NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration	)	
	)	
between	)	
	)	
UNITED STATES POSTAL SERVICE	)	Case No. Q11C-4Q-C 11311239
	)	
and	)	Supplemental Remedy Award
	)	
AMERICAN POSTAL WORKERS UNION, AFL-CIO	)	
	)	

BEFORE: Shyam Das

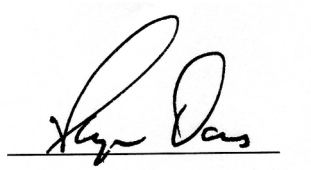
APPEARANCES:

For the Postal Service:	Patrick M. Devine, Esquire Neftali Pluguez, Esquire
For the APWU:	Melinda K. Holmes, Esquire

Place of Hearing:	Washington, D.C.
Dates of Hearing:	June 26-27, 2012
Date of Award:	March 29, 2013
Date of Supplemental Award:	October 16, 2013
Relevant Contract Provisions:	Article 1.6.B and Q06C-4Q-C 10005587 Global Settlement
Contract Year:	2010 - 2015
Type of Grievance:	Contract Interpretation

Supplemental Remedy Award Summary:

The remedy issue submitted to me for decision by the parties is resolved on the basis set forth in the above Findings. I retain jurisdiction in the unlikely event the parties are unable to resolve any matters relating to implementation of the remedy provided for herein.



Shyam Das, Arbitrator

On March 29, 2013 I issued my Award and decision in this case (Merits Award), which involves the Q06C-4Q-C 10005587 Global Settlement that the parties entered into on March 9, 2011. The Global Settlement relates to application of Article 1.6.B of the National Agreement.

The background leading up to the execution of the Global Settlement is set forth in the Merits Award. The Global Settlement provides as follows:

Q06C-4Q-C 10005587 GLOBAL SETTLEMENT

> The parties agree that grievance Q06C-4Q-C 10005587 will be resolved effective with the signing of this settlement. The parties further understand that any cases held in abeyance pending the outcome of this case will be affected by this settlement. Those cases will be returned to the level they were held for further processing.
>
> As a result of this settlement, in offices under 100 bargaining unit employees, postmasters and supervisors may only perform bargaining unit work in accordance with Article 1.6.A and when listed in their position description in accordance with the following:
>
> In level 18 offices, the Postmaster is permitted to perform no more than fifteen (15) hours of bargaining unit work per week. There will be no PMR usage in level 18 offices.
>
> In level 16 offices, the Postmaster is permitted to perform no more than twenty-five (25) hours of bargaining unit work per week. There will be no PMR usage in level 16 offices.
>
> In level 15 offices, the Postmaster is permitted to perform no more than twenty-five hours (25) of bargaining unit work per week. There will be no PMR usage in level 15 offices.
>
> In the event there is a second supervisor in any of these offices, only one of the supervisory employees may perform bargaining unit work as prescribed above (either the Postmaster or the Supervisor).
>
> Bargaining unit work performed by Postmasters or supervisors should be consecutive hours to the extent practicable, so as to minimize the necessity for split shifts for clerk craft employees, whenever possible. All time the supervisor or Postmaster spends

staffing the window during the day will be counted towards the permissible bargaining unit work limits.

Postal Operations Administrator (POA) will be obsolete.

The Postal Service will report to the APWU, on a quarterly basis, bargaining and non-bargaining unit employee staffing changes in Level 15 and below offices.

In accordance with the M-32, postmasters or supervisors performing bargaining unit work will record what operation they are performing either by time clock, PS Form 1260 or other appropriate means. A copy of such documentation shall be made available to the Union upon request.

Any office that is downgraded in level will remain at the bargaining unit work standard that is in place at the beginning of the Agreement through the life of that contract.

(Emphasis added.)

As stated in the Merits Award:

The present Step 4 grievance, filed by the Union on August 15, 2011, originally raised three issues, one of which the parties have resolved. The two remaining issues relate to: (1) the proper interpretation and application of the provision in the Global Settlement which states: "All time the supervisor or Postmaster spends staffing the window during the day will be counted towards the permissible bargaining unit work limits."; and (2) whether the final paragraph of the Global Settlement is subject to an exception for office downgrades effected under Delivery Unit Optimization (DUO).

In brief, the Union's position on the first issue was that if the window of a level 15, 16 or 18 post office is open and a postmaster (or supervisor) is responsible for staffing that window, every hour the window is open with the postmaster covering it counts against the hour limits in the Global Settlement, regardless of what the postmaster is actually doing during that time. The Postal Service's position was that only time spent in the actual performance of bargaining unit work should be counted against the agreed upon work hour limitation. The Postal Service also contended that subsequent to executing the Global Settlement the parties agreed to a DUO

exception to the provision in the final paragraph of the Global Settlement. The Union's position was that the Postal Service's request for such an exception had been discussed, but no binding agreement was reached.

The Merits Award in this case -- issued on March 29, 2013 -- states as follows:

AWARD

For the reasons set forth in the above Findings, I conclude that:

(1) The provision in the Q06C-4Q-C 10005587 Global Settlement which states:

> All time the supervisor or Postmaster spends staffing the window during the day will be counted towards the permissible bargaining unit work limits.

applies to all time the supervisor or postmaster is covering the window, which, in the absence of a clerk, includes all time the window is open.

(2) The provision in the Q06C-4Q-C 10005587 Global Settlement which states:

> Any office that is downgraded in level will remain at the bargaining unit work standard that is in place at the beginning of the Agreement through the life of that contract.

is subject to an agreed exception for an office without a clerk that is downgraded under the DUO initiative on or after November 21, 2010 to level 13 or below.

(3) Issues relating to remedy are returned to the parties for discussion and resolution. I retain jurisdiction to decide any remedial issues that the parties are unable to resolve.

Pursuant to paragraph (3) of the Merits Award, the parties jointly have requested that I now decide the issue of: "What, if any, remedy is appropriate for the time period between the Global Settlement MOU and the date of your award?"

UNION POSITION

As remedy for the period between the May 23, 2011 effective date of the Global Settlement and the March 29, 2013 Merits Award in this case, the Union proposes that: (1) the Postal Service provide the APWU, within 90 days of the remedy Award, the weekly retail window hours and other documentation specified in the Global Settlement for all Article 1.6.B offices categorized as level 15 or higher as of November 23, 2010 (the effective date of the 2010 Agreement), excluding those offices properly falling within the DUO exception in the Merits Award; (2) for any such office (and any other office identified by the APWU) where the hours of bargaining unit work performed by a postmaster (as determined in accordance with the Global Settlement) exceeds the work hour limits in the Global Settlement, the Postal Service will be liable for back pay for each hour over the applicable work hour limit; and (3) the precise amount and recipient(s) of the back pay will be determined by the parties or, in the event the parties cannot reach agreement promptly, through regional arbitration.

The Union asserts that its proposed remedy is completely on a par with typical APWU-Postal Service remedial schemes for violations and misapplications of the National Agreement. In particular, it cites Arbitrator Mittenthal's "90/10" award, USPS and APWU and NALC Case Nos. H4C-NA-C 77 and 93 (1988), as being strikingly on point. The present case, like the 90/10 case, is a national dispute, initiated at the national level, about the Postal Service's misinterpretation of the National Agreement that may have led to the misapplication of the Global Settlement. As in the 90/10 case, the Union does not have access to the information needed to identify violations of the work hour limits of the Global Settlement, especially in offices where there was no clerk. Also, like in the 90/10 case, the Postal Service should be held to applying the standards of the Global Settlement in every Article 1.6.B office since the effective date of the Global Settlement, regardless of whether the Union filed individual grievances.

The Union points out that in the 2012 Joint Contract Interpretation Manual (JCIM) for implementing the 2010 National Agreement, the parties specifically agreed that with regard to the Global Settlement:

> Where bargaining unit work which should have been assigned to employees is performed by a supervisor and such work hours are not *de minimus* [sic], the bargaining unit employees who would have been assigned the work shall be paid for the time involved at the applicable rate.

The Union argues that the Postal Service should be directed to apply the Global Settlement nationally in all Article 1.6.B offices since the effective date of the Global Settlement to the date of the Merits Award, including in offices where no grievances were filed. Any remedy that allows the Postal Service to avoid applying the Global Settlement for any amount of time, including the period while this dispute was pending, diminishes the parties' bargain and undermines its objectiveness and usefulness in resolving disputes. The Postal Service expected a result and remedy if it did not comply with the work hour limits in all Article 1.6.B offices, as demonstrated by its own directive to postmasters in level 15 to 18 offices to track their hours in a manner that follows the APWU's position going back to May 23, 2011. (See APWU Exhibit 23 in the Merits case.) Moreover, as the arbitrator observed in the Merits Award, there was a noticeable lack of evidence demonstrating any disagreement or misunderstanding between the parties' negotiators about the meaning of "all time spent staffing the window."

The Union contends that the Postal Service should be directed to affirmatively identify violations of the Global Settlement since its effective date to the date of the Merits Award. The parties already have agreed in the JCIM that a back pay remedy applies to any violations, and the parties or regional arbitrators are perfectly capable of resolving, in accordance with the JCIM, whether violations are *de minimis* and who should receive the compensation in offices without a clerk.

EMPLOYER POSITION

The Postal Service stresses that no violation either of the agreed-upon work limitations in the Global Settlement or Article 1.6.B has yet been established. Any actual damages to bargaining unit employees during the period in issue can only be speculated upon

and have not been demonstrated. The Postal Service further contends that only a prospective remedy is appropriate in this case.

The Postal Service asserts that the record in this case amply demonstrates that the parties adopted the Global Settlement as a "bright line" rule to govern the application of Article 1.6.B requirements. Prior to the Global Settlement, those requirements had been the source of endless disputes. The stated desire to "put this issue to rest" after 40 years was only finally accomplished, the Postal Service argues, after the parties negotiated the Global Settlement in 2011 and this arbitrator clarified its meaning and application in the March 29, 2013 Merits Award. Simply stated, the Postal Service asks, how can one violate a "rule" which was not negotiated until 2011 and only clarified in 2013 prior to such clarification? The Postal Service insists it should not be penalized for actions it took clearly operating in good faith to comply with "the previously-unguided path of the requirements of Article 1.6.B." The practical impact of a monetary remedy in this case would unfairly penalize the Postal Service, while a prospective remedy would place the Union in its bargained-for position.

The Postal Service points out that arbitrators have considerable authority and discretion in determining how a contract violation should be remedied. See: USPS and APWU Case Nos. H1C-NA-C 97 et al. (Mittenthal 1989). In the present case, not only has no actual violation been established, the Postal Service maintains, but this is a case of first impression. Consistent with prior National Arbitration decisions, an order requiring the Postal Service to abide by the terms of the Global Settlement, as clarified in the March 29, 2013 Merits Award, with no monetary remedy, is appropriate. See: USPS and APWU and NALC Case Nos. H4C-NA-C 65 and 95 (Mittenthal 1988); USPS and APWU and NALC Cases No. H7C-NA-C 36 et al. (Mittenthal 1994); USPS and APWU Case No. H1C-4F-C 18795 et al. (Bloch 1984); and USPS and NALC and NRLCA Case No. S1N-3P-C-41285 (Nolan 2001).

FINDINGS

As Arbitrator Mittenthal stated in his 1989 decision in USPS and APWU Case Nos. H1C-NA-C 97 et al.:

> Arbitrators have an extremely large measure of discretion in determining how a contract violation should be remedied. They can and should consider the nature of the wrong done, the damage (or lack thereof) to the employees, the practical impact of the remedy sought, the nature of the bargaining relationship, and other such matters.

In this case, the Postal Service asserts that there should be no retroactive or monetary remedy covering the period between the effective date of the Global Settlement, May 23, 2011, and the date of my Merits Award, March 29, 2013, for two reasons: (1) no violation of the agreed-upon work limitations has yet been established and any actual damages during that period are speculative; and (2) any remedy in this case of first impression should be prospective only.

The Union reasonably asserts, and the Postal Service has not argued to the contrary, that a determination as to whether -- and the extent to which -- the Postal Service has violated the Global Settlement in any particular office during the period in issue requires information that, as a practical matter, largely must be provided by the Postal Service. The parties anticipated this in the penultimate paragraph of the Global Settlement, which states:

> In accordance with the M-32, postmasters or supervisors performing bargaining unit work will record what operation they are performing either by time clock, PS Form 1260 or other appropriate means. A copy of such documentation shall be made available to the Union upon request.

Time spent by postmasters "staffing the window" (as defined in the Merits Award), particularly in offices with no clerk, is information far more readily available to the Postal Service than to the Union.[1]

In light of the instructions from USPS Headquarters to the field regarding the meaning of "staffing the window," which triggered the filing of this Step 4 grievance by the Union, the presumption must be that more likely than not there were a substantial number of violations of the Global Settlement as subsequently interpreted in the Merits Award. To the extent the Postal Service has access to the information needed to document this, it is to be made available to the Union within 90 days of the date of this Supplemental Remedy Award, absent a showing that this reasonably cannot be accomplished within such time period.

Once the total hours of bargaining unit work performed by a postmaster in a particular office during a particular week have been established -- consistent with the provisions of the Global Settlement -- the "bright line" rules in the Global Settlement should enable the parties to quickly determine whether the agreed limits established in the Global Settlement have been exceeded.

In Case No. H7C-NA-C 36, Arbitrator Mittenthal stated:

> It is generally accepted in labor arbitration that a damage award, arising from a violation of the collective bargaining agreement, should be limited to the amount necessary to make the injured employees whole. Those deprived of a contractual benefit are made whole for their loss. They receive compensatory damages to the extent required, no more and no less.

Here, the parties have spelled out in the JCIM the appropriate manner in which to make injured employees whole for violation of the Global Settlement:

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[1] In offices without a clerk, weekly retail window hours constitute time spent "staffing the window."

> Where bargaining unit work which should have been assigned to employees is performed by a supervisor and such work hours are not *de minimus* [sic], the bargaining unit employees who would have been assigned the work shall be paid for the time involved at the applicable rate.

Thus, there is nothing inherently speculative in determining from available data whether the limits set forth in the Global Settlement were violated in a particular office in a particular week, and, if so, what the extent (work hours) of the violation was. Pursuant to the JCIM, a monetary remedy then is to be paid "to the bargaining unit employees who would have been assigned the work" if it had not been performed by a postmaster in violation of the Global Settlement. If such bargaining unit employees cannot reasonably be identified, a monetary remedy is not called for -- at least for the period in issue prior to the issuance of the Merits Award. As the Union points out, if the local parties cannot resolve these matters, including whether the amount of work hours involved was *de minimis*, the parties can resort to regional arbitration for a final and binding determination.

In support of its contention that the remedy in this case of first impression should be prospective only, the Postal Service argues that a party cannot violate a "rule" prior to its clarification. Acceptance of this argument essentially would preclude any retroactive remedy in a case where the parties disagree as to the interpretation or application of an agreed contractual provision that has not been the subject of a prior ruling. That does not square with general arbitral practice, and the Postal Service has not shown that is these parties' practice.[2] As the employer, the Postal Service was able to manage its operations pursuant to its reading of the Global Settlement pending completion of the arbitration process initiated by the Union. During that period, the Union and the employees it represents did not get the benefit of its bargain with the Postal Service to the extent the limits in the Global Settlement -- as determined in the Merits Award -- were exceeded. As the record shows, the Postal Service was aware of the Union's contrary position within a week of the effective date of the Global Settlement, if not before. Thereafter, the Union filed its Step 4 grievance, putting the Postal Service on formal notice of the Union's interpretation of the relevant provisions of the Global Settlement and that the Union

[2] Prior National Awards cited by the Postal Service are discussed below.

was seeking to have its interpretation enforced under the grievance and arbitration procedure established in the parties' National Agreement. In its 15-Day Statement of Issues and Facts, the Union made clear it was seeking a make whole monetary remedy for violation of the Global Settlement. The Postal Service bore the risk that its interpretation would not prevail and that under general make whole principles affected employees could be entitled to a monetary remedy.

The Postal Service's assertion that it should not be penalized for action it took clearly operating in good faith to comply with "the previously-unguided path of the requirements of Article 1.6.B" also misses the mark. During the period in issue here, the bright line rule adopted by the parties in the Global Settlement to govern application of Article 1.6.B was in effect, and as I pointed out in the Merits Award:

> On its face, the wording of the sentence in dispute is straightforward....
>
> There really is no other reasonable way in which to read the language the parties agreed to. The Postal Service does not offer any persuasive alternative meaning for the phrase "staffing the window"....
>
> (Footnote omitted.)

Moreover, good faith action, as a general matter, does not by itself relieve an employer of back pay liability if it is determined not to have complied with the contract. That is not to say that there may not be some cases where the circumstances justify only a prospective remedy. But this is not one of them.

The Postal Service has cited several prior National Awards in support of its contention that only a prospective remedy should be granted in this case. Two related cases decided by Arbitrator Mittenthal in 1988 and 1994 involved violations of the 5 percent limitation on casual employment in Article 7, Section 1B3 of the then applicable National Agreement between the Postal Service and the APWU and the NALC. In the earlier decision, Arbitrator Mittenthal issued a cease and desist order. In the later decision, after additional violations, he

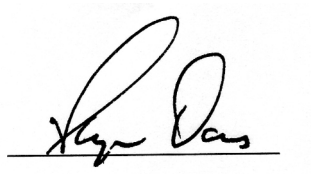
determined that a monetary remedy -- although not the one sought by the Unions -- should be provided. Those decisions are of little assistance in this case, however, because in discussing remedy in the earlier decision Arbitrator Mittenthal simply noted, without additional comment, that: "The Unions do not request any money damages." There is no way to know how he would have ruled if the Unions had sought a retroactive monetary remedy in that earlier case, but in another decision, USPS and APWU Case Nos. H1C-NA-C 97 et al., Arbitrator Mittenthal stated as a general axiom: "...the purpose of a remedy is to place employees (and Management) in the position they would have been in had there been no contract violation." That is what the present decision provides for.

The decision of Arbitrator Bloch cited by the Postal Service is not analogous to the present case. In that case, the grieving LSM operators were bypassed for EDIT tests because they were away from their consoles when the tests were scheduled and the next employee in the randomized crew rotational listing who was at his or her console was tested. Arbitrator Bloch, drawing on the parties' settlement of another grievance, "clarified" when it was appropriate under the applicable Postal Service regulation to bypass an employee absent from the console -- basically if the absence was for a "lengthy period." Absent evidence that the parties had agreed to specific limits, Arbitrator Bloch ruled that what constituted a "lengthy period" would depend on a case-by-case determination using criteria of the sort outlined in his decision. In that case, the Union had suggested as a remedy that the tests that were given to other employees due to grievants' "absence" be stricken from the records. Contrary to what appears to be the Postal Service's assertion in the present case, Arbitrator Bloch did not deny the Union's suggested remedy, and grant only a cease and desist order, because the parties had not previously agreed on specific limits regarding what length of absence would justify bypassing an employee. Arbitrator Bloch rejected the Union's proposed remedy because there was no showing the test results were flawed as a result of any deviation from the required rotation. Moreover, it is not accurate to state that the absence of agreed specific limits in that case is analogous to the present case where the parties did spell out specific limits in the Global Settlement, albeit they subsequently disagreed on the meaning of those agreed limits.

The case decided by Arbitrator Nolan, cited by the Postal Service, which the APWU was not a party to, is not at all analogous to the present case.

SUPPLEMENTAL REMEDY AWARD

The remedy issue submitted to me for decision by the parties is resolved on the basis set forth in the above Findings. I retain jurisdiction in the unlikely event the parties are unable to resolve any matters relating to implementation of the remedy provided for herein.



Shyam Das, Arbitrator