UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: January 15, 1997

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
NORTHWEST MOUNTAIN REGION
RENTON, WASHINGTON

Respondent

and Case No. DE-CA-60714

NATIONAL AIR TRAFFIC CONTROLLERS
ASSOCIATION, MEBA/AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION NORTHWEST MOUNTAIN REGION RENTON, WASHINGTON Respondent	
and NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION, MEBA/AFL-CIO Charging Party	Case No. DE-CA-60714

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **FEBRUARY 18, 1997**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

_____
ELI NASH, JR.
Administrative Law Judge

Dated: January 15, 1997
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION NORTHWEST MOUNTAIN REGION RENTON, WASHINGTON Respondent	
and NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION, MEBA/AFL-CIO Charging Party	Case No. DE-CA-60714

John J. Callahan, Esq.
For the Respondent

Michael Doss
For the Charging Party

Nadia Khan, Esq.
Nicholas J. LoBurgio, Esq.
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, *et seq.* (the Statute).

Based upon an unfair labor practice charge, as amended, filed by the Charging Party, National Air Traffic Controllers Association, MEBA, AFL-CIO (the Union), a Complaint and Notice of Hearing was issued by the Regional Director of the Denver Region of the Federal Labor Relations Authority. The complaint alleges that the Department of Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington (the Respondent)

violated section 7116(a)(1) and (8) of the Statute by failing to comply with an arbitrator's award. More specifically, the complaint alleges that the Respondent refused to comply with the award of Arbitrator Eric B. Lindauer dated April 12, 1996, directing the Respondent to obtain 30 parking spaces in a certain location at the Denver International Airport (DIA) for use by bargaining unit employees at no cost to them. Respondent denies that it refused to comply with the arbitrator's award in violation of the Statute, as alleged.

A hearing was held in Denver, Colorado, on November 18, 1996, at which all parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel and the Respondent filed timely post-hearing briefs which have been carefully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

A. The Parties' Partial Stipulation of Facts

In a joint stipulation with attachments, the parties stipulated to the following facts, among others:

The Union is the certified exclusive representative of an appropriate nation-wide collective bargaining unit of Air Traffic Control Specialists in the Department of Transportation, Federal Aviation Administration (FAA). The Respondent's employees located at DIA are included in the above unit exclusively represented by the Union. The FAA and the Union are parties to a collective bargaining agreement covering the unit employees. On April 12, 1996, Arbitrator Eric B. Lindauer issued a decision and award (attached as Exhibit 6 to the Partial Stipulation) finding that the Respondent violated the parties' collective bargaining agreement. Arbitrator Lindauer directed in his award that "[e]mployee parking for Air Traffic Controllers shall be relocated from its current site to the second level of the inside parking structure. The [Respondent] shall obtain 30 spaces in the west side of the East Terminal and use them to accommodate unit employee parking, including parking for handicapped personnel, at no cost to the employees." No exceptions to the foregoing award were filed with the Authority. There are 23,000 parking spaces at DIA, of which 13,600 are covered (i.e., indoor) spaces. All of

the parking spaces at DIA are owned and controlled by the City and County of Denver.

B. The Arbitrator's Decision and Award

In his decision dated April 12, 1996, which the parties have stipulated into this record, the arbitrator noted that the Union's grievance resulting in the hearing before him on January 18, 1996, alleged that the Respondent violated Article 70 of the parties' agreement and the agency's own policies--specifically FAA Order 4665.3--by failing to make every reasonable effort to locate the employee parking lot at DIA as close to the control tower as possible and by providing inadequate parking for unit employees. The arbitrator sustained the Union's grievance.

Specifically, the arbitrator found that Article 70 of the parties' agreement clearly required the Respondent to "make every reasonable effort to obtain parking as close to the facility as possible," and that the Respondent failed to meet that obligation in negotiating the lease with the City and County of Denver covering the facilities at DIA and thereafter when the latter determined where the 80 parking spaces to be used by the Respondent's employees at no cost to the agency would be located. The arbitrator noted that prior to the opening of DIA on February 28, 1995, the unit employees had worked in the control tower at Stapleton International Airport and had parked approximately 300 feet--or 5 minutes away--from their workplace. By contrast, at DIA they park approximately 2 miles from the control tower in an outdoor lot exposed to the weather, and are required to use a train conveyance and pass through public security checkpoints which create a commute from the parking lot to the control tower that takes from 20 to 35 minutes depending upon the time of day. The arbitrator further noted that the FAA regulation in effect at the time that the lease covering the DIA facilities was executed--FAA Order 4665.3A--required the agency to provide "a parking area located in close proximity" to the control tower, and that the FAA failed to do so based on the factors set forth in its own regulation.

Finally, the arbitrator found that the Respondent's efforts to provide parking for its employees within close proximity to the facility were "minimal at best" and thus "fell far short" of the contractual standard in Article 70 of "every reasonable effort." In this regard, the arbitrator noted that the Respondent made virtually no effort, either at the time of the lease or thereafter, to obtain covered parking closer to the control tower, but that its only efforts were directed toward improving conditions

at the existing outdoor parking lot. Accordingly, the arbitrator concluded that the Respondent had violated Article 70 of the parties' collective bargaining agreement.

As an appropriate remedy, the arbitrator recognized that any parking relocation still would be at some distance from the DIA control tower, but that ordering the Respondent to obtain some indoor parking spaces would at least protect unit employees from the weather and improve their personal security, as well as get them somewhat closer to their work site. Noting that the Union was flexible as to the precise location of the indoor parking but would prefer 30 spaces on the second level at the west end of the East Terminal at no cost to the employees, the arbitrator--as previously quoted--so ordered. Further, pursuant to the stipulation of the parties, the arbitrator retained jurisdiction of the matter for 60 days from the date of his Order "to resolve any dispute arising out of the implementation of this Order."[1]

C. Events After the Arbitrator Issued His Award

Upon receiving the arbitrator's award, the Respondent contacted officials of the City and County of Denver who had responsibility for administering the parking operation at DIA. The record indicates that Patricia Jensen, a real estate contracting officer for the Respondent in Renton, Washington, traveled to Denver and met with James A. Dunlap, the Deputy Director of Aviation/Operations at DIA, on May 1, 1996.[2] At that meeting, Ms. Jensen provided Mr. Dunlap with a copy of the arbitrator's decision and award; advised him of FAA's desire to obtain parking spaces inside the parking garage; had a lengthy discussion with him concerning DIA's policy on parking; and stated that she would be sending him a letter setting forth the following alternative proposals: (1) DIA would allow FAA to obtain 30 indoor parking spaces in the East Parking garage, the area specified by the arbitrator, at no cost to FAA; (2) DIA would provide the foregoing parking spaces to FAA for a fee; (3) DIA would provide parking beneath the Airport Operations Building; and

[1] The parties stipulated at the hearing in the instant case that the Respondent did not call any official at DIA or elsewhere within the City and County of Denver to testify at the arbitration hearing on January 18, 1996, concerning the parking situation at DIA or the costs to the Respondent of obtaining free reserved indoor parking at that facility for its unit employees.

[2] Mr. Dunlap directs all air and field operations at DIA, including parking and ground transportation.

(4) DIA would provide parking elsewhere in the East Parking garage to FAA for a fee.[3]

Mr. Dunlap, who testified at the hearing, essentially corroborated Ms. Jensen's description of their meeting, but elaborated on the discussion they had regarding DIA's parking policies. More specifically, Dunlap testified that he advised the Respondent "right up front" that it would not be possible for DIA to provide 30 parking spaces where the arbitrator had directed FAA to obtain them, and that indoor parking spaces could not be allocated at no cost to the Government.[4] Dunlap further testified that he rejected the Respondent's proposal "early on" to trade the outdoor parking spaces for an equal number of indoor spaces at no cost to the FAA. I credit Mr. Dunlap's testimony, not only because he was a forthright witness with no direct interest in the outcome of this case, but also because his testimony is consistent with that of Alan Hollinger, the Respondent's labor relations specialist who had the responsibility of trying to comply with the arbitrator's award. Hollinger testified that after Ms. Jensen had discussed a number of compliance options with Mr. Dunlap in Denver, she "came back with somewhat of a negative report."

Nevertheless, when the Respondent sent a letter to Mr. Dunlap on May 7, 1996, its only proposal was to trade 30 or more of FAA's outdoor parking spaces for an equal number of indoor spaces at no additional cost. Mr. Timken, who wrote the letter after receiving Ms. Jensen's May 6 memo, also suggested that if the Respondent's proposal were unacceptable, Dunlap should offer alternative proposals acceptable to DIA. Dunlap and Timken met to discuss the parking situation on May 24, 1996, at which Mr. Dunlap indicated that it would be possible for the Respondent to

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[3] Although Ms. Jensen did not testify at the hearing in this case, her version of the foregoing events were set forth in a memorandum dated May 6, 1996, to Mark Timken, another of the Respondent's Real Estate Contracting Officers, upon her return from meeting with Mr. Dunlap in Denver on May 1, 1996.

[4] The record indicates that even before the arbitration hearing which led to the instant unfair labor practice proceeding, Dunlap had informed Greg Mueller, the Respondent's Air Traffic Manager at DIA, that it would not be feasible to move the unit employees from their outdoor lot to the covered structure parking because the indoor parking spaces are within the revenue control system of the airport and, as such, are under constant audit to produce revenue at $10 per day.

trade its 80 outdoor parking spaces for a like number of spaces in the parking structure at a net cost to be determined after he had an opportunity to consult with the engineering and finance departments at DIA.[5] On June 6, 1996, Mr. Dunlap sent a letter of confirmation to Mr. Timken, specifying that the net cost to the Respondent of the parking-space trade would be $4.50 per space per day plus a one-time charge of $200,000 for moving certain electronic equipment from the outdoor lot to the inside garage.[6]

By letter dated June 27, 1996, Ms. Jensen sought clarification from Mr. Dunlap concerning the number of inside parking spaces that DIA would require the FAA to obtain, the exact location of those parking spaces, and the estimated monthly rental. In his response dated July 3, 1996, Mr. Dunlap attached the structural parking layout that he had previously discussed with Mr. Timken; identified where the FAA's indoor parking spaces would be located; and again stated that the estimated monthly rental would be $4.50 per day per space in addition to the cost of installing the "in" and "out" gate.

On July 17, Ms. Jensen again wrote to Mr. Dunlap, this time requesting an explanation in writing for presentation to the arbitrator as to why the City and County of Denver was unwilling to provide the FAA with 30 parking spaces on the west side of the second level of the East Parking garage. In his response dated August 5, 1996, Mr. Dunlap

[5] By the time that Mr. Timken met with Mr. Dunlap, he had already surveyed all of the Respondent's components at DIA concerning their parking needs, and knew from their responses that the total number of parking spaces needed was about 80.

[6] As Mr. Dunlap explained at the hearing in this case, DIA estimated that it could rent FAA's 80 cost-free outdoor parking spaces for enough money to bring down the $10 per day revenue requirement for each indoor parking space to $4.50 for the FAA. He also explained that the electronic equipment in question was a card reader which would restrict access to the designated parking spaces only to those FAA employees who had been issued an electronic card for use in entering and leaving the parking area. Mr. Dunlap indicated that the cost of installing new electronic equipment ordinarily was around $476,000, but that due to DIA's strong desire to help the FAA out of a difficult situation based on their special relation-ship, DIA offered to re-install the equipment then being used at the outdoor parking lot in the interior parking structure for only $200,000.

explained that public parking at DIA was increasing daily;[7] that in-close parking is critical to the business traveler; that granting an identifiable governmental entity close-in parking near the entrance to the facility would be perceived as preferential treatment and create a significant media event because the other (27,000) employees who work at the airport also want to park in the area designated by the arbitrator for the unit employees and would be aware of who was being permitted to park there; and that it would not be in the best interest of the FAA or the City and County of Denver to allow the unit employees to park in such a prominent location.

Although the Respondent and Mr. Dunlap communicated with each other in August and September concerning another possible alternative solution to the FAA's parking problem engendered by the arbitrator's award,[8] Mr. Dunlap remained firmly of the opinion that his previous offer of 80 indoor parking spaces on the ground level of the East Parking garage at a fee of $4.50 per space per day was the closest that the City and County of Denver could come to allowing the FAA to comply with the terms of the arbitrator's award, given all of the constraints he faced in administering DIA's parking facilities.

As previously stated, Respondent never filed exceptions to the arbitrator's award; never notified the arbitrator of any difficulties it was experiencing in attempting to comply with his award; and never accepted the City and County of Denver's stated "best" offer with respect to compliance with the arbitrator's award even though Mr. Dunlap's offer has

[7] Mr. Dunlap testified that the use of DIA parking spaces is growing by 7% each year; that high air traffic volume and people coming to the airport to shop have severely taxed DIA's existing parking capacity, although new parking facilities are under construction; that business travelers must be able to find parking convenient enough--i.e., in the covered parking areas--to allow them to catch their flights; and that covered parking therefore must be kept available for all of these public users of the airport facilities.

[8] By letter dated August 27, 1996, Mr. Timken suggested to Mr. Dunlap that 30 parking spaces might be developed in certain "wings" which at present had no overhead covering. Mr. Dunlap responded by letter dated September 27, 1996, that the location noted by Mr. Timken had no roof in order to provide ventilation to the enclosed parking structure, and that it would be cost prohibitive to convert that area to parking (because another source of ventilation would have to be engineered).

remained open at all times. Nor did the Respondent involve the Union at all in trying to find a solution to the problem of strictly complying with the terms of the arbitrator's award.9

Discussion, Conclusions of Law and Recommendations

A. The Applicable Law

Under section 7122(b) of the Statute, an agency must take the action required by an arbitrator's award when that award becomes "final and binding." The award becomes "final and binding" when there are no timely exceptions filed to the award under section 7122(a) of the Statute or when timely exceptions are denied by the Authority. *U.S. Department of the Air Force, Carswell Air Force Base, Texas*, 38 FLRA 99, 104 (1990)(*Carswell*); *U.S. Department of Health and Human Services, Health Care Financing Administration*, 35 FLRA 491, 494-95 (1990). An agency that fails to comply with a final and binding award violates section 7116(a)(1) and (8) of the Statute. *United States Department of the Treasury, Internal Revenue Service, Austin Compliance Center, Austin, Texas*, 44 FLRA 1306, 1315 (1992);

9 Gregory Mueller, the Respondent's Air Traffic Manager at DIA, who admittedly had no responsibility for compliance with the arbitrator's award, testified that he was told by Michael Coulter, president of the Union's local representing the 42 Air Traffic Controllers at DIA, that the Union would insist on strict compliance with the arbitrator's award and would not agree to any modifications, and that he (Mueller) passed that information along to management. Mr. Coulter testified that he never spoke with Mr. Mueller about an alternative location to the one ordered by the arbitrator, but that in fact he (Coulter) had expressed his flexibility in that regard to Mr. James DeLong, the Director of Aviation (Mr. Dunlap's superior) at DIA. I credit Mr. Coulter inasmuch as Mr. Mueller would have had no reason to discuss the matter with the Union's representative, and the Respondent's representatives who were responsible for implementing or challenging the arbitrator's award admitted that they simply never involved the Union in their efforts to comply with the award. Moreover, I note the arbitrator's finding that the Union had expressed flexibility in terms of fashioning a remedy for the Respondent's contractual failure to make every reasonable effort to obtain parking as close to the facility as possible. Accordingly, I find it far more likely than not that the Union would have remained flexible when difficulties developed in complying with the arbitrator's award if it had been informed of such difficulties.

U.S. Customs Service, Washington, D.C., 39 FLRA 749, 757-58 (1991)(*Customs*).

It is equally well established that an agency cannot collaterally attack an arbitration award during the processing of an unfair labor practice complaint alleging an unlawful failure to comply with that award. *U.S. Department of Veterans Affairs Medical Center, Allen Park, Michigan*, 49 FLRA 405, 426 (1994); *United States Air Force, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 15 FLRA 151, 153-54 (1984)(*Wright-Patterson*), *affirmed sub nom. Department of the Air Force v. FLRA*, 775 F.2d 727 (6th Cir. 1985). As the Authority stated in *Wright-Patterson*:

> To allow a party which has not filed exceptions to an award to defend its failure to implement that award in a subsequent unfair labor practice proceeding on grounds that should have been raised as exceptions to the award under section 7122 . . . would circumvent the procedures provided in section 7122(a) and frustrate Congressional intent with respect to the finality of arbitration awards.

Id. at 153. *See also Carswell*, 38 FLRA at 107; *Department of the Air Force, Headquarters, 832d Combat Support Group DPCE, Luke Air Force Base, Arizona*, 32 FLRA 1084, 1097-98 (1988).

B. Respondent Violated the Statute in this Case

Applying the foregoing principles to the circumstances of this case, I conclude that the Respondent violated section 7116(a)(1) and (8) of the Statute as alleged in the complaint. Thus, the parties stipulated that the arbitrator issued his Decision and Award on April 12, 1996, and that the Respondent never filed exceptions to that award with the Authority under section 7122(a) of the Statute. The Respondent failed to do so even though, as I have found above, it knew before the 30-day time limit for filing timely exceptions had expired[10] that the City and County of Denver would not allow the unit employees to park at DIA in the area of the indoor parking garage specified by the arbitrator in his award. Thus, Mr. Dunlap's credited

[10] The arbitrator's retention of jurisdiction for 60 days following the issuance of his award did not deprive the award of finality or extend the time limit for filing exceptions to the award with the Authority. *See San Antonio Real Property Management Agency and American Federation of Government Employees, Local 3782*, 15 FLRA 353, 354 (1984).

testimony reveals that he told Ms. Jensen "up front" on May 1, 1996, that he could not allow the FAA to acquire 30 parking spaces for use by the unit employees in the specific area designated by the arbitrator. Nevertheless, the Respondent did not file exceptions with the Authority. Had it done so, if only because of some uncertainty whether the award could be complied with as written, the Authority would have had the opportunity to remand the award to the parties for the purpose of having them jointly submit it to the arbitrator for further interpretation and clarification. *See, for example, Social Security Administration and American Federation of Government Employees, Local 1336*, 32 FLRA 712 (1988); *compare U.S. Army Transportation Center, Ft. Eustis, Virginia and National Association of Government Employees, Local R4-106*, 34 FLRA 601, 603 (1990).

Any lingering doubt about the Respondent's ability to comply with the specific terms of the arbitrator's award certainly was dispelled when Mr. Dunlap met with Mr. Timken on May 24 and followed up that meeting with a confirming letter dated June 6, 1996. At that point the Respondent knew that it could not obtain from the City and County of Denver the 30 parking spaces in the area of the parking structure specified by the arbitrator in his award. Accordingly, the Respondent could have notified the arbitrator of its difficulty in complying with the award--the arbitrator having retained jurisdiction over the matter for 60 days just for that purpose--and thereby afforded the arbitrator an opportunity to clarify his award as deemed appropriate. However, the Respondent never contacted the arbitrator or notified the Union during the 60-day period following the issuance of the April 12 award.

Finally, the Respondent never sought to involve the Union in the process of compliance with the arbitrator's award. Had it done so, the parties could have approached the arbitrator jointly--even after the 60-day period had expired--and sought clarification of the award from the arbitrator in light of the Respondent's inability to comply with the express terms of the April 12 award. However, the Respondent never gave the Union an option to agree upon such a bilateral approach.

In my view, the Respondent could not properly use the City and County of Denver's position with regard to parking at DIA as an excuse for failing to comply with the arbitrator's award while failing to take any of the foregoing measures to resolve the issue. Accordingly, I conclude that the Respondent violated section 7116(a)(1) and (8) of the Statute in the circumstances of this case.

C. The Appropriate Remedy

The traditional affirmative remedy in a case of failure to comply with an arbitrator's final and binding award is an order specifically requiring the respondent to comply with the terms of such award. *See, e.g., U.S. Department of Treasury, Customs Service, Washington, D.C. and Customs Service, Region IV, Miami, Florida*, 31 FLRA 603, 605-06 (1990); *Customs*, 39 FLRA at 759-60; *Carswell*, 38 FLRA at 107-08. From the record evidence in this case, however, it is obvious that such a traditional affirmative remedy would be futile in light of the City and County of Denver's stated unwillingness to permit the FAA to obtain permanent parking spaces in the location specified by the arbitrator in his award. In recognition of these circumstances, the General Counsel has requested instead that the Respondent should be ordered to accept the City and County of Denver's standing offer to provide designated covered parking spaces to the FAA in a different location within DIA's parking structure than that specified by the arbitrator for use by the Respondent's bargaining unit employees.[11] For the reasons set forth below, I conclude that the General Counsel's request would effectuate the purposes and policies of the Statute and should be granted.

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[11] The General Counsel also filed a Motion For Interim Relief, consistent with its previously stated intent at the hearing to do so, requesting that until a final decision is rendered herein, the FAA be ordered to provide unit employees free, covered parking spaces in the garages attached to the terminal building at DIA either by reimbursing the employees' parking costs or by providing them with access cards which would obviate the need for them to pay and then be reimbursed for their expenses. The Respondent filed a Response To Motion For Interim Relief, opposing the General Counsel's request. To the extent that granting the General Counsel's motion would require the Respondent to reimburse unit employees for their parking expenses, there is no specific provision of law waiving the government's sovereign immunity and authorizing an order directing the payment of such parking expenses. *See, Immigration and Naturalization Service, Los Angeles District, Los Angeles, California*, 52 FLRA 103, 105 (1996)(*INS*). The General Counsel's alternative request for the employees to be issued access cards to the covered parking area would not provide them with reserved spaces and might jeopardize their ability to find parking and arrive at the control tower in time for work. In any event, such interim relief is deemed unnecessary in view of the remedial order recommended below.

The Authority recently discussed its approach to evaluating requests for nontraditional remedies in *F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149 (1996) (*Warren*) and *Department of Veterans Affairs Medical Center, Phoenix, Arizona*, 52 FLRA 182 (1996). In *Warren*, the Authority concluded that nontraditional remedies must satisfy the same broad objectives that the Authority described in *U.S. Department of Justice, Bureau of Prisons, Safford, Arizona*, 35 FLRA 431, 444-45 (1990)(*Safford*). That is, assuming there are no legal or public policy objections to a nontraditional proposed remedy, the questions are whether the remedy is reasonably necessary and would be effective to "recreate the conditions and relationships" with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct. *Warren*, 52 FLRA at 161; *Safford*, 35 FLRA at 444-45. As the Authority additionally noted in *Warren*, the above questions are essentially factual and therefore should be decided in the same fashion that other factual issues are resolved: the General Counsel bears the burden of persuasion, and the Judge is responsible initially for determining whether the remedy is warranted.

I am assuming that there are no legal or public policy objections to the remedy proposed by the General Counsel herein. The Respondent's brief (p. 8) objects to the General Counsel's proposed remedy solely on the basis that it "does not satisfy the intent and scope of the [a]rbitrator's award" and is "clearly inconsistent with" his intentions, and that further attempts to persuade the City and County of Denver to provide parking in accordance with the award probably would be unsuccessful. Even if true, these are not legal or public policy objections. Indeed, public policy considerations favor the General Counsel's position. That is, public policy as expressed by Congress in the Statute requires parties to comply with final and binding arbitrators' awards. In my view, it would not further such public policy to permit a validly obtained award to be ignored by the losing party when that party failed to advise the arbitrator--either at the hearing or after the award was issued and while the arbitrator still retained jurisdiction to resolve compliance problems--of anticipated or known difficulties in effectuating compliance, and failed to file exceptions with the Authority which might have led to a resolution of those difficulties. In short, the Respondent should not be permitted to profit from its own inaction.

Moreover, it is not at all clear that the remedy

proposed by the General Counsel would be inconsistent with the intent and scope of the arbitrator's award. Thus, in his decision and award, the arbitrator noted that the Union was flexible in terms of a remedy for the Respondent's breach of contract, but preferred the specific remedy which the arbitrator incorporated in his award. To the extent that the arbitrator's intent can be discerned, therefore, it appears that he wanted to provide the remedy preferred by the Union. It is impossible to determine what revisions to his award the arbitrator would have made if the compliance problem had been brought to his attention in a timely manner. However, it appears highly unlikely that the arbitrator would have failed to require the Respondent to take any affirmative corrective action with respect to the unit employees' parking location, given his finding that the FAA took virtually no action--much less every reasonable effort as required by the parties' agreement--to obtain parking spaces for them as close as possible to the control tower at DIA. In any event, the Respondent's failure to notify the arbitrator or to involve the Union in the compliance process created the uncertainty as to what action the arbitrator would have required, and it would not effectuate the purposes and policies of the Statute to permit the Respondent to profit from that uncertainty.[12]

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The Respondent does not contend that the General Counsel's proposed remedy would be unlawful, and I am unaware of any reason why it would be. As previously noted (at n.11), the Authority in *INS* has adopted the D.C. Circuit's decision in *Department of Army v. FLRA*, 56 F.3d 273 (D.C. Cir. 1995) to the effect that an order requiring an agency to remedy an unfair labor practice by providing monetary reimbursement for losses incurred as a result of the unfair labor practice must be specifically authorized by law or else such an order is precluded under the doctrine of sovereign immunity. As I read the court's opinion and the Authority's adoption of it, there is a distinction between an order requiring the payment of money damages to employees unrelated to an unlawful reduction in their pay, allowances, or differentials (as to which the Statute does not expressly waive the government's sovereign immunity) and an order requiring the acquisition of parking spaces for use by unit employees even if such an order would result in the agency's expenditure of appropriated funds. The latter order would not provide the employees with monetary damages as a *substitute* for what the Statute required the agency to do; it would provide *the very thing* to which the employees were entitled under the Statute (i.e., substantial compliance with an arbitrator's final and binding award enforcing the terms of the parties' collective bargaining agreement).

What has been said thus far also supports the conclusion that the General Counsel's proposed remedy is reasonably necessary and would be effective in re-creating the conditions and relationships with which the unfair labor practice interfered; and would effectuate the purposes and policies of the Statute, including the deterrence of future violative conduct. As the record clearly indicates, an order requiring the Respondent to accept Mr. Dunlap's standing offer to provide the FAA with approximately 80 reserved indoor parking spaces on the first level of the northeast corner of the East Terminal at DIA would effectuate compliance with the terms of the arbitrator's award to the maximum extent possible in view of the parking difficulties that exist at the airport of which the arbitrator was unaware. While the unit employees would not be as close to the control tower as the arbitrator's award specified, they would be closer in time and distance than at the outdoor parking lot and would no longer need to contend with the vagaries of Denver's weather. Additionally, such an order would provide the indoor parking spaces to the unit employees at no cost to them, as the arbitrator's award required. While the order would require the FAA to obtain more parking spaces than the award specified, the record indicates that 80 spaces is the minimum number needed for reserved indoor parking at DIA,[13] and that FAA's parking needs at DIA would ensure that none of the 80 parking spaces went to

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13 As Mr. Dunlap testified without contradiction at the hearing, DIA's engineering experts decided that given the column lines and structure of the underground parking facility and where the card-reading equipment would need to be installed in order to reserve an area for FAA's exclusive use, a minimum of 80 parking spaces had to be enclosed to avoid interfering with normal traffic flow.

waste.[14] Moreover, the FAA would be acquiring the fewest possible reserved parking spaces at the lowest cost, given the City and County of Denver's strong desire to help the FAA out of its compliance dilemma.[15] Finally, such an order would effectuate the policies of the Statute by requiring the Respondent to comply with the arbitrator's award to the maximum extent possible, thereby encouraging future compliance with contractual commitments and validly obtained arbitrators' awards.

Accordingly, having found that the Respondent violated section 7116(a)(1) and (8) of the Statute, and that a nontraditional remedy is appropriate in the circumstances of this case, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Department of Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington, shall:

1. Cease and desist from:

(a) Failing to comply with the final and binding award of Arbitrator Eric B. Lindauer dated April 12, 1996, directing the Respondent to obtain reserved indoor parking spaces for use by its air traffic controllers at no cost to them.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

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[14] As previously noted (n.5), the FAA's survey of all its components at DIA revealed that approximately 80 parking spaces would be needed to handle employee traffic flow.

[15] As previously found, the daily rate for an indoor parking space is $10 per day, whereas the FAA would be charged only $4.50 with the trade-in of its outside parking lot (which would no longer be needed); and the expense of installing card readers--i.e., reserved gates--would be reduced from $476,000 to $200,000.

(a) Accept the City and County of Denver's offer dated June 6, 1996, to provide eighty (80) parking spaces on the first level of the northeast corner of the East Terminal at the Denver International Airport for use by Respondent's unit employees at no cost to them.

(b) Post at Respondent's Denver facility copies of the attached Notice To All Employees on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by Respondent's Regional Administrator of the Northwest Mountain Region, and shall be posted at that facility and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Denver Region, Federal Labor Relations Authority, 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204-3581, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued January 15, 1997, Washington, DC

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ELI NASH, JR.
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT fail to comply with the final and binding award of Arbitrator Eric B. Lindauer dated April 12, 1996, directing us to obtain reserved indoor parking spaces for use by our air traffic controllers at no cost to them.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of rights assured them by the Statute.

WE WILL accept the City and County of Denver's offer dated June 6, 1996, to provide eighty (80) parking spaces on the first level of the northeast corner of the East Terminal at the Denver International Airport for use by our unit employees at no cost to them.

(Agency or Activity)

Date: By:
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Denver Region, Federal Labor Relations Authority, whose address is: 1244 Speer

Boulevard, Suite 100, Denver, Colorado 80204-3581, and whose telephone number is: (303) 844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, JR., Administrative Law Judge, in Case No. DE-CA-60714, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

John J. Callahan, Esq.
Federal Aviation Administration
Northwest Mountain Region
1601 Lind Avenue, SW
Renton, WA 98055-4056

Mr. Michael Doss
National Air Traffic Controllers
Association MEBA/AFL-CIO
1150 17th Street, NW, Suite 701
Washington, DC 20036

Nadia Khan, Esq. and
Nicholas J. LoBurgio, Esq.
Federal Labor Relations Authority
1244 Speer Boulevard, Suite 100
Denver, CO 80204

REGULAR MAIL:

Mr. Alan Hollinger
Federal Aviation Administration
Northwest Mountain Region
1601 Lind Avenue, SW
Renton, WA 98055

Dated: January 15, 1997
Washington, DC