



UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260

April 10, 1986

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
817 14th Street, N.W.
Washington, D.C. 20005-3399

Dear Mr. Burrus:

This is in reference to your March 12 letter and our earlier correspondence relative to a Merit Systems Protection Board (MSPB) Opinion and Order directing that the Postal Service compensate a Mr. Frank F. Black, Jr. and other Postal Service employees who testified at the MSPB hearing in the appeal of the removal of Alfred D. Maisto.

As we indicated in our recent correspondence pertaining to this matter, Mr. Black and the other Postal Service employees who appeared as witnesses at the above-mentioned hearing were compensated in compliance with the MSPB Order. With respect to your question as to whether the Postal Service intends to compensate employees in future MSPB cases as was done in connection with the Maisto case, please be advised that guidance to the field is being developed. Once developed you will be provided with a copy.

Sincerely,

William J. Downes
Director
Office of Contract Administration
Labor Relations Department

APWU

American Postal Workers Union, AFL-CIO

817 14th Street, N.W., Washington, D.C. 20005

William Burrus
Executive Vice President
(202) 842-4246

March 12, 1986

Dear Mr. Downes:

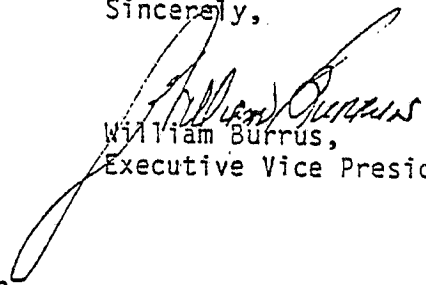
This is in further regard to our exchange of correspondence on the subject of payment for expenses in MSPB cases.

Your response of March 11, 1986 does not address the principle issue of USPS policy and whether or not it is the intent of the Postal Service to pay the covered expenses in future MSPB cases.

The wording of your letter of March 11, 1986 suggests that the employer intends to comply with the Board's decision only as it applies to the "Maisto" Case.

Please respond and advise me whether or not the Postal Service intends to modify postal policy and/or regulations where necessary to assure compliance with the Board decision.

Sincerely,


William Burrus,
Executive Vice President

William J. Downes
Director
Office of Contract Administration
Labor Relations Department
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260

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Eastern Region
- Neal Vaccaro
Northeastern Region
- Archie Sainsbury
Southern Region



UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260

March 11, 1986

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
817 14th Street, N.W.
Washington, D.C. 20005-3399

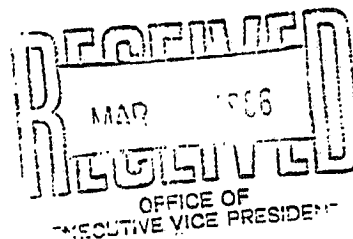
Dear Mr. Burrus:

This is in reference to your letter of February 24 concerning a Merit Systems Protection Board (MSPB) directive. In the letter, you asked to be advised as to whether the Postal Service intended to comply with the directive from the MSPB as it relates to reimbursement for witnesses appearing at an MSPB hearing.

We have looked into this matter. There was an Opinion and Order issued by the MSPB on August 6, 1985, in the case of Frank F. Black, Jr., a Postal Service employee who testified at the hearing in the appeal of the removal of Alfred D. Maisto, an employee of the Santa Ana, California, Post Office. Information received as a result of our inquiries into this matter disclosed that Mr. Black and other witnesses involved in that case have been compensated in accordance with the MSPB Order.

Sincerely,

William J. Downes
Director
Office of Contract Administration
Labor Relations Department





American Postal Workers Union, AFL-CIO

817 14th Street, N.W., Washington, D.C. 20005

William Burrus
Executive Vice President
(202) 842-4246

February 24, 1986

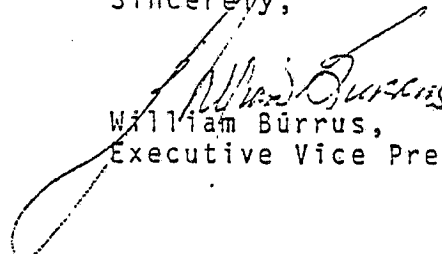
Dear Mr. Fritsch:

The Postal Service has recently received a directive from the regional director of the Merit Systems Protection Board regarding reimbursement for witnesses appearing at MSPB hearings. The director ordered compliance in the following areas:

1. Witnesses must be reimbursed for time spent testifying.
2. Witnesses must be paid for travel time and expenses incurred by the actual transportation.
3. Witnesses testifying during non-duty hours are entitled to overtime he/she would have received had he/she worked in their regular position that day.
4. Witnesses must be compensated for time spent waiting to testify..

Please advise of USPS intent to comply with this directive.

Sincerely,



William Burrus,
Executive Vice President

Thomas Fritsch
Assistant Postmaster General
Labor Relations Department
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260

WB:mc

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Neri Vaccaro
Northeastern Region

Archie Samoury
Southern Region

vouchers: threatening reprisal; and violating the provisions of a policy letter by allowing employees to disconnect hot line clamps from an energized circuit without permission.

The presiding official held that the agency had not proven by a preponderance of the evidence that the appellant submitted a false travel voucher or that he threatened reprisal and retaliation. He held that the remaining charges were proven and sustained the removal, holding that the penalty was not beyond the bounds of reasonableness for the sustained charges.

However, the Board found, under the circumstances of this case, that the penalty of removal was beyond the bounds of reasonableness for the sustained charges. The Board found that the appellant proved circumstances which substantially abated the potential seriousness of the sustained charges. The Board also noted that the appellant had no prior record and performed his duties satisfactorily and dependably. Thus, the Board found the appellant to demonstrate considerable potential for rehabilitation. Accordingly, the Board found a 60-day suspension to be the maximum reasonable penalty, and so ordered.

In re Alfred D. Maisto
SF07528411054COMP
August 6, 1985

This case arose from a claim by a witness who testified in *Maisto v. United States Postal Service*, MSPB Docket No. SF07528411054, that the agency had not properly reimbursed him for appearing.

The presiding official, citing 5 C.F.R. § 1201.34, ordered the

agency to ensure that all the witnesses who testified at the hearing were in official duty status at the time, and that they were properly compensated for the period of time beginning when they left the agency to travel to the hearing, and ending when they arrived at their place of employment after being excused from the hearing by the presiding official. In response, the agency argued that it interpreted this regulation to apply only to the actual time spent testifying, not the time spent traveling and waiting to testify. The agency informed the Board that it "respectfully declines to comply with your Order, unless or until you cite appropriate authorities in support of your interpretation of the aforesaid CFR section."

The regional director responded with an order citing statutes and the Federal Personnel Manual which supported the presiding official's order, found the agency to be in noncompliance and ordered compliance within seven days. When the agency responded 22 days later, it said that its practice was to pay testifying employees as though they were in a duty status only when the testimony took place during the employee's tour of duty. It argued that this witness had already completed his tour of duty for the day in question.

In its analysis, the Board noted that since the agency agreed that it must reimburse the witness for time he spent testifying, the issue was narrowed to whether he must be paid for the other time.

As the regional director noted, 5 U.S.C. § 1205(b)(3) requires that witnesses subpoenaed to Board hearings be compensated in the same manner as those subpoenaed to United States courts. That manner is set out at 28 U.S.C. § 1821(b) which states that witnesses are to be paid for travel

time time as well as "... any time during such attendance." (emphasis added).

However, the agency's main argument was that the Board lacked jurisdiction, since the agency argued that it was not covered by the Civil Service Reform Act of 1978 and that the Board only has jurisdiction over preference eligibles with a year of continuous service.

The Board found the agency's reasoning erroneous, stating that its jurisdiction over the appeal was undisputed and the assertion of that jurisdiction included authority to conduct a hearing and to govern the presentation of witness testimony where it is required for proper adjudication. 5 U.S.C. § 1205(a)(1). It went on to say that 5 U.S.C. § 1205(a)(2) was meant to confer on the Board a broad grant of enforcement power. *Kerr v. National Endowment for the Arts*. 726 F.2d 730, 733 (Fed. Cir. 1984). Moreover, the Board has the authority to prescribe regulations necessary for the performance of its functions. Consequently, the Board said it had the authority to prescribe regulations concerning witness fees and to enforce the Postal Service's compliance with an order or decision regarding witness fees.

The Board said that where, as here, an employee of a federal agency, including an employee of the Postal Service, is a witness at a Board hearing during his non-duty hours, he is entitled to overtime pay he would have received had he worked in his regular position that day.

The Board ordered the agency to place the witness in official duty status for the travel time to and from the hearing, any time spent waiting to testify, and to compensate him for such time as well as expenses incurred by the actual transportation.

courts of the United States shall be paid "for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance." (Emphasis added)

The Board's Jurisdiction

The agency's main argument, however, is that the Board lacks jurisdiction in this matter. The Postal Service, it argues, is not covered by the Civil Service Reform Act (CSRA), and the Board only has jurisdiction over preference eligibles with a year of continuous service. The Postal Reorganization Act (PRA), 39 U.S.C. § 101 *et seq.*, exempted the Postal Service from coverage of all federal laws except as specifically noted at section 410(b) of Title 39, the agency argues. As a result, the agency asserts, neither 5 U.S.C. § 6322, 5 U.S.C. § 2105(a), nor the Federal Personnel Manual apply to the Postal Service, and the Board has no jurisdiction to impose these witness fee laws and regulations on the Postal Service. In support of this argument, the agency cites *Hall v. U.S. Postal Service*, [MSPB DA07528210720 (01/25/85), 85 FMSR 5049], where the Board held, *inter alia*, that pursuant to the PRA, federal labor laws are not applicable to the Postal Service absent a specific provision in the PRA or other statute.

This reasoning is erroneous. The Board also stated in *Hall* that Postal Service employees who are preference eligibles as defined at 5 U.S.C. § 2108(3) and who have completed one year of current, continuous service in the same or similar positions, *see* 5 U.S.C. § 7511, are entitled by statute and regulation to appeal to the Merit Systems Protection Board. Mr. Black was a witness at the hearing of an appeal filed by Mr. Maisto, a preference eligible Postal Service employee. The Board's jurisdiction over that appeal is undisputed, and the assertion of that jurisdiction includes the authority to conduct a hearing and to govern the presentation of witness testimony where it is required for proper adjudication. 5 U.S.C. § 1205(a)(1). The Board, therefore, clearly retains jurisdiction over matters which arise during the processing of an appeal over which the Board has jurisdiction.

In this case, the witness compensation issue arose during the processing of such an appeal. As such, it is a matter which the Board has the authority to hear and adjudicate pursuant to 5 U.S.C. § 1205(a)(1). As a result, the Board has the authority to order any federal employee or agency to comply with any order or decision issued in accordance with section 1205(a)(1) and to enforce compliance with such an order. 5 U.S.C. § 1205(a)(2). Section 1205(a)(2) is meant to confer upon the Board a broad grant of enforcement power. *Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984) [84 FMSR 7001]. Moreover, the Board has the authority to prescribe such regulations as may be necessary for the performance of its functions. 5 U.S.C. § 1205(g); 5 U.S.C. § 7701(j). Consequently, the Board has the authority to prescribe regulations concerning witness fees and to enforce the Postal Service's compliance with an order or decision regarding witness fees.

While the Postal Service is correct that 5 U.S.C. § 6322 and the FPM sections governing its implementation are not applicable to the Postal Service, it is not correct in its

contention that it is complying with the Board's regulation, 5 C.F.R. § 1201.33. We interpret our regulation as other federal agencies have interpreted it, to require that agency employees who testify at Board hearings be properly compensated for the time necessarily occupied in going to and from the place of attendance. Where, as here, an employee of a federal agency, including an employee of the Postal Service, is a witness at a Board hearing during his nonduty hours, he is entitled to overtime pay he would have received had he rendered service in his regular position with the agency on that day. This interpretation is consistent with the purpose of 5 U.S.C. §§ 1205(g) and 7701(j) and with the Office of Personnel Management's instructions to other federal agencies whose employees testify in Board proceedings. *Cf.* FPM, Ch. 630, subch. 10-3. The Board's interpretation of its own regulations is entitled to great deference. *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

Accordingly, the agency is hereby ORDERED to place Mr. Black in official duty status for the time spent in transit to and from the hearing, and any time spent waiting to testify, and to compensate him for such time as well as for expenses incurred by the actual transportation to and from the hearing. Satisfactory evidence of compliance with this order shall be submitted to the Office of the Clerk of the Board within ten days of the date its issuance. If evidence of compliance is not submitted, the agency shall submit the names of the officials responsible for its continued noncompliance and show cause why sanctions pursuant to 5 U.S.C. § 1205(a)(2) and (d)(2) and 5 C.F.R. § 1201.184 should not be imposed against them.⁴

¹ Originally captioned *Maisto v. United States Postal Service*, MSPB Docket No. SF07528411054, [85 FMSR 1563] this case arises from a claim by a witness from the Postal Service in Mr. Maisto's appeal that the agency had not properly reimbursed him for appearing as a witness at Mr. Maisto's hearing.

² The presiding official apparently intended to cite 5 C.F.R. § 1201.33, which provides:

Every federal agency shall make its employees available to furnish sworn statements or to appear as witnesses at the hearing when requested by the presiding official. When providing such statements or testimony, witnesses shall be in official duty status.

³ The actual reimbursement for the time Mr. Black spent testifying is a matter of some dispute. Mr. Black maintains that he has not been paid anything. The agency, in a later submission, states that it offered Mr. Black the opportunity to file a claim for reimbursement for mileage and the time he spent testifying only, but that he declined. Mr. Black has submitted evidence that he filed for reimbursement for those expenses plus his time spent traveling to and from the hearing and waiting to testify, and that his claim had been denied. It seems that no actual payment has been made, but that the agency agrees that at least some compensation is in order.

⁴ 5 U.S.C. § 1205(a)(2) provides that the Board has the authority to order any Federal agency or employee to comply