

FEDERAL AVIATION ADMINISTRATION
FORT SMITH, ARKANSAS

Respondent

and

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION

Charging Party

Case No. DA-CA-90727

Charles M. de Chateaufvieux, Esquire For the General Counsel

Ms. Rachel W. Nolen For the Respondent

Mr. David Gilmore For the Charging Party

Before: WILLIAM B. DEVANEY Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.⁽¹⁾, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether, as the Complaint alleges, "Since May 18, 1999 Respondent refused to comply with the agreement. . . [Memorandum of Understanding, effective on May 7, 1997, that provided that all bargaining unit employee operational personnel in the Fort Smith, Arkansas, facility would receive an eight-hour time-off award for every 120 days of operational error-free service] (G.C. Exh. 1(c), Pars. 11 and 12), in violation of §§ 16(a)(5) and (1) of the Statute.

This case was initiated by a charge filed on August 16, 1999 (G.C. Exh. 1(a)). The Complaint and Notice of Hearing issued March 30, 2000 (G.C. Exh. 1(c)) and set the hearing for July 11, 2000, in Tulsa, Oklahoma. By Order dated June 14, 2000 (G.C. Exh. 1(h)), the hearing was rescheduled for July 10, 2000, at a location to be determined in Fort Smith, Arkansas; by Notice dated June 22, 2000 (G.C. Exh. 1(i)), the location of the hearing was fixed; and the hearing was duly held in Fort Smith, Arkansas, on July 10, 2000, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which Respondent waived. At the conclusion of the hearing, August 10, 2000, was fixed as the date for mailing post-hearing briefs, which time subsequently was extended, on motion of the General Counsel, to which the other parties did not object, for good cause shown, to August 28, 2000. Respondent and General Counsel each filed a helpful brief, received on, or before, August 30, 2000, which have been carefully considered. Upon the basis of the entire record, including the demeanor of the witnesses, I make the following findings and conclusions:

FINDINGS

1. The parties entered into a Memorandum of Understanding (MOU) effective May 7, 1997, the complete text of which, exclusive of the signatures, is as follows:

"MEMORANDUM OF UNDERSTANDING

"Facility Error-Free Award

"between

"National Air Traffic Controllers Association

"Local FSM

"and

"Federal Aviation Administration

"FSM ATCT

"1. Purpose.

This notice outlines procedures to recognize all operational personnel for achieving a predetermined length of operational error-free service.

"2. Effective Date

This notice is effective May 7, 1997.

"3. Background

This program is being initiated to promote and recognize teamwork and group performance that results in error-free service. Time off awards will be granted to operational personnel for their contribution towards this goal.

"4. Definitions

"a. Operational Personnel. This term is used to identify personnel that have a direct input to the operation

f the facility, i.e., FPL Controller, Developmental Controller checked out on one position, Staff Specialist and Area Supervisors.

"b. Benchmark. A predetermined length of operational error-free service beginning on May 7, 1997 that results in an 8 hour award every 120 days.

"5. Procedures.

"a. The Quality Assurance Specialist will track the facility's error-free service.

"b. Operational personnel who are assigned to the facility throughout the entire benchmark period are eligible to receive the time off award.

"c. When the facility reaches a benchmark, the Quality Assurance Specialist will forward a list of eligible employees to the ATM for award processing.

"d. All provisions of FAA Order 3550.15, Federal Employees Pay Comparability Act of 1990, apply to this program.

. . . ." (G.C. Exh. 2)(Emphasis supplied).

2. The "predetermined" 120 day periods, beginning May 7, 1997, prior to the hearing [July 10, 2000] were as follows:

May 7, 1997 - September 3, 1997

September 4, 1997 - January 1, 1998

January 2, 1998 - May 1, 1998

May 2, 1998 - August 29, 1998

August 30, 1998 - December 27, 1998

December 28, 1998 - April 26, 1999

April 27, 1999 - August 24, 1999

August 25, 1999 - December 22, 1999

December 23, 1999 - April 20, 2000

(G.C. Exh. 8).

3. The MOU has followed a troubled path. On September 23, 1997, Mr. Charles DuBois, then Air Traffic Manager at the Fort Smith Traffic Control Tower and the management representative for the negotiation of the MOU (Tr. 66), recommended Time Off Awards for the 120 day period of May 7 - September 3, 1997, which were effective [paid] November 12, 1997 (Agency Exh. 3).

On November 13, 1997, Mr. DuBois advised Mr. Richard W. Carroll, then President of the Fort Smith Local of the National Air Traffic Controllers Association, the exclusive representative, and the Union representative for the negotiation of the MOU (Tr. 10, 12), that the MOU was canceled (Tr. 18). On November 21, 1997, Mr. Carroll filed an unfair labor practice charge (G.C. Exh. 4).

On June 7, 1998, Mr. Roger Luck replaced Mr. DuBois as Air Traffic Manager at the Fort Smith Tower (Tr. 66). On August 31, 1998, Mr. Luck wrote to Mr. Carroll and stated, in part, as follows:

". . . Since my arrival in June, as Manager of Ft. Smith Tower, we have had several conversations about the Unfair Labor Practice filed over the termination of the MOU concerning facility error-free performance.

"Since this issue is one of very few labor relations issues we face here at Ft. Smith, I have taken action to re-instate, retroactively, the facility MOU on Error-free performance.

"According to my records, the date the previous manager terminated the MOU was November 13, 1997. Re-instating the MOU on that date indicates that 32 employees are due an 8 hour Time-Off-Award for the second 120 day period. Mr. Russell Brier will not receive an award because, as we discussed, he was erroneously awarded 8 hours in the previous payout.

"I have notified the HUB Administrative Officer to complete the appropriate personnel action. Upon receipt of the awards, my records show no other payout is due at this time.

"This action is intended to demonstrate my commitment to fairness and as proof that I believe in the partnership approach to resolving facility issues at the lowest level. There is no action required on

your part, however, if you feel this action has eliminated the basis for the ULP, removing the ULP would be appreciated." (Agency Exh. 2) (Emphasis supplied).

It should be noted, see Paragraph 2, above, that as of August 31, 1998, the date of Mr. Luck's memorandum to Mr. Carroll, there had been four 120 day periods and Mr. Luck stated that Time-Off Awards were due only for the second 120 period, i.e., September 4, 1997 - January 1, 1998. Mr. Luck said, ". . . my records show no other payout is due at this time." (Agency Exh. 2; Tr. 41-42). Therefore, Mr. Luck was informing Mr. Carroll that no Awards were due for the periods January 2, 1998 - May 1, 1998⁽²⁾, and May 2, 1998 - August 29, 1998⁽³⁾, because ". . . We had an operational deviation, a loss of separation." (Tr. 43). The Time-Off Awards for the period September 4, 1997 - January 1, 1998, were "Paid" (Tr. 45), sometime after September 1, 1998 (Agency Exh. 5).

By letter dated September 14, 1998, Mr. Carroll wrote the Authority as follows,

"On or about 8/24/98 Roger Luck, manager, at FT. Smith TRACON presented me with a letter agreeing to make whole our Time off award MOU and has informed me he has started the process to pay all hours owed. I no longer believe we have a ULP. We are happy with these results and wish to remove my ULP (case number) DA-CA-80107." (G.C. Exh. 5).

Accordingly, the ULP charge filed on November 21, 1997 [DA-CA-80107] (G.C. Exh. 4), was withdrawn (Tr. 19, 45).

A deviation occurred on November 10, 1998 (Agency Exh. 7), and, accordingly, no time-off Award was processed for the period August 30, 1998 - December 27, 1998 (G.C. Exh. 8).

4. On May 18, 1999, Mr. Luck notified the Union that he was withholding authorization to pay the time-off Award for the period December 28, 1998 - April 26, 1999, ". . . a period . . . where the facility has completed a 120 day period without an incident . . ." and gave notice of the termination of the MOU 30 days from May 18, 1999, ". . . based on non-compliance with the above mentioned orders." [FAAO 3550.15 or FAAO 3450.7E] (G.C. Exh. 6). Mr. Luck's memorandum of May 18, 1999, stated, in part, as follows:

"This is to inform you of my decision regarding the Fort Smith Facility Error-MOU. A period ended on April 26, 1999 where the facility has completed a 120 day period without an incident. This is the first period since I have been manager here that there has not been an incident disqualifying a pay-out.

During the other three periods, Operational Deviations have negated the award.

"This MOU was designed as an incentive to promote and recognize teamwork and group performance resulting in a reduction of errors. Since the inception of this MOU, the facility has experienced four (4) operational deviations in the last twelve months. It is clear that this has not been effective in reaching the goals it was designated to do. . . ." (G.C. Exh. 6).

Mr. Luck reiterated his position in his July 1, 1999, memorandum to Mr. David Gilmore, who succeeded Mr. Carroll as President of the local Union (Tr. 24), stating, in part, as follows:

"As you know from our discussions the past two weeks, my position has not changed on the status of the facility MOU. I still believe that the provisions of FAAO 3550.15 for qualifying for a Time Off Award are well beyond what this MOU uses to justify an award.

"I do appreciate your willingness to discuss the issue with me. I continue to seek ways to come to an agreement with you on this issue and move forward. I am willing to look at ways to modify the document to make it acceptable with the requirements of FAAO 3550.15.

"On the subject of back pay-outs for periods where Operational Deviations occurred, I disagree with an entitlement to those pay-outs. We have had an understanding between both parties that an Operational Deviation disqualified a pay-out of Time Off Awards. That past practice was established prior to my arriving at this facility and it has not been changed. I think that if that was not the understanding, the dates of some of the 120 days periods you are seeking pay-outs for would not be over two years old. . . ." (G.C. Exh. 7).

Mr. Luck's action with regard to the MOU, as set forth above, resulted in Mr. Gilmore filing the charge in this case on August 16, 1999 (G.C. Exh. 1(a)).

On September 9, 1999, Mr. Luck recommended payment of the Time-Off Award for the period December 28, 1998 - April 26, 1999, which he had withheld by his May 18, 1999, memorandum (Agency Exh. 8) and the awards were effective September 15, 1999 (Agency Exh. 8; G.C. Exh. 8).

There was a deviation on May 1, 1999 (Agency Exh. 9) and, accordingly, no Time-off Award was processed for the period April 27, 1999 - August 24, 1999 (G.C. Exh. 8).

Time-off Awards were made for the period August 25, 1999 - December 22, 1999, effective February 24, 2000 (Agency Exh. 10; G.C. Exh. 8). And, finally, Time-off Awards were made for the period December 23, 1999 - April 20, 2000, effective April 25, 2000, the last 120 day period prior to the hearing (Agency Exh. 11; Tr. 63-64); G.C. Exh. 8).

Mr. Luck credibly testified, without contradiction, that he had never approved a Time-Off Award for a period when an error or a deviation occurred (Tr. 64) and Mr. Gilmore testified, "We're receiving them [Time Off Awards] . . . to my knowledge at this time for 120 days that we are error free and deviation free." (Tr. 27).

5. Page 7210.56A of FAA's Quality Assurance Binder under "Chapter 5, AIR TRAFFIC OPERATIONAL ERRORS AND DEVIATIONS, INVESTIGATIONS AND REPORTING" (Tr. 15) contains the following definitions:

"5-1-1. DEFINITIONS

"a. Operational Error: An occurrence attributable to an element of the air traffic system in which:

"1. Less than the applicable separation minima results between two or more aircraft, or between an aircraft and terrain or obstacles (e.g., operations below minimum vectoring altitude (MVA); equipment/personnel on runways), as required by FAA Order 7110.65 or other national directive; or

"2. An aircraft lands or departs on a runway closed to aircraft operations after receiving air traffic authorization.

"b. Operational Deviation: An occurrence attributable to an element of the air traffic system in which applicable separation minima as referenced in paragraph 5-1-1a was maintained, but:

"1. Less than the applicable separation minima existed between an aircraft and adjacent airspace without prior approval; or

"2. An aircraft penetrated airspace that was delegated to another position of operation or another facility without prior coordination and approval; or

"3. An aircraft penetrated airspace that was delegated to another position of operation or another facility at an altitude or route contrary to the altitude or route requested and approved in direct coordination or as specified in a letter of agreement (LOA), pre-coordination, or internal procedure; or

"4. An aircraft, vehicle, equipment, or personnel encroached upon a landing area that was delegated to another position of operation without prior coordination and approval.

"c. Operational Duties: Duties that require an employee to issue or relay an ATC clearance or instruction; make a control decision that will affect coordination; perform a strip marking function or update computer generated information that may be used by an AT controller to make a control decision; or supervise these duties." (G.C. Exh. 3).

6. Mr. Carroll described the creation and origin of the MOU as follows,

"A The previous facility head filed eight or nine ULPs against Mr. Dubois and one of his supervisors. And after I took over the office, Chuck wanted to try to find a way to make them go away, basically. And I came upon a letter that had been in effect at San Antonio, and I pretty much copied it from that.

Q Can you tell us what the purpose of the MOU is?

A To award the controllers at Fort Smith for every 120 days of operational error-free service.

Q Now, Mr. Carroll, did you and Mr. Dubois draft the memo from scratch, or did you all have something to work with when you all drafted it?

A No, we took this mostly off the San Antonio MOU.

Q Could you explain to us, sir, how the procedures regarding the earning of Time Off Awards at the Fort Smith Tower worked according to the MOU?

A Well, every 120 -- starting May 7, 1997, every 120 days that we went error free, that's operational error-free, we were to receive eight hours of comp time, Time Off Award. (Tr. 12).

At the conclusion of the testimony, the following colloquy took place between Counsel for General Counsel and the undersigned:

MR. DE CHATEAUVIEUX . . . It is undisputed that this memorandum [MOU] was negotiated by Mr. Rick Carroll and Mr. Chuck Dubois. The only witnesses giving testimony at this hearing being one of the negotiators is Mr. Rick Carroll . . .

JUDGE DEVANEY: Let me interrupt you just a minute.

. . .

JUDGE DEVANEY: You know there's something funny in this case, and I don't understand. The testimony indicates -- Mr. Carroll indicated quite clearly that while he negotiated this MOU he took it from a memorandum that was in effect in San Antonio.

MR. DE CHATEAUVIEUX: That's correct, Your Honor.

JUDGE DEVANEY: Nobody put in any evidence at all as to what San Antonio did. Now, if it's the same MOU in San Antonio, it would seem to me that might have some bearing on this case here.

MR. DE CHATEAUVIEUX: I think you are correct, Your Honor. The MOU from San Antonio could not be located, and I believe that that MOU has been terminated or expired a number of years ago.⁽⁴⁾" (Tr. 81-82).

CONCLUSIONS

- A. Respondent violated §§ 16(a)(5) and (1) on May 18, 1999, when it unilaterally suspended the MOU, even though it later reinstated the MOU.

On May 18, 1999, Mr. Luck informed the Union that he was, ". . . withholding authorization to pay-out the time-off award for this period [December 8, 1998 - April 26, 1999]. . . ."; Mr. Luck further stated that this was a period, ". . . where the facility has completed a 120 day period without an incident. This is the first period since I have been manager here that there has not been an incident disqualifying a pay-out. During the other three periods, Operational Deviations have negated the award." (G.C. Exh. 6). Mr. Luck reiterated his position on July 1, 1999 (G.C. Exh. 7); and on August 16, 1999, the Union filed the charge in this case (G.C. Exh. 1(a)). On September 9, 1999, Mr. Luck recommended payment on the time-off Award for the period December 28, 1998 - April 26, 1999, which he had withheld on May 18, 1999 (Agency Exh. 8) and the Awards were effective September 15, 1999 (Agency Exh. 8; G.C. Exh. 8). Respondent has granted time-off Awards for each period since April 26, 1999, which was error free, *i.e.*, for the periods August 25, 1999 - December 22, 1999, and for the period December 23, 1999 - April 20, 2000. Because there was a deviation on May 1, 1999, Respondent did not process an award for the period April 27, 1999 - August 24, 1999. It long has been made clear that subsequent compliance with an obligation under the Statute does not remedy an initial violation of §§ 16(a)(5) and (1). See, for example: Department of the Air Force, 47th Flying Training Wing, Laughlin Air Force Base, Texas, 2 FLRA 212, 214 (1979); Department of the Treasury, Internal Revenue Service, Detroit, Michigan, 9 FLRA 437, 454 (1982); U.S. Department of Transportation and Federal Aviation Administration, 40 FLRA 690, 705 (1991); Air Force Accounting and Finance Center, Denver, Colorado, 42 FLRA 1196, 1207-1208 (1991); Bureau of Engraving and Printing, Washington, D.C., 44 FLRA 575, 581 (1992).

Plainly, Respondent violated §§ 16(a)(5) and (1) of the Statute on May 18, 1999, when it unilaterally, without prior notice, suspended operation of the MOU and, at that time, Respondent changed the condition of employment established by the MOU to grant time-off Awards to all operating personnel of the facility for each 120 day period the facility was error free. Respondent was in violation of §§ 16(a)(5) and (1) of the Statute when the Union filed the charge in this case on August 16, 1999, and its unilateral abrogation of the MOU continued until on, or about, September 9, 1999, when Mr. Luck recommended payment of the Award he had withheld, *i.e.*, for the period December 28, 1998 - April 26, 1999, and since September 9, 1999, Respondent has reinstated the MOU and complied with its terms. Nevertheless, Respondent's reinstatement of, and compliance with, the terms of the MOU does not remedy its initial violation of §§ 16(a)(5) and (1) and an appropriate Order will be recommended for this violation.

- B. No Time-Off Award is due under MOU when a deviation occurs.

The full text of the May 7, 1997, MOU is set forth in Paragraph 1, above. It will be noted that the title of the MOU is "Facility Error-Free Award" (G.C. Exh. 2)(Emphasis supplied); Paragraph 1 of the MOU states,

". . . procedures to recognize all operational personnel for achieving a predetermined length of

operational error-free service." (G.C. Exh. 2) (Emphasis supplied).

Paragraph 3 of the MOU states,

"This program is . . . initiated to promote and recognize . . . performance that results in error-free service. Time off awards will be granted to operational personnel" (G.C. Exh. 2) (Emphasis supplied).

Paragraph 4a. of the MOU defines, "Operational Personnel"; Paragraph 4b. defines, "Benchmark" as

"b. . . . A predetermined length of operational error-free service beginning on May 7, 1997" (G.C. Exh. 2) (Emphasis supplied).

Paragraph 5 of the MOU, provides,

"5. Procedures.

a. The Quality Assurance Specialist will track the facility's error-free service.

b. Operational personnel who are assigned to the facility throughout the entire benchmark period are eligible to receive the time off award.

c. When the facility reaches a benchmark, the Quality Assurance Specialist will forward a list of eligible employees" (G.C. Exh. 2) (Emphasis supplied).

General Counsel is correct that the MOU does not refer to, "Operational Deviation" (G.C. Brief, p.6); but neither does it refer to, "Operational Error". To the contrary, the MOU is entitled, "Facility Error-Free Award" for, "performance that results in error-free service" (Par. 3 of MOU). The MOU defines, "Operational Personnel" as ". . . personnel that have a direct input to the operation of the facility, i.e., FPL Controller, Developmental Controller . . . Staff Specialist and Area Supervisors" (Par. 4a. of MOU); and defines "Benchmark" as, ". . . A predetermined length of operational error-free service" (Par. 4b. of MOU). In short, "operational error-free service" means, "performance" (Par. 3 of the MOU) by operational personnel, as defined in Par. 4a. of the MOU, "that results in error-free service" (Par. 3 of the MOU). The word "operational" in Par. 4b. of the MOU plainly relates back to the work performance of "Operational Personnel" as defined in Par. 4a. of the MOU; and the qualification is that such performance be "operational error-free service" (Par. 4b. of the MOU).

Mr. Carroll, who negotiated the MOU on behalf of the Union (Tr. 12) said, ". . . we took this mostly off the San Antonio MOU" (Tr. 12) and he explained it would work as follows:

"A Well, every 120 -- starting May 7, 1997, every 120 days that we went error free, that's operational error-free, we were to receive eight hours of comp time, Time Off Award." (Tr. 12)

(Emphasis supplied).

Mr. DuBois, who negotiated the MOU for Respondent, in recommending the first Award under the MOU stated in his memorandum of September 23, 1997, in part, as follows:

"JUSTIFICATION FOR AWARD: The purpose of this award is to promote and recognize . . . performance to the operational personnel of Fort Smith Tower. Each individual has helped this facility remain error free from the period May 7, 1997 through September 3, 1997. . . ." (Agency Exh. 3).

Thus, the two negotiators of the MOU, Mr. Carroll and Mr. DuBois, recognized from the outset that the MOU conditioned the Time Off Award to operational error-free service, or as Mr. Carroll put it, ". . . every 120 days that we went error free, that's operational error-free, we were to receive eight hours of comp time, Time Off Award." (Tr. 12) and as Mr. DuBois put it, ". . . performance to the operational personnel . . . remain error free . . ." (Agency Exh. 3). General Counsel stated, "...The MOU from San Antonio could not be located, and I believe that that MOU has been terminated or expired a number of years ago." (Tr. 82).

Respondent has never departed from its position that an Award under the MOU requires that operations during each period be error-free service; that an "Operational Deviation", or "Deviation", within the meaning of its Instructions (G.C. Exh. 3), while not an "Operational Error", or "Error", within the meaning of its Instructions (id.), nevertheless is an error which negates the Award. Nor is there any doubt that the Union was informed on, or about August 31, 1988, that a deviation negates the Award. Thus, when Mr. Luck on August 31, 1988, wrote Mr. Carroll and reinstated the MOU which Mr. DuBois unilaterally had cancelled on November 13, 1997, he stated in part as follows:

". . . I have taken action to re-instate, retroactively, the facility MOU on Error-free performance.

"According to my records, the date the previous manager terminated the MOU was November 13,

1997. Re-instating the MOU on that date indicates that 32 employees are due an 8 hour Time-Off Award for the second 120 day period.

...

"I have notified the HUB Administrative Officer to complete the appropriate personnel action. Upon receipt of the awards, my records show no other payout is due at this time. . . ." (Agency Exh. 2)

(Emphasis supplied).

As of August 31, 1998, the date of Mr. Luck's memorandum to Mr. Carroll, there had been four 120 day periods and Mr. Luck stated that Time-Off Awards were due only for the second 120 day period, i.e., September 4, 1997 - January 1, 1998 (Agency Exh. 5) Time-Off Awards had been granted for the first period of May 7, 1997 - September 3, 1997 (Agency Exh. 3). Accordingly, Mr. Luck was informing Mr. Carroll that no awards were due for the period January 2, 1998 - May 1, 1998, because a deviation had occurred April 25, 1998 (G.C. Exh. 8, Agency Exh. 4), or for the period May 2, 1998 - August 24, 1998, because a deviation had occurred June 24, 1998 (G.C. Exh. 8, Agency Exh. 6). Mr. Carroll, in a letter to the Authority on September 14, 1998, stated,

"On or about 8/24/98 Roger Luck, manager, at FT. Smith TRACON presented me with a letter agreeing to make whole our Time off award MOU and has informed me he has started the process to pay all hours owed. I no longer believe we have a ULP. We are happy with these results and wish to remove my ULP (case number) DA-CA-80107." (G.C. Exh. 5) (Emphasis supplied).

Accordingly, the ULP charge filed on November 21, 1997 [DA-CA-80107 (G.C. Exh. 4)], was withdrawn (Tr. 19, 45). While Mr. Luck's notice, ". . . my records show no other payout is due at this time. . . ." (Agency Exh. 2) (Emphasis supplied), i.e. as of August 31, 1998, is brief, there is no question that the Union was well aware of the deviations of April 25, 1998 and June 24, 1998, as Mr. Gilmore, then Vice President, was both the employee involved and was one of the Investigators of the April 25, 1998 deviation (Agency Exh. 4) and Mr. Gilmore was one of the Investigators of the June 24, 1998, deviation (Agency Exh. 6).

A deviation occurred on November 10, 1998 (Agency Exh. 7) and, accordingly, no time-off Award was processed for the period August 30, 1998 - December 27, 1998 (G.C. Exh. 8). In his memorandum of May 18, 1999 (G.C. Exh. 6), and of July 1, 1999 (G.C. Exh. 7), Mr. Luck stated, again, that operational deviations negate a Time Off Award. A deviation occurred on May 1, 1999 (Agency Exh. 9) and accordingly, no Time-Off Award was processed for the period April 27, 1999 - August 24, 1999 (G.C. Exh. 8).

In Internal Revenue Service, Washington, D.C., 47 FLRA 1091 (1993), the Authority held,

". . . We now hold that when a respondent claims as a defense to an alleged unfair labor practice

that a specific provision of the parties' collective bargaining agreement permitted its actions alleged to constitute an unfair labor practice, the Authority, including its administrative law judges, will determine the meaning of the parties' collective bargaining agreement and will resolve the unfair labor practice complaint accordingly." (*id.* at 1103).

General Counsel, in effect, argues that Respondent breached the MOU, and thereby repudiated a major objective of the MOU, by refusing to grant Time-Off Awards for 120 day periods when there is a Deviation, as distinguished from an Operation Error. Respondent asserts that the MOU does not authorize Time-Off Awards for any 120 day period unless the operational service is error-free, *i.e.*, that either an Operational Error or an Operational Deviation negates the Time-Off Award.

General Counsel would have Paragraph 4b. of the MOU read as "A predetermined length of service that is free of Operational Error. . . ." But this is not what Paragraph 4b. of the MOU provides. Paragraph 4b. of the MOU is as follows:

"4. Definitions.

. . .

"b. Benchmark. A predetermined length of operational error-free service beginning on May 7, 1997 that results in an 8 hour award every 120 days." (G.C. Exh. 2) (Emphasis supplied).

Neither the term, "Operational Error", nor the term, "Operational Deviation" appears in the MOU and there is no reference whatever to Respondent's Instruction (G.C. Exh. 3). Indeed, General Counsel's reference to and reliance on the definition of the terms, "Operational Error" and "Operational Deviation" in General Counsel Exhibit 3, is a "Red Herring" to divert attention from the language of the MOU. As noted earlier, the title of the MOU was, "Facility Error-Free Award"; Paragraph 1 of the MOU states that purpose is, ". . . to recognize all operational personnel for achieving a predetermined length of operational error-free service"; Paragraph 3 of the MOU states, "This program is being initiated to promote and recognize . . . performance that results in error-free service. Time off awards will be granted to operational personnel for their contribution towards this goal."; Paragraph 4a. of the MOU defines, "Operational Personnel" as ". . . personnel that have a direct input to the operation of the facility, i.e., FPL Controller, Developmental Controller . . . Staff Specialist and Area Supervisors"; Paragraph 4b. defines "Benchmark" as, "A predetermined length of operational error-free service . . ."; Paragraph 5a. of the MOU states, "The Quality Assurance Specialist will track the facility's error-free service"; Paragraph 5b., states, "Operational personnel . . . are eligible to receive the time off award."; and Paragraph 5c. states, "When the facility reaches a benchmark, the Quality Assurance Specialist will forward a list of eligible employees . . ." (G.C. Exh. 2) (Emphasis supplied).

Plainly, the MOU is, as Paragraph 1, states, ". . . to recognize all operational personnel for achieving a predetermined length of operational error-free service." (G.C. Exh. 2). The qualification for the Award is "error-free service", as specifically stated in Paragraphs 1, 3, 4b., and 5a. of the MOU. It is equally clear that the word, "operational" in Paragraph 4b. relates back to, and means, ". . . operational personnel for . . . operational error-free service", as stated in Paragraph 1 and "Operational Personnel" as defined in Paragraph 4a. Not only does the MOU not use or make any reference whatever to "Operational Error" or "Error" (Tr. 14) within the meaning of Respondent's Instruction (G.C. Exh. 3); but, obviously, the words, "error-free" and "error-free service" do not equate to mean "Error", within the meaning of Respondent's Instructions. To the contrary, as noted above, Paragraph 1 states that these procedures are, ". . . to recognize all operational personnel for . . . operational error-free service"; Paragraph 3 states, ". . . teamwork and group performance that results in error-free service . . ."; and, of course, Paragraph 4b., states, ". . . length of operational error-free service . . ." (Emphasis supplied).

General Counsel misrepresents Mr. Carroll's testimony. Mr. Carroll did not testify, as General Counsel asserts, "Carroll testified that when the parties negotiated this MOU, the purpose of the MOU was expressly stated in the 'Purpose Section' of the MOU, that being for the employees to receive time-off awards when they achieved a predetermined length of service which was free of Operational Errors [Tr. 12]." (General Counsel's Brief, p. 5). To the contrary, Mr. Carroll testified as follows:

"Q Can you tell us what the purpose of the MOU is?

"A To award the controllers at Fort Smith for every 120 days of operational error-free service.

"Q Now, Mr. Carroll, did you and Mr. Dubois draft the memo from scratch, or did you all have something to work with when you all drafted it?

"A No, we took this mostly off the San Antonio MOU.

"Q Could you explain to us, sir, how the procedures regarding the earning of Time Off Awards at the Fort Smith Tower worked according to the MOU?

"A Well, every 120 -- starting May 7, 1997, every 120 days that we went error free, that's operational error-free, we were to receive eight hours of comp time, Time Off Award.

"Q And has this MOU ever been modified?

"A No, it has not." (Tr. 12-13).

As previously noted, both Mr. Carroll, who negotiated the MOU for the Union, and Mr. DuBois, who negotiated the MOU (Agency Exh. 3), recognized from the outset that an Award was contingent on operations being error-free, ". . . every 120 days that we went error free, that's operational error-free . . ." (Tr. 12), as Mr. Carroll stated, or, ". . . facility remain error free . . ." (Agency Exh. 3), as Mr. DuBois stated in recommending the first Award for the period May 7, 1997 - September 3, 1997. Respondent's consistent practice has been that any operational error negates an Award, whether the error is an "Operational Error" or an "Operational Deviation" within the meaning of its Instructions (G.C. Exh. 3) and the Union was so informed by Mr. Luck's memorandum of August 31, 1998 (Agency Exh. 2) and with full notice that, because of deviations, no Awards were due for the third and fourth periods, i.e. January 2, 1998 - May 1, 1998 and May 2, 1998 - August 29, 1998, Mr. Carroll on September 14, 1998, withdrew the ULP charge he had filed on November 21, 1997.

Accordingly, because the MOU conditions Time Off Awards on there being error-free service for each predetermined 120 day period, Respondent did not breach the MOU by denying Time Off Awards for any period in which there was a deviation, inasmuch as a deviation, within the meaning of its Instructions (G.C. Exh. 3), is an error and performance was not error-free as required by the MOU. Because Respondent's action was fully consistent with the plain meaning and consistent practice under the MOU, the allegations that Respondent breached the MOU, or repudiated any portion of it, by denying Time Off Awards because a deviation had occurred are dismissed.

Having found that Respondent, on May 18, 1999, violated §§ 16(a)(5) and (1) of the Statute by unilaterally suspending operation of the MOU, although it subsequently, on, or about, September 9, 1999, reinstated the MOU and since September 9, 1999, has complied therewith, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.41 of the Authority's Rules and Regulations and 5 C.F.R. § 2423.41, and § 18 of the Statute, 5 U.S.C. § 7118, it is hereby ordered that the Federal Aviation Administration, Fort Smith, Arkansas, shall:

1. Cease and desist from:

(a) Unilaterally suspending, cancelling or refusing to comply with the Memorandum of Understanding duly entered into by Respondent and the National Air Traffic Controllers Association, Fort Smith Local (hereinafter, "Union"), on May 7, 1997.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

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

(a) Notify the Union and, upon request, negotiate in good faith with the Union, the exclusive representative of certain of its employees, of any proposed charge or termination of the MOU and adhere to the terms of the MOU until completion of good faith bargaining in accordance with the provisions of the Statute.

(b) To assure compliance with the MOU, Respondent shall, within ten days after the end of each predetermined 120 day period under the MOU, notify the Union in writing whether a Time Off Award has been recommended, and, if not, the reason therefor.

(c) Post at its facilities at Fort Smith, Arkansas, copies of the attached NOTICE on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Air Traffic Manager at the Fort Smith Air Traffic Control Tower, Fort Smith, Arkansas, and shall be posted and maintained by him 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.

(d) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e), notify the Regional Director, Dallas Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM B. DEVANEY

Administrative Law Judge

Issued: October 30, 2000

Washington, DC

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Federal Aviation Administration, Fort Smith, Arkansas, has 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 unilaterally suspend, cancel or refuse to comply with the Memorandum of Understanding duly entered into by Respondent and the National Air Traffic Controllers Association, Fort Smith Local (hereinafter referred to as "Union"), on May 7, 1997.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL notify the Union and, upon request, negotiate in good faith with the Union, the exclusive representative of certain of our employees, concerning any proposed change or termination of the MOU and

WE WILL ADHERE to the terms of the MOU until completion of good faith bargaining in accordance with the provisions of the Statute.

WE WILL, to assure compliance with the MOU, notify the Union, within ten days after the end of each predetermined 120 day period under the MOU, whether a Time Off Award has been recommended, and, if not, the reason therefor.

Date: _____ By: _____

AIR TRAFFIC MANAGER

Fort Smith Air

Traffic Control Tower

Fort Smith, Arkansas

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 questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Dallas Regional Office, whose address is: 525 South Griffin Street, Suite 926, LB-107, Dallas, Texas 75202-1906, and whose telephone number is: (214) 767-4996.

1. For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71" of the statutory reference, i.e., Section 7116(a)(5) will be referred to, simply, as, "§ 16(a)(5)".
2. Deviation on April 25, 1998 (G.C. Exh. 8; Agency Exh. 4).
3. Deviation on June 24, 1998 (G.C. Exh. 8; Agency Exh. 6).
4. In his November 21, 1997, ULP charge [DA-CA-80107] Mr. Carroll stated, in part, as follows: "Our ERROR-FREE AWARD MOU was cancelled . . . This program is still in effect at other ATC facilities. Our MOU is patterned after the San Antonio tower MOU, which is still in effect." (G.C. Exh. 4).