


## American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

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

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

**Date:** June 27, 2006

**Re:** Award on Obligation to Notify APWU of Withdrawal of Proposed Code of Federal Regulations Revision

A recent national-level arbitration award sustained the union's position that in order to make moot the union's appeal to arbitration of a proposed revision to a regulation which the Postal Service does not intend to implement, the Service is required to notify the APWU that it is withdrawing the proposed revision. Arbitrator Byars rejected the Postal Service's argument that the grievance was moot since a final rule containing the proposed revisions to Title 39 of the Code of Federal Regulations Section 232.1, Conduct on Postal Property, had not been issued. She said that in order to make the appeal moot, the Postal Service was required to withdraw the proposed revision and the notice to the APWU of the proposed revision. (*USPS #Q90C-4Q-C 95053266; 5/24/2006*)

This case arose after the Postal Service notified the APWU on March 14, 1995, as "a matter of general information," of proposed revisions to 39 CFR Section 232.1 which provide that "when conduct that is a violation of Federal or state criminal law is committed on Postal Service property, it is also a violation of Postal Service regulations, and ... the fine and/or imprisonment penalties of 39 CFR 232.1(p) may be imposed for such conduct when Federal and state prosecution of the criminal law are declined." It thereafter published its proposed regulation in the Federal Register for public comment, and following a subsequent meeting with the APWU, the Postal Service advised the union that it intended to publish a final rule containing the changes. Subsequently, on May 15, 1995, the APWU appealed to arbitration the March 1995 notice proposing to revise 39 CFR Section 232.1. After the APWU's grievance was scheduled for arbitration in March 2006, the Postal Service informed the union that, since the revision to the Code of Federal Regulations had never been made, the grievance lacked merit and was moot. The APWU responded, however, that the Postal Service should provide it with notice that the proposed revisions were withdrawn. The case proceeded to arbitration.

At the arbitration hearing, according to Arbitrator Byars, the parties agreed that “the proposed revisions to 39 CFR Section 232.1 were not published during the eleven years post-notification” [and that] “the Postal Service could decide to publish a final rule in the future.” Moreover, in a post-hearing brief, the Postal Service conceded that the grievance appeal is not moot. The arbitrator indicated that “[t]he Parties’ current agreement that the Grievance appeal is not moot is based on their mutual understanding that a contrary finding could prevent the APWU from challenging the promulgation of a final rule if and when the Postal Service decided to go forward with the revision.” Based on this finding, the arbitrator determined that the APWU’s position at the hearing that the grievance is not moot “is no longer an issue.”

However, according to Arbitrator Byars, the Postal Service’s position is that an arbitrator is required to make a decision on the merits at this time in order to preserve the union’s appeal rights. APWU’s argument, on the other hand, is that its requested relief, that the Postal Service withdraw its notification of the change, “protects [its] right to challenge a possible future revision without requiring an arbitration decision on the merits of a revision that may never be made, is consistent with the Parties’ practice, and can be granted without prejudice to the underlying disputes of either Party.”

Arbitrator Byars found that even though the National Agreement does not specifically require the withdrawal of a “stale notification,” the record shows “without rebuttal” that the Postal Service as a matter of practice “withdraws proposed revisions when it does not intend to implement [them], thereby permitting the APWU to withdraw an appeal to arbitration and permitting a later challenge to any subsequent proposed revision to the same regulation.” In addition, she found that the evidence established that the Postal Service “withdraws proposed revisions even when it explicitly reserves the right to reissue the proposed change,” and when as in this case, “the notice to the APWU was issued as ‘a matter of general interest’ and ... the Postal Service does not agree that the proposed revisions directly relate to wages, hours, or working conditions.” Arbitrator Byars reasoned that it was reasonable to withdraw a “stale proposal” that management does not intend to act upon because the APWU may then withdraw a grievance appeal, and therefore “the Parties sensibly avoid arbitral decisions on issues that may never exist.”

Accordingly, she concluded that though Article 19 “does not provide a procedure for withdrawal of notice as a means to preserve the APWU’s appeal rights, the record demonstrates a mutually accepted, and manifestly reasonable, procedure for resolving such a grievance, i.e. withdrawal of proposal to review and a concomitant notice to the APWU.”

Arbitrator Byars ruled, however, that it is unnecessary to decide if the Postal Service has an obligation to withdraw the notice of the proposed revision that it had placed in the Federal Register. “Even without formal withdrawal, the Postal Service’s withdrawal of the notice to the APWU prevents the APWU’s losing its right to appeal to arbitration if and when the Postal Service decides to make the proposed revision to 39 CFR 232.1,” according to the arbitrator.

**NATIONAL ARBITRATION PANEL**

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IN THE MATTER OF THE ARBITRATION.

between

**UNITED STATES POSTAL SERVICE**

AND

**AMERICAN POSTAL WORKERS UNION  
AFL-CIO**

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.CASE NO.: Q90C-4Q-C 95053266  
.Revisions to 39 CFR 232.1  
.Conduct on Postal Property  
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BEFORE: Linda S. Byars, Arbitrator

APPEARANCES:

For the APWU: Anton G. Hajjar, Counsel

For the USPS: Stephan J. Boardman, Counsel

Place of Hearing: Washington, D.C.

Date of Hearing: March 10, 2006

Post-Hearing Briefs: Dated May 24, 2006

Award Summary

The APWU's May 15, 1995 appeal to arbitration is not moot. To make the appeal moot, the Postal Service shall withdraw the proposed revision and the March 14, 1995 notice to the APWU.

## BACKGROUND

By letter dated March 14, 1995, the Postal Service notified the Union as follows:

Enclosed for your information are proposed revisions to Title 39, Code of Federal Regulations (CFR), 232.1, Conduct on Postal Property. These proposed regulations provide that when conduct that is a violation of Federal or state criminal law is committed on Postal Service property, it is also a violation of Postal Service regulations, and that the fine and/or imprisonment penalties of 39CFR 232.1(p) may be imposed for such conduct when Federal and state prosecution of the criminal law violation are declined. [APWU Exhibit No. 1, p. 3.]

On April 5, 1995 the Postal Service published its proposed regulation in the Federal Register for public comment.

By letter dated May 15, 1995, the APWU responded as follows:

In accordance with the 1990-1994 Collective Bargaining Agreement the American Postal Workers Union appeals to arbitration the March 14, 1995 Sherry A. Cagnoli letter to Messrs. Biller and Sombrotto proposing to revise Title 39, Code of Federal Regulations (CFR) 232.1, Conduct on Postal Property. [APWU Exhibit No. 1, p. 2.]

On June 7, 1995 the Parties met to discuss the Grievance, and by letter dated August 23, 1995 the Postal Service advised the APWU that it had decided to publish the changes as proposed. [APWU Exhibit No. 10.]

By letter dated February 16, 2006, the Postal Service advised the APWU that the Grievance, scheduled for

arbitration on March 10, 2006, contested a proposed change to Title 39 that was posted in the Federal Register but never made, and therefore the Grievance "lacks merit and is moot." [APWU Exhibit No. 4, p. 1.] By letter dated February 28, 2006, the APWU responded that it had received no record of notification from the Postal Service indicating that the proposed revisions had been withdrawn and asking that the Postal Service provide official notification to the APWU that it, " . . . hereby withdraws the April 5, 1995 notification letter and the draft revisions to Title 39, Code of Federal Regulations (CFR), 232.1." [APWU Exhibit No. 4, pp. 2-3.] By Letter also dated February 28, 2006, the APWU asked the Postal Service to withdraw the notification letter sent to the APWU dated March 14, 1995 and to withdraw the proposed changes. [APWU Exhibit No. 4, p. 4.]

On March 10, 2006 the Grievance came before the Arbitrator, and at the request of the Parties the record remained open for post-hearing briefs, which were dated May 24, 2006. The Parties proposed the following statements of issue.

## STATEMENT OF ISSUE

### APWU

Is the APWU's appeal to arbitration in this matter moot?

If not, what shall be the remedy? [Transcript p. 15.]

### Postal Service

Is there arbitrable authority to prohibit the government from publishing a proposed regulation or to require the Postal Service to cease publication or to withdraw the publication of a proposed regulation? [Transcript p. 24.]

## OPINION

The APWU appealed the Grievance to arbitration pursuant to the 1990 - 1994 Collective Bargaining Agreement, which provided in pertinent part:

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

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least sixty (60) days prior to issuance. At the request of the Unions, the parties shall meet

concerning such changes. If the Unions, after the meeting, believe the proposed changes violate the National Agreement (including this Article), they may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Unions upon issuance. [Joint Exhibit No. 1F, pp. 99-100.]

The Parties agree that, contrary to the Postal Service's stated intention in its August 23, 1995 letter to the APWU, the proposed revisions to 39 C.F.R. Section 232.1 were not published during the eleven years post-notification. The Parties also agree, however, that the Postal Service could decide to publish a final rule in the future. In its post-hearing brief, the Postal Service agrees with the APWU's assertion in its February 28, 2006 letter that the Grievance appeal is not moot. The Parties' current agreement that the Grievance appeal is not moot is based on their mutual understanding that a contrary finding could prevent the APWU from challenging the promulgation of a final rule if and when the Postal Service decided to go forward with the revision.

The Parties did not agree to a statement of issue; however, the procedural issue as proposed by the APWU is no longer an issue. The Postal Service does not agree with the remedy as proposed by the APWU for protecting appeal rights but asks the Arbitrator to make a decision on the merits as a

means to preserve the APWU's appeal. However, as the APWU maintains, its requested relief, i.e. for the Postal Service to withdraw the March 14, 1995 notification, protects the APWU's right to challenge a possible future revision without requiring an arbitration decision on the merits of a revision that may never be made, is consistent with the Parties' practice, and can be granted without prejudice to the underlying disputes of either Party.\*

Absent any action by the Postal Service to implement the proposed regulation during the eleven years since the notice to the Union, the proposed regulation is, as the Union contends, clearly stale. Although there is nothing in the Parties' written Agreement that requires an official withdrawal of a stale notification, there is also nothing in the Agreement that prohibits it. Moreover, the record demonstrates, without rebuttal, that the Postal Service withdraws proposed revisions when it does not intend to implement, thereby permitting the APWU to withdraw an appeal to arbitration and permitting a later challenge to any subsequent proposed revision to the same regulation. The record demonstrates that the Postal Service withdraws the proposed revisions even when it explicitly reserves the right to reissue the proposed change (APWU Exhibit Nos. 6 and 9),

\*Granting the APWU's requested remedy also obviates a decision on a substantive issue that was not fully developed at arbitration.



and the Postal Service officially withdraws the proposed revision when, as in the instant case, the notice to the APWU was issued as "a matter of general interest" and when the Postal Service does not agree that the proposed revisions directly relate to wages, hours, or working conditions (APWU Exhibit Nos. 8-9). By withdrawing a stale proposal that the Postal Service agrees it has no current intent to act on, the APWU may then withdraw its grievance appeal, and the Parties sensibly avoid arbitral decisions on issues that may never exist. The Parties reserve and preserve their arbitration procedure for those issues that are ready for decision.

The issue as stated by the Postal Service asks, " . . . whether there is arbitrable authority to prohibit the government from publishing a proposed regulation or to require the Postal Service to cease publication or to withdraw the publication of a proposed regulation."

[Transcript p. 24.] Such a statement does not adequately frame the issue. The APWU is asking that its contractual rights be preserved. Although Article 19 does not provide a procedure for withdrawal of notice as a means to preserve the APWU's appeal rights, the record demonstrates a mutually accepted, and manifestly reasonable, procedure for resolving such a grievance, i.e. withdrawal of proposal to revise and a concomitant notice to the APWU.

The APWU also requests as remedy that the April 5, 1995 notice in the Federal Register be withdrawn. Director of Industrial Relations Greg Bell testified that in another case dealing with the Federal Register the Postal Service, " . . . also withdrew the notice that they put in the Federal Register." [Transcript pp. 38-39.] Mr. Bell further testified that the Parties agreed during pre-arbitration discussion that, "they were obligated to withdraw it from the Federal Register." [Transcript p. 44.] The record demonstrates that the Postal Service agreed on July 16, 2003 in Case No. Q90C-4Q-C 93046261 to settle the Grievance by rescinding and discontinuing the disputed matter and withdrawing the Federal Register Notice related to that matter. However, the settlement agreement does not acknowledge an obligation to do so, and the APWU has not shown that such action is necessary to preserve its rights under Article 19. [APWU Exhibit No. 5, p. 1.] Moreover, it is unnecessary to decide if the Postal Service is obligated to withdraw formally the April 5, 1995 Federal Register notice. Even without formal withdrawal, the Postal Service's withdrawal of the notice to the APWU prevents the APWU's losing its right to appeal to arbitration if and when the Postal Service decides to make the proposed revision to 39 CFR 232.1. Therefore, in accordance with the reasoning set forth above, the Arbitrator makes the following Award.

AWARD

The APWU's May 15, 1995 appeal to arbitration is not moot. To make the appeal moot, the Postal Service shall withdraw the proposed revision and the March 14, 1995 notice to the APWU.

DATE: June 23, 2006

  
Linda S. Byars Arbitrator