not be included, but rather that there was no specific agreement that TCOLA would be included.

Of course, the Postal Service had only a limited interest in the methodology used to make payments from the \$80 million fund, since its liability was fixed at that amount. Therefore, what is more significant is that when the Postal Service began to make ongoing ABC payments pursuant to Paragraph 6 -- which evidently did not occur until December 1992 -- and ever since, the Postal Service has not limited these payments to the difference in basic salary. On the contrary, it has included all elements of special pay included in compensation other than TCOLA.

Thus, it is reasonable to conclude that in applying the principles of the 1990 MOS the parties have not considered the "difference" on which anomaly payments are to be based as limited to just the difference in basic salary, although the other differences flow from the difference in basic salary. It then is appropriate to look to the broader principle in Paragraph 2 to determine whether TCOLA, which is directly derived from basic salary, should be included in the ABC payments.

The Postal Service, notably, has offered no principled reason why TCOLA, alone among all the elements of special pay associated with basic salary and compensation, should be excluded. The fact that TCOLA is not paid on other contractual lump sum payments is not comparable. By statute, TCOLA is paid only on basic salary. Other contractual lump sum payments are not designed, as are ABC payments, to compensate an employee for the anomaly of a reduction in basic salary -- and hence a reduction in TCOLA -- when the employee receives a promotion.

Payment of TCOLA also is not considered as part of a promotion increase as specified in ELM §439.12(c), but that has no real bearing on ABC payments, given their specific purpose.

The Postal Service has not suggested there is any practical reason to not include TCOLA. For cost and efficiency reasons, the Postal Service considers it very important that it be able to utilize its normal "retro" program to calculate the quarterly lump sum ABC payments. The evidence shows, however, that the "retro" program automatically calculates and includes the difference in TCOLA along with other pay differences. Indeed, the Postal Service currently has to back out the TCOLA difference after using that program.

Accordingly, in resolving the interpretive issue presented in this case, I find that the June 13, 1990 Memorandum of Settlement for Case No. H7C-NA-C 39 requires that ongoing anomaly or ABC lump sum payments made pursuant to Paragraph 6 of that agreement include TCOLA. Remedy and other issues relating to the underlying grievance filed by the NALC's Anchorage Alaska Branch should be addressed by the parties, consistent with this determination. There is no need in ruling on the interpretive issue to further address the Postal Service's contention that the APWU has no standing in this matter because it can show no injury during the time period covered by the underlying grievance.

AWARD

For the reasons set forth in the above Findings, the June 13, 1990 Memorandum of Settlement for Case No. H7C-NA-C 39 requires that ongoing anomaly or ABC lump sum payments made pursuant to Paragraph 6 of that agreement include TCOLA. Remedy and other issues relating to the underlying grievance filed by the NALC's Anchorage Alaska Branch should be addressed by the parties, consistent with this determination.



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Shyam Das, Arbitrator