

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

61029
98396

FILE: B-180010.02

DATE: JUN 2 1976

MATTER OF:

Federal Aviation Administration and Professional
Air Traffic Controllers Organization - Arbitration
Awards of Employee Parking Accommodations

DIGEST:

Federal Aviation Administration (FAA),
Department of Transportation, questions
propriety of implementing three arbitration
awards requiring FAA to provide parking
accommodations for employees. FAA does
not consider it would be justified in making
a determination, as required for expendi-
ture of funds by applicable regulations, that
such leased parking accommodations are
necessary to avoid impairment of its oper-
ational efficiency. Inasmuch as, FAA
regulations incorporated by reference in
the collective bargaining agreement have
already made the required determination,
FAA is not required to make a further
determination. Accordingly, FAA may
expend appropriated funds to implement
awards.

This action involves an October 14, 1975 letter request for an advance decision from Mr. William S. Heffelfinger, Assistant Secretary for Administration, Department of Transportation, as to the propriety of implementing three arbitration awards that require the Federal Aviation Administration (FAA), a subordinate agency of the Department, to expend appropriated funds for employee parking. Initially, the Department noted an exception to the awards and, under the provisions of section 13(b) of Executive Order No. 11491, as amended, petitioned the Federal Labor Relations Council, for review on the basis that the arbitrators had exceeded their authority and fashioned remedies that would require the improper expenditure of appropriated funds. In support of the petitions, the Department alleged that the awards did not meet the criteria set forth in two Comptroller General decisions (43 Comp. Gen. 131, and 49 Comp. Gen. 476) and in GSA Order 7030.2C. The Council on July 24, 1975, declined to accept, the petitions for review on the ground that the applicability of the GSA order and the two Comptroller General decisions had not been demonstrated in the petitions. Consequently the Department has requested a ruling from this Office on the matter.

PUBLISHED DECISION
55 Comp. Gen.

The three arbitration cases involved are in the matters of: (1) FAA Dallas-Fort Worth, Texas and Professional Air Traffic Controllers Organization, (PATCO) (Schedler, Arbitrator) FLRC No. 74A-88; (2) FAA, Portland, Oregon and PATCO (Hanlon, Arbitrator), FLRC No. 75A-9; and (3) FAA, Kansas City, Missouri and PATCO (Yarowsky, Arbitrator), FLRC No. 75A-54. These cases stemmed from grievances filed by Air Traffic Controllers represented by PATCO employed at airport terminals located at Dallas-Fort Worth, Texas; Portland, Oregon; and Des Moines, Iowa. In each case, the grievants alleged that the FAA had violated Article 47 of its collective bargaining agreement with PATCO, dated April 1973, pertaining to parking accommodations which the agency had obligated itself to provide for employees within the bargaining unit. Article 47 provides:

"ARTICLE 47 -- PARKING

"Section 1. The Employer will provide adequate employee parking accommodations at FAA owned or leased air traffic facilities where FAA controls the parking facilities. This space will be equitably administered among employees in the bargaining unit, excluding spaces reserved for government cars and visitors. There may be a maximum of three reserved spaces at each facility where such spaces are available except at facilities where there are employees with bonafide physical handicaps. At other air traffic facilities, the Employer will endeavor to obtain parking accommodations at least equal to those provided the employees of the airport owner or operator.

"Section 2. At parking facilities under the control of FAA, the Employer will insure that employees have prompt access to and from the parking facilities.

"Section 3. Parking accommodations at FAA occupied buildings and facilities will be governed by law, regulation and agency order 4665.3A."
(Emphasis supplied.)

FAA Order 4665.3A, dated September 14, 1971, entitled: "Policy on Parking Accommodations at FAA Occupied Buildings and Facilities," as incorporated by reference in Article 47, explicitly sets forth in detail the agency policy of providing good, close in, free or low cost parking to employees and officials of the agency. A review of the arbitration cases here involved reveals that FAA does not control the parking at any of the three air traffic facilities. Rather it must negotiate parking accommodations it requires with the airport authorities. All three arbitrators took notice of this fact and therefore focused their attention on the last sentence of section 1 of Article 47 to determine what, if any, obligations FAA had assumed as to providing parking for its employees at the three facilities.

In light of the FAA policy on parking contained in FAA Order 4665.3A, *supra*, the arbitrators, in effect, construed the referenced provision as placing an obligation on the FAA to use its best efforts to obtain parking accommodations for its employees at least equal to those provided the employees of the airport owner or operator. In all three cases, after a review of the then existing parking situations and the efforts put forth by the FAA to obtain improved accommodations, the arbitrators concluded that FAA had violated this provision of the agreement.

It is a well settled principle of law that where a collective bargaining agreement provides for binding arbitration, it is the function of the arbitrator, rather than a reviewing authority, to determine issues of fact which bear on the question of whether a particular section of the agreement has been violated. Detroit Newspaper Publishers Association v. Detroit Typographical Union No. 18, International Typographical Union, 471 F.2d 872 (6th Cir. 1972). United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960). Thus, after a review of the opinions in all three cases, we are unable to find that the arbitrators on the basis of the evidence presented at the hearings exceeded their authority in concluding that the FAA had violated the terms and conditions of the agreement concerning FAA's obligation to endeavor to obtain employee parking accommodations at least equal to those provided the employees of the airport owner or operator.

After concluding that the agreement had been violated in the three arbitration cases, the arbitrators fashioned the following

remedies. At the Dallas-Fort Worth Regional Airport, the arbitrator ordered the FAA to reserve 14 of the 20 parking spaces it controls at the ground control tower for use by air controllers. At the Portland, Oregon, airport, the arbitrator ordered the FAA to take steps to obtain and provide free parking accommodations to all employees working under the agreement in either the short term parking location or at the proposed rental car parking lot. Finally, at the Des Moines Air Terminal, the arbitrator ordered the FAA to permit air controllers to use the regular commercial airport parking lots on a voluntary basis. Each employee would be required to pay the first \$10 per month of his parking expenses, and the FAA would be required to pay the balance, if any, to the private operator of the parking facility. The arbitrator noted that this was an interim arrangement and would cease when free proximate parking was made available when the FAA relocated its facility to a new tower scheduled for operation sometime in 1976.

The Department of Transportation is of the opinion that it lacks authority to implement the aforementioned remedies under General Services Administration regulations and decisions of our Office. It relies on 43 Comp. Gen. 131 (1963); 49 id. 476 (1970); B-168946, February 26, 1970, and General Services Administration (GSA) Order PBS 7030.2C, dated April 10, 1970, in support of this position. We have reviewed the cited authorities and have concluded that 43 Comp. Gen. 131, supra, is not applicable inasmuch as that case held that an agency could not spend appropriated funds for employee parking accommodations in the absence of a statute authorizing such expenditures. The other decisions relied on generally provide that agencies may request GSA to lease employee parking accommodations under the authority that it was granted by the Federal Property and Administrative Services Act, 40 U.S.C. §§ 471 and 490, where the requesting agency certifies to GSA, pursuant to GSA Order PBS 7030.2C, that such parking is required to avoid a significant impairment of its operational efficiency. Then, the agency can use appropriated funds to reimburse GSA for the cost of the leased parking accommodations. The Department of Transportation states that the subject cases do not meet the basic standard required by the GSA order to justify this type of expenditure.

All the cited authorities are concerned with the normal situation where agencies have no independent authority to lease space and consequently must rely on GSA to procure the space

and accommodations they require. These cited authorities do not purport to govern situations where agencies have independent statutory or delegated authority to procure space and facilities.

In this regard, we note that the FAA has certain independent statutory authority to procure real property. This authority is contained in 49 U. S. C. § 1344(c) which provides:

"(c) Acquisition and disposal of property.

"The Administrator, on behalf of the United States, is authorized, where appropriate: (1) to accept any conditional or unconditional gift or donation of money or other property, real or personal, or of services; (2) within the limits of available appropriations made by the Congress therefor, to acquire by purchase, condemnation, lease, or otherwise, real property or interests therein, including, in the case of air navigation facilities (including airports) owned by the United States and operated under the direction of the Administrator, easements through or other interests in airspace immediately adjacent thereto and needed in connection therewith: Provided, That the authority herein granted shall not include authority for the acquisition of space in buildings for use by the Federal Aviation Administration, suitable accommodations for which shall be provided by the Administrator of General Services unless the Administrator of General Services determines pursuant to section 1(d) of Reorganization Plan Numbered 18, 1950, that the space to be acquired is to be utilized for the special purposes of the Federal Aviation Administration and is not generally suitable for the use of other agencies * * *." (Emphasis supplied.)

The above-quoted statutory authority permits the GSA to delegate authority to the FAA to procure its own special purpose space such as that required at airports for air traffic control and for other purposes. Pursuant thereto, GSA has delegated certain leasing authority to FAA in 41 C. F. R. § 101-18.104-1(L)(2) (1975), which permits FAA to directly lease the following kinds of space:

"(2) Federal Aviation Administration. The Aeronautical Center at Oklahoma City, Oklahoma, air route traffic control centers, garage space held under service contracts, land at airports, and not more than 10,000 square feet of space at airports that is used predominately as general purpose office space in buildings under the jurisdiction of public or private airport authorities."

We have been informally advised by FAA officials that FAA has construed the above-quoted regulation as providing authority for that agency to directly negotiate with airport owners and operators and lease space at airports without reference to GSA. FAA also construes this authority as permitting that agency to lease employee parking accommodations without reference to GSA, where FAA determines to its own satisfaction that the criterion, namely that such parking accommodations are required to avoid a significant impairment of the agency's operational efficiency, as set forth in paragraph 10(c) of GSA Order PBS 7030.2C, April 10, 1970, on: "Vehicle Parking Facilities," has been satisfied. Hence, according to the FAA the determination of whether the criterion for leasing employee parking accommodations has been satisfied is a matter within the sole discretion of FAA.

Our recent decisions, concerning the legality of binding arbitration awards relating to Federal employees covered by collective bargaining agreements, have held that an agency may bargain away its discretion and thereby make agreement provisions nondiscretionary agency policies, if such provisions are consistent with applicable laws and regulations, including Executive Order No. 11491, as amended (3 C.F.R. 254 (1974)). See for example, 55 Comp. Gen. 42 (1975), 54 id. 1071 (1975), 54 id. 312 (1974). Thus, if an agency bargains away its right to exercise its discretion on a matter that is normally discretionary with the agency, the agency is bound by the nondiscretionary policy expressed in the labor-management agreement, just as it would be bound by its own mandatory regulations. 54 Comp. Gen. 1071, *supra*. Consequently, the basic issue presented by this case is whether the FAA, in promulgating FAA Order 4665.3A dated September 14, 1971, entitled "Policy on Parking Accommodations at FAA Occupied Buildings and Facilities" and in agreeing to Article 47 of the collective bargaining agreement that incorporated by reference the FAA order, affirmatively exercised its discretion in advance

and, in effect, made a determination that adequate parking accommodations for air controller employees were required to avoid a significant impairment of the operational efficiency of the agency. If the agency has already affirmatively exercised such discretion, it may not properly withhold implementation of the arbitration awards where they are otherwise appropriate.

In deciding this issue, we have reviewed FAA Order 4665.3A dated September 14, 1971, supra, as incorporated by express reference in the agreement, which sets forth FAA policy on providing accommodations for employee parking at FAA occupied buildings and facilities. Section 4a(2) of the FAA order expressly provides that "[A]dequate parking accommodations shall be provided for the privately owned vehicles of FAA employees engaged in the maintenance and operation of agency technical facilities." In fact, that section goes on to demonstrate the importance FAA attaches to employee parking as follows:

"(a) On Airports. Adequate parking accommodations for FAA employees in close proximity to FAA technical facilities is considered to be an integral part of each facility.

"1 Project approvals for new facilities shall be withheld and start of construction of new facilities shall be delayed until adequate employee parking arrangements are made for all FAA technical facilities located on the airport.

"2 No new leases, permits or other instruments are to be executed or existing ones modified without the inclusion of specific statements assuring adequate employee parking accommodations at all technical facilities located on the airport. No new ADAP agreements will be entered into without obtaining assurances from the sponsor of adequate parking accommodations for employees at all FAA technical facilities on the airport."

Under section 5 of the FAA order, responsibility for determining the adequacy of parking accommodations for official and employee

parking on a site-by-site basis is delegated to regional and center directors and the factors to be considered are set forth in detail. To correct deficiencies in parking, section 6 of the order permits the use of FAA funds as follows:

- "(b) Employee Parking at Technical Facilities.
A maximum effort shall be made to negotiate for adequate employee parking. In the event these efforts fail, the Regional Director may approve the expenditure of FAA funds to obtain temporary relief for the problem until such time as parking accommodations can be obtained from the airport owner/sponsor, or, in the case of off airport sites, until parking accommodations can be acquired."

A careful reading of the above-quoted FAA order clearly indicates that FAA considered adequate parking for its employees at air traffic control facilities to be essential to the performance of its mission. This fact is evidenced by its order to withhold project approval of new facilities that involve air traffic safety improvements until adequate employee parking arrangements were made. Similarly, new leases were not to be executed nor existing ones modified without the assurance of adequate employee parking accommodations. Also, Airport Development Aid Programs (ADAP) agreements that provide Federal aid to airports were not to be entered into without such assurances. Obviously, FAA would never have ordered such drastic measures unless it had determined that adequate employee parking accommodations were essential for the maintenance of the operational efficiency of the agency.

Nor does the FAA order require us to ponder over and speculate as to what is meant by the term "adequate employee parking accommodations." For it explicitly sets forth that such accommodations should be at least equal to those provided the employees of the airport owner/operator. Further, the order states that parking accommodations should normally be within 500 feet of the work facility and not require the employee to resort to other means of transportation such as shuttle buses. Moreover, the order states that free parking for employees is a desirable objective. Finally the order indicates that adequate employee parking should be obtained at FAA expense when justified.

Based on the foregoing, we are of the opinion that FAA made a determination that adequate employee parking accommodations were required in order to avoid a significant impairment of the operational efficiency of that agency when it promulgated the order. At that time, the determination became a nondiscretionary agency policy. Moreover FAA, by incorporating the order by express reference in its collective bargaining agreement providing for binding arbitration, subjected the provisions of the order to interpretation by a neutral arbitrator. 54 Comp. Gen. 403, 405 (1974). Thus FAA is not required to make a further determination. In interpreting the provisions of the agreement, including the order, three arbitrators have now found that FAA violated Article 47 of the agreement by failing to endeavor to provide adequate employee parking accommodations at the airports here involved and have fashioned awards that require FAA to expend appropriated funds to provide parking accommodations that satisfy the provisions of the agreement. We see no legal impediment to the expenditure of funds to implement these awards, inasmuch as we have concluded that FAA has already made the requisite determination in FAA Order 4665.3A, supra, and Article 47 of the collective bargaining agreement that adequate employee parking accommodations are essential to the operational efficiency of the agency.

R. F. KELLER¹

[Deputy]

Comptroller General
of the United States