American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

Greg Bell, Director
Industrial Relations
1300 L Street, NW
Washington, DC 20005
(202) 842-4273 (Office)
(202) 371-0992 (Fax)

To: Local and State Presidents
National Business Agents
Regional Coordinators
National Advocates
Resident Officers

From: Greg Bell, Director
Industrial Relations

Date: January 26, 2009

Re: Mail Handler Award on Validity of Step 2 Decision Issued after Progression to Step 3

Enclosed you will find a copy of a national-level award by Arbitrator Eischen arising from a grievance initiated by the National Postal Mail Handlers Union (NPMHU) on the issue of whether a Step 2 decision is valid when it is issued after a grievance has been moved to Step 3. *(USPS #I94M-11-C 98072898; 1/9/2009).* Arbitrator Eischen ruled that "[a] Step 2 decision issued by the Postal Service after the grievance has been progressed **properly** to Step 3 in accordance with the 'deemed to move' provisions of Article 15.3.C [15.4.C in APWU's contract], **because of** failure by the Employer to schedule a Step 2 meeting within the time provided in Article 15.2 Step 2(c) (including mutually agreed to extension periods), has no validity, force or effect under the last sentence of paragraph 2 of Article 16.5 (formerly 16.4) of the USPS/NPMHU National Agreement." [emphasis in original] That sentence provides that when a grievance is timely filed and appealed to Step 2, a grievant won't begin to serve the suspension until after the Step 2 decision has been rendered. The APWU National Agreement (Article 16.4) provides that "if a timely grievance is initiated over a suspension of 14 days or less, the effective date of the suspension will be delayed until disposition of the grievance, either by settlement or an arbitrator's final and binding decision." The APWU intervened in this case in support of the Mail Handlers Union position; particularly because we have a similar dispute pending national arbitration that involves issuance of a Step 2 decision beyond the contractually prescribed time limits.

This case arose after a mail handler was issued a 14-day suspension for irregular attendance. The NPMHU timely filed a grievance that was denied by management and the union appealed to Step 2 on January 23, 1998. The Postal Service failed to schedule a Step 2 meeting within the time requirements of Article 15.2 Step 2(c) and the NPMHU simultaneously invoked the "deemed to move" provision of Article 15.3.C [which is identical to APWU's Article 15.4.C] on February 4, 1998 and also initiated a formal appeal of the grievance to Step 3. The union declined the Postal Service's request to remand the case back for a Step 2 meeting and thereafter, management issued a Step 2 decision denying the grievance on February 19, 1998. It also directed the grievant to begin serving the 14-day suspension on February 21, 1998, in accordance with Article 16.5 of the NPHMU contract.

The Mail Handlers Union filed another grievance challenging the Postal Service's actions and claiming violations of Article 3, 5 and 16.4 of the Agreement; this grievance proceeded to Step 4, was appealed to arbitration, and is the grievance that was presented to Arbitrator Eischen. The grievance protesting the merits of the 14-day suspension was addressed by a regional award which didn't decide the procedural issue presented in the national-level grievance but denied the grievance on the merits. However, the regional arbitrator held that the 14-day suspension wouldn't take effect until after the corresponding national-level grievance was decided. Specifically, Arbitrator Goldman ruled that "[i]f the ruling in that case sustains the Grievance concerning the lack of a Step 2 meeting, the suspension upheld in this case is not to take effect and shall be expunged from all records. If the ruling in that case denies the Grievance, the 14 day suspension in the case before this Arbitrator shall take effect and may be cited in later discipline."

At the hearing the NPMHU argued in part that once a grievance has properly been "deemed ... move[d]" to Step 3 of the grievance procedure in accordance with Article 15.3.C [15.4.C of the APWU Agreement], Step 2 of the process has ended and the grievance is required to be resolved in accordance with provisions of Article 15 which cover steps of the procedure beyond Step 2. The union also maintained that once the grievance is moved to Step 3 due to the Service's failure to schedule a timely Step 2 meeting, management may not thereafter issue a Step 2 decision for any purpose. The NPMHU framed the issue in its post-hearing brief as "When a grievance properly is 'deemed move[d]' to Step 3 of the grievance-arbitration process under Article 15.3C of the National Agreement, based on a '[f]ailure by the [Postal Service] to schedule a [timely Step 2] meeting,' may the Postal Service thereafter issue a Step 2 decision with respect to that grievance?'"

The Postal Service countered that the National Agreement doesn't prohibit the Postal Service from issuing a Step 2 decision if there hasn't been a Step 2 meeting. It maintained that the only consequence of not scheduling or holding such a meeting is the union may move the grievance to the next step of the grievance procedure after the relevant time periods have expired. In its post-hearing brief, the Postal Service framed the issue as "Does the Collective Bargaining Agreement between the NPMHU and Postal Service prohibit the Postal Service from issuing a Step 2 decision if there has been no Step 2 meeting and the NPMHU has appealed the grievance to Step 3 in accordance with Article 15.3.C of the CBA?"

The APWU maintained in part that we agreed with the NPMHU's position that the contractual language is clear that the only time management may issue a Step 2 decision is within the contractual time limits or mutually agreed extensions of the time limits. Furthermore, it makes little sense to ignore the parties' mutual agreement that the only instance in which the Postal Service may hold a Step 2 meeting or issue a Step 2 decision beyond the contractual time requirements is where the parties have mutually agreed to an extension of time. We argued that without an agreement to extend the time limits, the Postal Service forfeits its opportunity to issue a decision on the grievance at Step 2. The APWU asserted that the issue in this case is whether in the absence of a mutually agreed upon extension of time, may the Postal Service issue a Step 2 decision beyond the contractually prescribed time limits.

Arbitrator Eischen first of all noted that the parties didn't present a joint submission of the issues to be presented in this arbitration. He said that during the steps of the grievance procedure, the NPMHU and the Postal Service had framed the issue in "factual terms" which were "whether a 'Step 2 denial' dated February 19, 1998 of a grievance 'deemed moved' to Step 3 on February 4, 1998 because no Step 2 meeting had been timely scheduled by the

Employer, was effective to initiate a 14-day suspension on February 21, 1998, under the last sentence of paragraph 2 of Article 16.5 (formerly 16.4) of the USPS/NPMHU National Agreement." However, he noted that during the hearing and in post-hearing briefs as indicated above, the parties reformulated the issue in this case. Arbitrator Eischen reasoned that the later characterizations of the issue didn't take adequate account of the "factual record of this case." He thus indicated that the "real (and only) question presented by the facts of this particular case is whether ... a belatedly issued Step 2 decision has any contractual validity, force or effect for purposes of the last sentence of paragraph 2 of Article 16.5 [of the NPMHU Agreement]." He stressed that "the various revised issue formulations proposed ... all openly invite *dicta* and/or arbitral determination of related disputed issues which might or could arise under a different set of facts but which are not adequately presented for determination in this record." Arbitrator Eischen commented also that "the record in the present case squarely presents for arbitral determination only the limited issue of contractual interplay between Articles 15.2 Step 2(c), 15.3.C [15.4.C in APWU's contract] and the last sentence of 16.5 (16.4 in the previous [NPMHU] contract) [which isn't in APWU's contract]." He indicated also that he wouldn't consider whether the union must file a formal Step 3 appeal in order that a grievance at Step 2 be "deemed to move" to the next step of the grievance-arbitration procedure under the provisions of Article 15.3.C. He noted that such an issue was not fairly presented by the facts underlying this case.

Arbitrator Eischen further reasoned that he couldn't ignore or refuse to enforce "clear-cut contractual language," and the intent of the parties is ascertained from the "plain meaning" of unambiguous language in their contract. He said that the language in Article 15.3.C, which had been in the Mail Handler's contract since 1978, "makes it clear that a procedural failure by the Employer to schedule a [timely Step 2] meeting carries the same consequence as a failure of the Employer to render a [timely Step 2] decision – i.e., a timeliness failure by the Postal Service of *either* specified kind 'shall be deemed to move the grievance to [Step 3] of the grievance-arbitration procedure." Arbitrator Eischen then indicated that the "necessary implication" of the relevant Agreement provisions is that a Step 2 decision must be "timely rendered while the grievance is at Step 2 to have contractual validity, force and effect for the purpose of the last sentence of paragraph 2 of Article 16.5." He disagreed with management's contention that its position must be sustained due to the contract's lack of "express language" that a Step 2 decision rendered after the grievance has progressed to Step 3 has no force and effect. According to the arbitrator, this theory "is misplaced and unpersuasive because it stands logic, reason and the so-called 'plain-meaning rule' on its head."Arbitrator Eischen stressed that "the reasonable, logical and necessary implication of the plain language of Articles 15.3.C and 16.5 is that a Step 2 decision must be rendered in a timely manner and before a grievance is progressed properly to Step 3 to have any validity and contractual force or effect under the last sentence of Section 2 of Article 16.5."

Although the arbitrator didn't render a decision on the issue formulated by the APWU, this award will enhance our position in arbitration on the APWU's pending national-level dispute (as referred to previously) should arbitration be necessary, in the event the parties are unable to reach settlement. Significantly, Arbitrator Eischen noted that a recent decision of the U.S. Court of Appeals for the Second Circuit in *Eastman Kodak Co. v. STWB, Inc.*, 452 F.3d 215 (2d Cir. 2006), which was rendered shortly after the hearing in this case, lends strong support to his "common sense reading" of Articles 15.2, Step 2(c) and 15.3.C. While noting that the *Eastman Kodak* decision is not binding in this national arbitration, Arbitrator Eischen wrote that "[a]pplying that reasoning to the facts of this case, to allow the Postal Service a unilateral "do-over" of Step 2, after a grievance properly has been progressed to Step 3 under the 'deemed to move' provision of Article 15.2.C of the National Agreement, because of the

Postal Service's failure to get the contractually-required Step 2 procedures right the first time, would plainly conflict with the mutual intent of the Parties, as manifested in the plain language and the logical, reasonable and necessary implications of Articles 15.2, Step 2(c), 15.3.C...."

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Attachment

USPS/NPMHU NATIONAL ARBITRATION PROCEEDINGS
Case No. 194M-11-C-98072898

In the Matter of the Arbitration Between

UNITED STATES POSTAL SERVICE

- and -

NATIONAL POSTAL MAIL HANDLERS UNION

-and-

AMERICAN POSTAL WORKERS UNION, AFL-CIO (INTERVENOR)

Subject: Validity of Step 2 decision issued post proper progression to Step 3 under Article 15.3.C

National Arbitrator

Dana Edward Eischen

Appearances

For the NPMHU:	Bredhoff & Kaiser, P.L.L.C. by Andrew D. Roth, Esq.
For the Postal Service:	Teresa A. Gonsalves, Esq. Anthony M. Thuro, Esq. (at the hearing) Joseph R. Berezo, Esq. (on the brief)
For the APWU:	O'Donnell, Schwartz & Anderson, P.C. by Brenda C. Zwack, Esq. (at the hearing) Lee W. Jackson, Esq. (on the brief)

PROCEEDINGS

The United States Postal Service ("USPS", "Postal Service" or "Employer") and the National Postal Mail Handlers Union("NPMHU", "Mailhandlers" or "Union") designated me to arbitrate National-level disputes under Article 15. 5. D of their National Agreement. The terms of Article 15.3.C of that USPS/NPMHU National Agreement are dispositive of the matter in dispute but, in advancing their respective positions in this case, both the USPS and the NPMHU also cited and relied upon arbitration awards construing virtually identical language in Article 15.4.C of the National Agreement between USPS and the American Postal Workers Union, AFL-CIO ("APWU"). After being provided with third party notice of this arbitration proceeding, the APWU elected to participate as an Intervenor in this case by appearing and participating in the hearing and filing a post-hearing brief. [At the arbitration hearing on June 13, 2006, Counsel for the APWU stipulated as follows: "Since we have intervened in this case as a third party, then [the decision in this case] interpreting that language would bind the APWU"]. *See* Tr. p.81, lines 10-12.

The USPS, the NPMHU and the APWU each were represented by Counsel and afforded full opportunity to present documentary evidence, testimony subject to cross-examination and oral argument at the hearing of this matter. Following receipt of the transcribed stenographic record, the Parties deferred filing post-hearing briefs, pending the possibility of a resolution of the controversy in connection with ongoing national-level collective bargaining negotiations. The Parties subsequently advised me that their discussions had not resolved the matter and eventually filed and exchanged their respective post-hearing briefs in late March 2008. At my request, the Parties graciously allowed me an extension of the contractual time limits for the rendition of this Opinion and Award.

PERTINENT CONTRACT PROVISIONS

USPS/NPMHU 2002-2004 NATIONAL AGREEMENT
ARTICLE 15 GRIEVANCE-ARBITRATION PROCEDURE

Section 15.1 Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

Section 15.2 Grievance Procedure-Steps

* * *

Step 2: (a) The standard grievance form appealing to Step 2 shall be filed with the installation head or designee. In any associate post office of twenty (20) or less employees, the Employer shall designate an official outside of the installation as the Step 2 official, and shall so notify the Union Step I representative.

(b) Any grievance initiated at Step 2, pursuant to Article 2 of this Agreement, must be filed within fourteen (14) days of the date on which the Union or the employee first learned or may reasonably have been expected to have learned of its cause.

(c) The installation head or designee will meet with the steward or a Union representative as expeditiously as possible, but no later than seven (7) days following receipt of the Step 2 appeal unless the parties agree upon a later date. In all grievances appealed from Step 1 or filed at Step 2, the grievant shall be represented in Step 2 for all purposes by a steward or a Union representative who shall have authority to settle or withdraw the grievance as a result of discussions or compromise in this Step. The installation head or designee in Step 2 also shall have authority to grant or settle the grievance in whole or in part.

(d) At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31. The parties' representatives may mutually agree to jointly interview witnesses where desirable to assure full development of all facts and contentions. In addition, in cases involving discharge either party shall have the right to present no more than two witnesses, Such right shall not preclude the parties from jointly agreeing to interview additional witnesses as provided above.

(e) Where grievances appealed to Step 2 involve the same, or substantially similar issues or facts, one such grievance to be selected by the Union representative shall be designated the "representative" grievance. If not resolved at Step 2, the "representative" grievance may be appealed to Step 3 of the grievance procedure. All other grievances which have been mutually agreed to as involving the same, or substantially similar issues or facts as those involved in the "representative" grievance shall be held at Step 2 pending resolution of the "representative" grievance, provided they were timely filed at Step I and properly appealed to Step 2 in accordance with the grievance procedure.

(f) Following resolution of the "representative" grievance, the parties involved in that grievance shall meet at Step 2 within seven (7) days of their receipt of that resolution, unless the parties agree upon a later date, to identify the other pending grievances involving the

same, or substantially similar issues or facts, and to apply the resolution to those grievances. Disputes over the applicability of the resolution of the "representative" grievance shall be resolved through the grievance arbitration procedures contained in this Article; in the event it is decided that the resolution of the "representative" grievance is not applicable to a particular grievance, the merits of that grievance shall also be considered.

(g) Any settlement or withdrawal of a grievance in Step 2 shall be in writing or shall be noted on the standard grievance form and shall be furnished to the Union representative within ten (10) days after the Step 2 meeting unless the parties agree to extend the ten (10) day period. Any such settlement or withdrawal shall not be a precedent for any purpose, unless the parties specifically so agree or develop an agreement to dispose of future similar or related problems.

(h) Where agreement is not reached, the Employer's decision shall be furnished to the Union representative in writing within ten (10) days after the Step 2 meeting unless the parties agree to extend the ten (10) day period. The decision shall include a full statement of the Employer's understanding of (1) all relevant facts, (2) the contractual provisions involved, and (3) the detailed reasons for denial of the grievance.

(i) If the Union representative believes that the facts or contentions set forth in the decision are incomplete or inaccurate, such representative should, within ten (10) days of receipt of the Step 2 decision, transmit to the Employer's representative a written statement setting forth corrections or additions deemed necessary by the Union. Any such statement must be included in the file as part of the grievance record in the case. The filing of such corrections or additions shall not affect the time limits for appeal to Step 3.

(j) The Union may appeal an adverse Step 2 decision to Step 3. Any such appeal must be made within fifteen (15) days after receipt of the Employer's decision unless the parties' representatives agree to extend the time for appeal. Any appeal must include copies of (1) the standard grievance form, (2) the Employer's written Step 2 decision, and, if filed (3) the Union corrections or additions to the Step 2 decision.

Step 3: (a) Any appeal from an adverse decision in Step 2 shall be in writing to the appropriate management official at the Grievance/Arbitration Processing Center with a copy to the Employer's Step 2 representative, and shall specify the reasons for the appeal.

(b) The grievant shall be represented at Step 3 level by the Union's Regional representative, or designee. The Step 3 meeting of the parties' representatives to discuss the grievance shall be held at the respective Postal Service office (former regional headquarters) within fifteen (15) days after it has been appealed to Step 3. Each party's representative shall be responsible for making certain that all relevant facts and contentions have been developed and considered. The Union representative shall have authority to settle or withdraw the grievance in whole or in part. The Employer's representative likewise shall have authority to grant the grievance in whole or in part. In any case where the parties' representatives mutually conclude that relevant facts or contentions were not developed adequately in Step 2, they shall have authority to jointly return the grievance to the Step 2 level for full development of all facts and further consideration at that level. In such event, the parties' representatives at Step 2 shall meet within seven (7) days after the grievance is returned to Step 2. Thereafter, the time limits and procedures applicable to Step 2 grievances shall apply.

(c) The Employer's written Step 3 decision on the grievance shall be provided to the Union's Step 3 representative within fifteen (15) days after the parties have met in Step 3, unless the parties agree to extend the fifteen (15) day period. Such decision shall state the reasons for the decision in detail and shall include a statement of any additional facts and contentions not previously set forth in the record of the grievance as appealed from Step 2. Such

decision also shall state whether the Employer's Step 3 representative believes that no interpretive issue under this Agreement or some supplement thereto which may be of general application is involved in the case.

(d) The Union, at the Regional level, may appeal an adverse decision directly to arbitration at the Regional level within twenty-one (21) days after the receipt of the Employer's Step 3 decision in accordance with the procedure hereinafter set forth; provided the Employer's Step 3 decision states that no interpretive issue under this Agreement or some supplement thereto which may be of general application is involved in the case.

(e) If either party's representative maintains that the grievance involves an interpretive issue under this Agreement, or some supplement thereto which may be of general application, the Union representative shall be entitled to appeal an adverse decision to Step 4 (National level) of the grievance procedure. Any such appeal must be made within twenty-one (2 1) days after receipt of the Employer's decision and include copies of the standard grievance form, the Step 2 and Step 3 decisions and, if filed, any Union corrections and additions filed at Steps 2 or 3. The Union shall furnish a copy of the Union appeal to the appropriate management official at the Grievance/Arbitration Processing Center.

The party whose representative maintains that the grievance involves an interpretive issue shall provide the other party a written notice specifying in detail the precise interpretive issues(s) to be decided. The Employer's notice shall be included in the Step 3 decision. The Union's written notice shall be automatically included as part of the grievance record in the case but the filing of such notice shall not affect the time limits for appeal.

[See Memos, pages 137, 138]

Step 4: (a) In any case properly appealed or referred to this Step the parties shall meet at the National level promptly, but in no event later than thirty (30) days after filing such appeal or referral in an attempt to resolve the grievance. The Union representative shall have authority to settle or withdraw the grievance in whole or in part. The Employer's representative shall have authority to grant or settle the grievance in whole or in part. The parties' Step 4 representatives may, by mutual agreement, return any grievance to Step 3 where (a) the parties agree that no national interpretive issue is fairly presented or (b) it appears that all relevant facts have not been developed adequately. In such event, the parties shall meet at Step 3 within fifteen (15) days after the grievance is returned to Step 3. Thereafter the procedures and time limits applicable to Step 3 grievances shall apply. Following their meeting in any case not returned to Step 3, a written decision by the Employer will be rendered within fifteen (15) days after the Step 4 meeting unless the parties agree to extend the fifteen (15) day period. The decision shall include an adequate explanation of the reasons therefor. In any instance where the parties have been unable to dispose of a grievance by settlement or withdrawal, the Union shall be entitled to appeal it to arbitration at the National level within thirty (30) days after receipt of the Employer's Step 4 decision.

Article 15.3

A. The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end. Every effort shall be made to ensure timely compliance and payment of monetary grievance settlements and arbitration awards. The Employer agrees that upon receipt of necessary paperwork, from the grievant and/or union, concerning a grievance settlement of arbitration award, monetary remuneration will be made. The necessary paperwork is the documents and statements specified in Subchapter 436.4 of the ELM. The Employer

will provide the union copies of appropriate pay adjustment forms, including confirmation that such forms were submitted to the appropriate postal officials for compliance and that action has been taken to ensure that the affected employee(s) receives payment and/or other benefits. In the event that an employee is not paid within sixty (60) days after submission of all the necessary paperwork, such employee, upon request, will be granted authorization from management to receive a pay advance equal to seventy (70) percent of the payment owed the employee. In the event of a dispute between the parties concerning the correct amount to be paid, the advance required by this section will be the amount that is not in dispute.

B The failure of the employee or the Union in Step 1, or the Union thereafter to meet the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance. However, if the Employer fails to raise the issue of timeliness at Step 2, or at the step at which the employee or Union failed to meet the prescribed time limits, whichever is later, such objection to the processing of the grievance is waived.

C Failure by the Employer to schedule a meeting or render a decision in any of the Steps of this procedure within the time herein provided (including mutually agreed to extension periods) shall be deemed to move the grievance to the next Step of the grievance-arbitration procedure.

D It is agreed that in the event of a dispute between the Union and the Employer as to the interpretation of this Agreement, such dispute may be initiated as a grievance at the Step 4 level by the Union. Such a grievance shall be initiated in writing and must specify in detail the facts giving rise to the dispute, the precise interpretive issues to he decided and the contention of the Union. Thereafter the parties shall meet in Step 4 within thirty (30) days in an effort to define the precise issues involved, develop all necessary facts, and reach agreement. Should they fail to agree, then, within fifteen (15) days of such meeting, each party shall provide the other with a statement in writing of its understanding of the issues involved, and the facts giving rise to such issues. In the event the parties have failed to reach agreement within sixty (60) days of the initiation of the grievance in Step 4, the Union then may appeal it to arbitration, within thirty (30) days thereafter,

E The parties have agreed to jointly develop and implement a Contract Interpretation Manual (CIM) within six (6) months after the effective date of the 1998 National Agreement. The CIM will set forth the parties' mutual understanding regarding the proper interpretation and/or application of the provisions of this Agreement. It is not intended to add to, modify, or replace, in any respect, the language in the current Agreement; nor is it intended to modify in any way the rights, responsibilities, or benefits of the parties under the Agreement. However, production of the CIM demonstrates the mutual intent of the parties at the National level to encourage their representatives at all levels to reach resolution regarding issues about which the parties are in agreement and to encourage consistency in the application of the terms of the Agreement. For these reasons, the positions of the parties as set forth in the CIM shall be binding on the representatives of both parties in the resolution of disputes at the Local and Regional levels, and in the processing of grievances through Steps 1, 2 and 3 of the grievance-arbitration procedure. In addition, the positions of the parties as set forth in the CIM are binding on the arbitrator, in accordance with the provisions of Article 15AA6, in any Regional level arbitration case in which the CIM is introduced. The CIM will be updated periodically to reflect any modifications to the parties' positions which may result from National level arbitration awards, Step 4 decisions, or other sources. The parties' representatives are encouraged to utilize the most recent version of the CIM at all times.

[See Memos, pages 140, 141, Letters, pages 141, 143, 156]

ARTICLE 16 DISCIPLINE PROCEDURE

Article 16.5

In the case of discipline involving suspensions of fourteen (14) days , the employee against whom disciplinary action is sought to be initiated shall be served with a written notice of the charges against the employee and shall be further informed that he/she will be suspended after fourteen (14) calendar days during which ten day period the employee shall remain on the job or on the clock (in pay status) at the option of the Employer. However, if the Union or the employee initiates a timely grievance prior to the effective date of the action and if the grievance is timely appealed to Step 2, the grievant shall not begin to serve the suspension until after the Step 2 decision has been rendered.

In the case of suspensions of more than fourteen (14) days, or discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days. Thereafter, the employee shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance arbitration procedure. However, if the Union or the employee initiates a timely grievance prior to the effective date of the action and if the grievance is timely appealed to Step 2, the grievant shall not begin to serve the suspension until after the Step 2 decision has been rendered.

USPS/APWU 2002-2004 NATIONAL AGREEMENT

Article 15.2

* * *

(c) The installation head or designee will meet with the steward or a Union representative as expeditiously as possible, but no later than seven (7) days following receipt of the Step 2 appeal unless the parties agree upon a later date...

* * *

(f) Where agreement is not reached, the Employer's decision shall be furnished to the Union representative in writing within ten (10) days after the Step 2 meeting unless the parties agree to extend the ten (10) day period...

* * *

Article 15.4

* * *

C. Failure by the Employer to schedule a meeting or render a decision in any of the Steps of this procedure within the time herein provided (including mutually agreed to extension periods) shall be deemed to move the grievance to the next Step of the grievance-arbitration procedure.

* * * * * *

BACKGROUND

The decade-old facts giving rise to this National-level grievance are fairly straightforward and not much in material dispute. On December 30, 1997, Lewis J. Rothman, III was notified by Management of a proposed 14-day disciplinary suspension, for alleged attendance irregularity and excessive absenteeism from his job in the Des Moines, Iowa BMC. The timely filed Step 1 grievance challenge by NPMHU, claiming lack of just cause for that discipline, (Grievance No. 22-333-00698) was denied by Management on January 16, 1998 and appealed to Step 2 by the Union

on January 23, 1998. When the Employer thereafter failed to schedule any Step 2 meeting within the time limits set forth in Article 15.2 Step 2 (c), the NPMHU, on February 4, 1998, simultaneously invoked the "deemed to move" provision of Article 15.3.C and also filed a formal appeal of Grievance No. 22-333-00698 to Step 3.[1] After the Union declined a request by Management to "remand" the case back to a Step 2 meeting, Management responded with the following document, dated February 19, 1998, labeled "Step 2 Denial":

> The subject Step 2 grievance was not discussed with your representative, Tony Irvin in accordance with Article 15, Section 2 of the National Agreement. The Union appealed with out the benefit of a meeting; respectfully request the grievance be remanded to step 2.
>
> The union contends the grievant was issued a 14 day suspension and allege violation of article 16 of the National Agreement and ELM 5 15. The union requests the discipline be expunged from all files and records.
>
> The facts in this case are the grievant received a 14 day suspension for failing to meet the attendance requirements, after receiving a 5 day suspension and a letter of warning for failing to meet the attendance requirements of his position. There was a settlement on the five day suspension. One date cited on the notice of suspension, was outside of the review period, however there were a sufficient number of absences to establish just cause. Information provided by the union in their written appeal did not establish a violation of article 16 or ELM 15.
>
> Inasmuch as the union has failed to establish a contractual violation, a contractual basis for the requested remedy, or that just cause did not exist, this grievance is denied.

The Union thereafter perfected its appeal of Grievance No. 22-333-00698, which eventually resulted in a regional arbitration award, on October 26, 1998, by Arbitrator Roger L. Goldman, *infra.* In the meantime, after Management had directed Mr. Rathman to begin serving the 14-day suspension on February 21, 1998, the NPMHU also filed Grievance No. 98072898; invoking Article 15.3.C and claiming violations of Articles 3,5,and 16.4 of the National Agreement. The string of successive Management denials of that grievance leading to this arbitration read as follows:

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[1] As noted in my discussion of the Issue, *infra*, no opinion is expressed or implied in this decision on the countervailing positions of the Parties regarding whether filing a formal Step 3 appeal is a contractual necessity when a Step 2 grievance is"deemed to move" to the next Step of the grievance-arbitration procedure under the provisions of Article 15.3.C.

Step 2 Denial of March 30, 1998

The subject Step 2 grievance was discussed . . . on March 16, 1998, in accordance with Article 15, Section 2 of the National Agreement.

The union contends the grievant was placed on suspension and allege a violation of articles 3, 5, and 16, of the National Agreement. The union did not explain the relevance of articles 3 and or how they were violated. The union requests the grievant be made whole and the subject discipline be expunged from all files and records.

As claimed by the union, this grievance was appealed to step 3 without the benefit of a step 2 meeting. Management attempted to meet with the union at step 2 after their appeal, but the union refused.

In accordance with Article 16.4 of the National Agreement, the grievant did not begin his suspension until a step 2 decision had been issued prior.

In as much as the union has failed to establish a contractual violation, a contractual basis for the requested remedy or that just cause did not exist, this grievance is denied.

Step 3 Denial of June 2, 1998

Pursuant to the terms and obligations as set forth in Article 15 of the 1994 National Agreement, management and union designees met at Step 3 of the grievance procedure. The result of that meeting on the above referenced case is as follows:

The issue is whether management violated Articles 3, 5 and 16 of the National Agreement when the grievant was allegedly placed on suspension prior to management rendering its step two decision.

The record establishes that the grievant initiated a grievance concerning a notice of suspension received on January 6, 1998. The parties did not discuss that grievance at step two within the prescribed time limits. On February 4,1998 the union appealed that grievance to step three without holding a step two meeting. On February 19 management provided the local union with its written step two decision for the grievance at issue. On February 21 the grievant began serving the suspension period.

The local union's claim that management was prohibited from (ever) requiring the grievant to serve his suspension is totally baseless. The union has failed to present any evidence to support their allegation that management is barred from ever requiring an employee to serve a suspension when the grievance (protesting the suspension) is appealed to step three due to the failure to meet at step two in a timely manner. Indeed, the union's assertion would change the clear intent of the requirement to "delay" a suspension outlined In Article 16.4 of the Agreement. In any event, the step two decision n this case was "rendered" and provided to the union prior to the grievant beginning his suspension.

The union's attempt to disavow the step two decision is groundless as is their entire "position" in this matter. The union has failed to demonstrate a violation or the relevance of the cited Articles of the Agreement. Absent the union meeting their

burden in this contractual matter and absent the union providing a foundation for their requested remedy, this grievance is denied.

Step 4 Denial of November 9, 1998

On November 2. 1998, 1 met with your representative Dallas Jones to discuss the above-captioned grievance at the fourth step of our contractual grievance procedure.

The issue in this grievance is whether management violated the National Agreement when management issued a Step 2 Decision without meeting with the Union at the Step 2 level of the grievance process.

The Union contends that this is an issue of due process in that management had to meet with the union before it could issue a Step 2 decision. The Union contends that if management failed to meet at Step 2, then it could not rightfully issue a Step 2 decision. The union further contends that if there is no Stop 2 decision, then management would be in violation of Article 16.4 of the National Agreement by forcing the Grievant to serve the fourteen (14) day suspension.

It is the position of the Postal Service that no interpretive issue involving the terms and conditions of the National Agreement is fairly presented in this case. This is a local dispute suitable for regional determination by application of Article 16, Section 2 of the National Agreement to the particular circumstances. However, inasmuch as the Union did not agree, the following represents the decision of the Postal Service.

Article 15.2 Step 2: (c) of the National Postal Mail Handlers Union (NPMHU) National Agreement states in part; ' The installation head or designee will meet with the steward or a Union representative as expeditiously as possible, but no later than seven (7) days following receipt of the Step 2 appeal unless the parties agree upon a later date...

Article 15.3. C. off the National Agreement further states, in part; "Failure by the Employer to scheduled a meeting or render a decision in any of the Steps of this procedure within the time herein provided (including mutually agreed to extension periods) shall be deemed to move the grievance to the next Step of the grievance arbitration procedure.

Management contends that the terms and conditions of Article 15 compel management to meet with the union as soon as possible after receipt of a timely Step 2 Appeal; likewise, Article 15 provides for the union to proceed to the next stop in the grievance process if management fails to meet within the required time period.

The evidence of record indicates that management did not to meet within the seven (7) day period after a grievance was initiated by the union. Although the seven (7) day time period had elapsed, the record indicates that management made good faith attempts to meet with the union to discuss the grievance. However, the terms of Article 15 state that the both parties have agree to any extension to meet beyond the seven (7) day period. The union's Step 2 Representative in this case did not agree to an extension; therefore, the union exercised its contractual rights and appealed the grievance to the Stop 3 level of the grievance process.

It is management's position that the grievance procedures outlined in Article 15 include provisions for the parties to take if the steps of the grievance process are not

> properly adhered to. Management argues that the union did in fact exercise its contractual rights by forwarding the grievance to Step 3 which was the appropriate resolve if the parties did not meet at Step 2.
>
> Furthermore, Article 15.2 Step 2: (h) of the National Agreement states in part: "Where agreement is not reached, the Employees decision shall be fumished to the Union representative in writing within ten (10) days after the Step 2 meeting unless the parties agree to extend the ten (10) day period..."
>
> In accordance with Article 16 of the National Agreement regarding suspensions of 14 Days or less, Section 16.4 states in part: "...the grievant shall not begin to serve the suspension until after the Step 2 decision has been rendered." This provision outlined in the discipline procedure requires management to render a decision prior to a grievant serving the suspension. This provision does not dictate that managements decision hinges on whether or not a Step 2 meeting took place.
>
> It is the Service's position that this is not a dispute for national interpretation. The terms and conditions of Article 15 dearly identify and plainly articulate the steps to process a grievance. There are no provisions at any level of the grievance process that prohibits management from issuing a Step 2 decision letter.
>
> After careful review of the facts surrounding this grievance, it is managements position that this dispute does not rise to application for interpretive determination. In view of the above considerations, this grievance is denied.

When that matter remained unresolved, NPMHU made a timely appeal for final and binding determination of the confronting procedural issue in Case No. 194M-11-C-98072898 to National-level arbitration, under Article 15.4.D of the Mail Handlers National Agreement between NPMHU and USPS. While the appeals of that case were progressing to this National Arbitration, however, the underlying grievance protesting the merits of the 14 day suspension (No. 22-333-00698) was decided long ago, in expedited arbitration by Arbitrator Roger L. Goldman, whose Award of October 26, 1998 reads, in pertinent part, as follows:

> FACTS: Grievant, Lewis J. Rothman III, was issued a Notice of Fourteen Day Suspension for being irregular in attendance. Grievant had previously received a Letter of Warning, dated December 31, 1996, and a five day suspension, dated May 27, 1997, both for failure To Maintain Regular Attendance.
>
> UNION'S POSITION: Union contends that the Suspension was punitive, rather than corrective action and therefore lacked just cause; that it was procedurally defective; and that it should be rescinded and Grievant made whole.
>
> MANAGEMENT'S POSITION: Management contends that there was just cause to issue the.,Notice of Suspension to Grievant; that the procedure was not defective; and therefore the grievance should be denied.
>
> * * *

A. Jurisdiction of the Arbitrator

There is a serious question whether the Arbitrator has jurisdiction of the case since Union referred the case to Step 4 of the grievance procedure on August 12, 1998, Management Exhibit 5. Pursuant to Article 15, Sec. 15.4(b)51 either party may remove a case from regional arbitration and refer the case to Step 4 of the grievance procedure. In that event, the referring party pays the entire cost of the regional arbitrator, unless another scheduled case is heard on that date. No other case was heard. Although the August 12, 1998 referral by Union to Step 4 did state the case was withdrawn from regional arbitration, neither party renewed the request that the case be withdrawn from regional arbitration on October 20, 1998, the date of the arbitration. Management sought a decision on the merits while Union sought a decision on both the procedural issue and the merits.

No provision in the Agreement was cited to Arbitrator that directly addressed the question: Can an Arbitrator proceed to decide an issue (in this case, the merits) while another issue is pending at Step 4 (in this case, the procedural issue)?

Since both parties were willing to have the arbitrator proceed on the merits and since the Arbitrator did hear evidence on the merits, it would seem inconsistent with the purposes of arbitration to be expeditious and inexpensive for the Arbitrator to dismiss the entire grievance on jurisdictional grounds. Accordingly, the Arbitrator will render a decision on the merits but will stay implementation of the decision until completion of the Step 4 proceeding and its possible appeal to National Arbitration.

B. Issues to be Decided

The parties differ on the jurisdiction of the Arbitrator to render a decision-on the procedural matter which is now pending at Step 4 of the grievance procedure.

The procedural matter arises from the failure of the parties to meet within 7 days of the receipt of the Step 2 appeal. Union claims that such a failure to meet prohibits a Step 2 decision from being validly rendered, and without a Step 2 decision, there can be no discipline. (Management contends that there was a valid Step 2 decision rendered, and that a Step 2 meeting is not necessary to make the Step 2 decision valid).

The Arbitrator agrees with Management that he cannot decide this procedural issue which is now pending at Step 4 as an interpretative issue under the National Agreement. Article 15, Section 15.4(b)5, does not contemplate a regional arbitrator resolving the very same issue, in the same case, that is pending at Step 4.

Therefore, the Arbitrator will not address the procedural issue but will only decide the merits.

* * *

AWARD: Grievance denied but the 14 day suspension is not to take effect until after the Step IV decision and appeal to Arbitration, if any, in the case involving this same Grievant, Regional # 194M-II-C-98072898, dated August 12, 1998 (sic). If the ruling in that case sustains the Grievance concerning the lack of a Step 2 meeting, the suspension upheld in this case is not to take effect and shall be expunged from all records. If the ruling in that case denies the Grievance, the 14 day suspension in the case before this Arbitrator shall take effect and may be cited in later discipline.[2]

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[2] The record shows that Mr. Rathman left the employment of the Postal Service sometime during the 8-year hiatus between the November 1998 Step 4 denial of Grievance #194M-11-C-98072898 and the June 2006 hearing of that grievance in this National-level arbitration.

POSITIONS OF THE PARTIES

The following statements of position have been extrapolated and edited from the respective post hearing briefs:

NPMHU

Once a grievance properly has been "deemed . . . move[d]" to Step 3 of the grievance arbitration process pursuant to Article 15.3C, Step 2 of that process has, by definition, ended. By agreement of the parties, "jurisdiction" (as it were) has passed from Step 2 of the grievance-arbitration process to Step 3, and from that point forward the grievance is to be handled and ultimately resolved exclusively in accordance with the various provisions of Article 15 governing those steps of the grievance-arbitration process beyond Step 2. This being so, there is no basis whatsoever in the National Agreement or in common sense for the Postal Service's assertion of a contractual right belatedly to issue a Step 2 decision in these circumstances for any purpose—whether for the purpose of resurrecting a timeliness objection to the Union's processing of the grievance that has been "waived" under Article 15.3B of the National Agreement, see infra pp. 21-24, or for the purpose of requiring the grievant to serve a fourteen-day suspension that has been tolled pending a Step 2 decision under Article 16.5 of the National Agreement. Recognition of such a contractual right belatedly to issue a Step 2 decision in these circumstances would in effect excuse the Postal Service's "[f]ailure . . . to schedule a [timely Step 2] meeting," and there is no warrant in Article 15.3C or in any other provision of the National Agreement for excusing such a failure on the Postal Service's part.

The premise of that Postal Service response is that where a collective bargaining agreement does not set out the parties' agreement on a particular issue in express language, it is never appropriate for an arbitrator to imply an agreement between the parties on that issue. But that premise is a false one, as every experienced labor arbitrator knows. Given the realities of collective bargaining, labor arbitrators regularly are called upon—and properly so—to resolve interpretative disputes over the consequences that flow from an agreed-upon contractual provision that does not state those consequences in express language. And, a labor arbitrator who answers that call by reasonably concluding that the wording of contractual provision "X" necessarily implies consequence "Y" does not thereby commit the cardinal sin of "re-writing" the parties' agreement for them.

For the foregoing reasons, the NPMHU respectfully requests that the Arbitrator to find that when a grievance properly is "deemed . . . move[d]" to Step 3 of the grievance-arbitration process under Article 15.3C of the National Agreement, based on a "[f]ailure by the [Postal Service] to schedule a [timely Step 2] meeting," the Postal Service may not thereafter issue a Step 2 decision with respect to that grievance for any purpose, including specifically (i) for the purpose of resurrecting a timeliness objection to the Union's processing of the grievance that has been "waived" under Article15.3B of the National Agreement; and(ii) for the purpose of requiring the grievant to serve a fourteen-day suspension that has been tolled pending a Step 2 decision under Article 16.5 of the National Agreement.

U.S.P.S.

The NPMHU has failed to meet its burden of demonstrating that the Postal Service violated the contract by issuing a Step 2 decision after the NPMHU had appealed the grievance to Step 3. The clear and unambiguous language of the parties' agreement does not prohibit the Postal Service from issuing a Step 2 decision if there has been no Step 2 meeting. Rather, the agreement specifies the single consequence resulting from a failure to schedule a step 2 meeting or issue a timely step 2 decision–the only consequence of not scheduling or having a meeting is that the Union may, after the relevant time periods have expired, move

the grievance to the next step of the process. *See* Postal Service and APWU, No. Q94C-4Q-C 98117564 (National Award, April 29, 2003:Snow, Arb.)

There was no prejudice to the grievant or Union as a result of the issuance of the Step 2 decision after the NPMHU's appeal to Step 3. Indeed, the Union here had a double opportunity to evaluate and respond to the Postal Service's position, as it filed two related grievances. Therefore, the NPMHU has no plausible argument that any prejudice whatsoever was caused by the "belated" Step 2 decision. And notably, it is due to the NPMHU's own refusal to cooperate in remanding the grievance to Step 2 that this "interpretive" issue even arose.

The cases also do not support the proposition that if a Step 2 decision is issued after an appeal has been taken under Article 15.3C, the union is entitled to an automatic victory, as it is effectively seeking here. The NPMHU's invitation to add new consequences on top of negotiated contract language must be declined, for what it seeks is improper and contrary to both the CBA, which prohibits the arbitrator from legislating for the parties, and to customary rules of contract interpretation, which prohibit decision-makers from — under the guise of contract interpretation — rewriting or modifying the parties' negotiated agreement. In addition to the fact that adding these negative consequences would be tantamount to rewriting the parties' contract, it would also encourage games of "gotcha". In short, there would be less incentive to cooperate, which both the NPMHU and the APWU agree is an important part of the grievance-arbitration process. The proposal of the NPMHU to find that additional consequences outside the contract flow from the absence of a Step 2 decision prior to an appeal to Step 3 would therefore not only conflict with the contract itself, but would also be a disservice to the truth and to the mutual cooperation that underlies successful collective bargaining relationships.

In addition, to accept the NPMHU's proposal would be tantamount to granting the Union a default judgment in all discipline cases involving 14-day suspensions–a result the Union has attempted but failed to achieve in bargaining. By seeking in arbitration what it failed to achieve in bargaining, the NPMHU hopes to chip ts way closer to its unachieved bargaining demands from 1993 and 1998. This is improper. *See* Elkouri at 454 ("[A] party may not obtain 'through arbitration what it could not acquire through negotiation'" (quoting Postal Service v. APWU, 204 F.3d 523, 530 (4th Cir. 2000)). Accordingly, the NPMHU's improper, unjustified and contra-contractual request should be denied.

The NPMHU's due process claims are disingenuous and without merit, as the Grievant suffered no harm. Further, no due process violation arises in cases where no Step 2 meeting is held or timely Step 2 decision is issued. The parties anticipated that Step 2 may be bypassed in drafting their agreement and, therefore, the parties provided for a full opportunity to explain their versions of the facts and arguments — including new arguments not raised previously — at Step 3. Although Article 15.3C begins with the phrase, "[f]ailure by the Employer to schedule a meeting," many instances exist where, due to one intervening event or another, it is virtually impossible for the Postal Service to schedule a Step 2 meeting within seven days or for the parties to meet at Step 2 within seven days as required by Article 15.2.Step 2(c). And common experience teaches that from time to time events happen that hinder the scheduling of a Step 2 meeting or someone's attendance at a Step 2 meeting, and one party is unwilling to agree to an extension agreement. To namejust a few examples, the parties' scheduled days off, sick, personal, or annual leave usage, natural or human-caused disasters, traffic problems, business travel, grievance processing, and/or arbitration hearings may make scheduling, or attaining an extension, within seven days difficult, if not impossible. Although the NPMHU is under an obligation to act in good faith, sometimes the Union plays games, as it admittedly did here in refusing to remand the grievance to Step 2.

The NPMHU urges that the opportunity to issue a Step 2 decision is extinguished once the Union has taken an appeal to Step 3 in accordance with Article 15.3C. The NPMHU reasons that once such an appeal has been taken, "jurisdiction" over the grievance resides solely at

Step 3 and no longer resides at Step 2. This artful and hyper-technical argument may make sense in the context of a district court opinion that has been appealed under clearly written jurisdictional statutes and judicial precedent. But it is specious in this context where no provision of the CBA discusses the Union's concept of "jurisdiction," or whether a Step 2 decision can be rendered after an appeal to Step 3 has been taken. Since the parties are expressly permitted to present new facts and arguments at Step 3, it follows that the Postal Service may issue a Step 2 decision after an appeal to Step 3 as a way to provide additional facts and arguments. The NPMHU's "jurisdictional" view, however, would effectively create a forfeiture where no "timely" Step 2 decision is issued. This nonsensical result could not possibly have been what the parties intended and, indeed, the Postal Service rejected such views during the 1993 and 1998 negotiations. Moreover, because "the law abhors a forfeiture," Elkouri at 482, the Postal Service's interpretation, which avoids one, is preferable. *See id.* ("If any agreement is susceptible of two constructions, one of which would work a forfeiture and one of which would not, the arbitrator will be inclined to adopt the interpretation that will prevent the forfeiture").

APWU

The APWU supports the NALC's position that the contractual language is clear in providing that the only instance in which the Postal Service may issue a Step 2 decision is where the parties have mutually agreed to an extension of the contractual time limits set forth in Article 15.2 of the collective bargaining agreements. It makes little sense to ignore the parties' mutual agreement that the only instance in which the Postal Service may hold a Step 2 meeting or issue a Step 2 decision beyond the contractual time requirements is where the parties have mutually agreed to an extension of time. Absent such agreement to extend the time limits, if the Postal Service fails to timely respond, it has forfeited its opportunity to issue a decision on the grievance at Step 2.

The Postal Service claims that the contractual language permits it to issue an untimely Step 2 decision, even where there has been no Step 2 meeting, because the contract is silent regarding the result of the Postal Service's failure to schedule a Step 2 meeting. This argument stretches the imagination and ignores the plain language of Article 15. The contract is not at all silent about the required steps of the grievance procedure, which requires the Postal Service to meet with the Union representative within seven days of receiving the Step 2 appeal. The Step 2 decision does not exist independent of the Step 2 meeting, but must be issued within ten days of the Step 2 meeting. If the Postal Service fails to meet either time limit, then absent an agreement to extend the time limits, Step 2 is over and the grievance is "deemed to move ... to the next Step of the grievance-arbitration procedure."

According to the Postal Service, however, this particular consequence apparently does not preclude it from continuing to treat the grievance as if it remained at Step 2 and the applicable time limits no longer apply. This reading of the contract defies logic and renders the relevant contractual provisions meaningless. If the grievance has moved to the next step of the grievance procedure, then the Postal Service may not continue to treat the grievance as if it remained at Step 2 by issuing an untimely Step 2 decision.

There is no silence or ambiguity regarding the impact of the Postal Service's failure to comply with the contractual time lines. Absent agreement to extend those time lines, the Postal Service may not schedule an untimely Step 2 meeting or issue an untimely Step 2 decision. IV. Accordingly, for the reasons set forth above and at the hearing in this matter, the Arbitrator should sustain NPMHU's grievance and find that, in the absence of a mutually agreed upon extension of time, the Postal Service may not issue a Step 2 decision beyond the time limits prescribed in the parties' collective bargaining agreement.

OPINION OF THE NATIONAL ARBITRATOR

ISSUE

The Parties did not present a joint submission of the issue(s) to be determined in this National-level arbitration case of Case No. 194M-11-C 98072898. In Steps 2, 3 and 4 handling, *supra*, both Parties had framed the issue presented by Grievance No. 194M-11-C 98072898 in straight forward factual terms whether a "Step 2 denial" dated February 19, 1998, of a grievance "deemed moved" to Step 3 on February 4, 1998 because no Step 2 meeting had been timely scheduled by the Employer, was effective to initiate a 14-day suspension on February 21, 1998, under the last sentence of ¶2 of Article 16.5 (formerly Article 16.4) of the USPS/NPMHU National Agreement. However, during the hearing on June 13, 2006, and later in their respective posthearing briefs, Counsel advanced various revisions of the issue formulations customized by artful pleading to better fit preferred theories of the case. At the June 13, 2006 arbitration hearing, the NPMHU proposed the following alternative formulation of the issue: *If the Postal Service fails to schedule a Step 2 meeting on a grievance within the time provided by Article 15.2 of the NPMHU/USPS Agreement (including mutually agreed to extension periods) --thus triggering Article 15.3C, which states that such a failure "shall be deemed to move the grievance to the next Step [i.e., Step 3] of the grievance-arbitration procedure" -- can the Postal Service thereafter issue a Step 2 decision with respect to that grievance?* In its March 21, 2008, post-hearing brief, NPMHU again reformulated its statement of the issue, as follows: *When a grievance properly is "deemed . . .move[d]" to Step 3 of the grievance-arbitration process under Article 15.3C of the National Agreement, based on a "[f]ailure by the [Postal Service] to schedule a [timely Step 2] meeting," may the Postal Service thereafter issue a Step 2 decision with respect to that grievance?*

For its part, the Postal Service initially re-framed its suggested issue as follows: *Does the Collective Bargaining Agreement prohibit the Postal Service from issuing a Step 2 decision if there has been no Step 2 meeting?* In its post-hearing brief, dated March 21, 2008, the Postal Service again reformulated its earlier suggested statements of the issue, as follows: *Does the Collective Bargaining Agreement ("CBA") between the NPMHU and Postal Service prohibit the Postal Service*

from issuing a Step 2 decision if there has been no Step 2 meeting and the NPMHU has appealed the grievance to Step 3 in accordance with Article 15.3C of the CBA?

As the Intervenor, APWU suggested that the following articulation best describes its perspective on the issue presented for determination in this case: *In the absence of a mutually agreed upon extension of time, may the Postal Service issue a Step 2 decision beyond the time limits prescribed in Article 15, Section 2, Step 2.f of the National Agreement between the APWU and the Postal Service?*

After carefully considering the facts and circumstances of this record and the competing formulations, I conclude that none of the foregoing formulations accurately sets forth the only issue fairly presented by the factual record of this case. In that regard, it begs the question to ask whether the Agreement "prohibits" issuing or whether the Postal Service "can" or "may" issue a Step 2 decision after the grievance has already moved on to Step 3, by dint of Article 15.3.C. Rather, the real (and only) question presented by the facts of this particular is case is whether such a belatedly issued Step 2 decision has any contractual validity, force or effect for purposes of the last sentence of ¶2 of Article 16.5. Moreover, the various revised issue formulations proposed by Counsel all openly invite *dicta* and/or arbitral determination of related disputed issues which might or could arise under a different set of facts but which are not adequately presented for determination in this record.

Finally, it must also be noted that the record in the present case squarely presents for arbitral determination only the limited issue of contractual interplay between Articles 15.2 Step 2(c), 15.3.C and the last sentence of 16.5 (16.4 in the previous contract). This case does not properly present any issue concerning the last sentence of Article 15.3.B-- a matter raised *de novo* by the NPMHU at the arbitration hearing. In the present case, the Postal Service asserted no timeliness objections below and the NPMHU never raised any Article 15.3.B waiver argument in any of the moving papers. Black letter law in labor arbitration holds that when written grievances and grievance procedure discussions clearly limit the issues in dispute, arbitrators should foreclose introduction of new claims at the time of the hearing (other than fundamental jurisdictional challenges). *See*, International Paper, 105 LA 970, 974 (Duda,1996); Mason & Dixon Tank Lines, 94 LA 1225, 1228 (Byars, 1990);

City of Cadillac, 88 LA 924, 925 (Huston, 1987); NLRB Union, 76 LA 450, 456 (Gentile, 1981); Ralston Purina Co., 71 LA 519, 523-24 (Andrews, 1978). Were the rule otherwise, the most basic purpose of the Parties' grievance resolution mechanism--prompt discussion and consideration of issues at informal and earlier stages of the grievance procedure with the goal of resolution short of arbitration--would be frustrated.

Accordingly, I find that the only interpretive issue fairly presented by Case No. 194M-11-C-98072898 for determination in this National-level arbitration case is objectively framed as follows:

> Does a Step 2 decision issued by the Postal Service after the grievance has been progressed **properly** to Step 3 in accordance with the "deemed to move" provisions of Article 15.3.C, **because of** failure by the Employer to schedule a Step 2 meeting within the time provided in Article 15.2 Step 2 (c) (including mutually agreed to extension periods), have any validity, force or effect under the last sentence of Article 16.5 (formerly 16.4) of the USPS/NPMHU National Agreement?[3]

DECISION

The Postal Service quite correctly points out that the NPMHU bears the burden of proving its grievance claim in this case by a persuasive preponderance of record evidence. *See* Postal Service and Nat'l Rural Ltr. Carrier's Assoc., Case No. E95R-4E-C 99099528, at 19 (Nat'l Arb., Jan. 12, 2003: Eischen, Arb.) ("The charging party in a grievance over interpretation and application of a contract bears the burden of proving, by a preponderance of the record evidence, that the responding party violated the agreement in some fashion"; *see also* Postal Service andNat'l Rural Ltr. Carrier's Assoc., No. Q95R-4Q-C 02101253 (National Arb., May 15, 2006: Eischen, Arb.): "[I]t is well-established that the charging party in a nondisciplinary grievance bears the burden of proof, by a

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[3] My use of the emphasized conjunctive phrase *"**because of** failure by the Employer to schedule a Step 2 meeting"* tracks the literal language of Article 15.3.C and posits the undisputed fact that in this particular case no intervening event and no delay, default or dereliction by the employee or the Union caused or contributed in any way to the Employer's failure to schedule a Step 2 meeting within the time required by the Agreement. Similarly, my use of the emphasized adverb in *"progressed **properly** to Step 3 in accordance with the 'deemed to move' provisions of Article 15.3.C"* serves to skirt the significant dispute between the Parties (not fairly presented by the facts of this particular case) of how a grievance progresses contractually from Step 2 to Step 3 under the "deemed to move" provision of Article 15.3C (*"automatically"*, as the NPMHU would have it, or only through the filing of *"a formal appeal"*, as the Postal Service would have it). Thus, determination of the of the issue set forth in the foregoing formulation resolves the specific controversy presented in this case but preserves for possible arbitral resolution at a later date, hopefully in an appropriate case with an adequately informed record, the respective positions of the Parties on these various other potential but currently inchoate issues.

preponderance of the record evidence, that the responding party violated the parties' agreement as alleged in the grievance(s)" (citing cases).

The arbitrator's primary goal must be to effectuate the intent of the parties, which ordinarily is best ascertained from the plain words used in their collective bargaining agreement to express their bargain. Even when the parties to an agreement disagree on what was intended by disputed contract language, an arbitrator who finds the language to be unambiguous will enforce its plain meaning. *See* Safeway Stores, 85 LA 472, 476 (1985) (Thorp); Metropolitan Warehouse, 76 LA 14, 17-18 (1981) (Darrow). Arbitrators and courts alike presume that understandable language means what it says, despite the contentions of one of the parties that something other than the apparent meaning was intended. Independent School Dist. No. 47, 86 LA 97, 103 (1985) (Gallagher). Thus, it is a maxim of contract construction that an arbitrator cannot properly eviscerate the contract by ignoring clear-cut contractual language nor usurp the role of the labor organization and employer by legislating new language under the guise of interpretation. Clean Coverall Supply Company, 47 LA 272, 277 (Fred Witney, 1966). *See also,* Continental Oil Company, 69 LA 399, 404 (A. J. Wann, 1977) and Andrew Williams Meat Company, 8 LA 518, 524 (A. J. Chaney, 1947).

The following language of Article 15.3.C first appeared in the 1978 National Agreement and has appeared *in haec verba* in every National Agreement since that time:

> Failure by the Employer to schedule a meeting or render a decision in any of the Steps of this procedure within the time herein provided (including mutually agreed to extension periods) shall be deemed to move the grievance to the next Step of the grievance-arbitration procedure.

In a National Arbitration award issued shortly after that contractual provision (in its current form) appeared in 1978, Arbitrator Richard Mittenthal construed the language of Article 15.3C, as follows (USPS and NALC Case N8-NAT-0006, p.7):

> [T]he parties wrote into the present grievance procedure that a grievance will automatically move to the next step where there is a "failure by the Employer to schedule a meeting . . . in any of the Steps . . . within the time herein provided. . ." **The Postal Service has an obligation to schedule a Step 3 meeting once a proper appeal has been taken from a Step 2 decision. But that obligation pertains strictly to time constraints**.(emphasis added).

The use of the disjunctive "or" in the grammatical construction of Article 15.3.C makes it clear that a procedural failure by the Employer to schedule a [timely Step 2] meeting carries the same consequence as a failure of the Employer to render a [timely Step 2] decision-- *i.e.*, a timeliness failure by the Postal Service of *either* specified kind "shall be deemed to move the grievance to [Step 3] of the grievance-arbitration procedure."[4] Further, under that express wording, it is also clear that the catalyst for an Article 15.3.C "deemed to move" progression of a grievance from the current step to the next step of the grievance-arbitration procedure is a "[f]ailure by the Employer" to fulfill its contractual obligation to initiate one or the other of those two specified procedural actions in a timely manner at the current step.[5]

The bottom line question presented by this grievance and this factual record is whether the Parties mutually intended that a Step 2 decision "rendered" belatedly by the Employer, some two weeks after the grievance was "deemed to move" properly from Step 2 to Step 3 under Article 15.3.C, because the Employer had failed to timely schedule the Step 2 meeting, has any validity, force or effect for the purpose of requiring the Grievant to begin serving a fourteen-day disciplinary suspension that had been tolled, pending rendition of the Step 2 decision, by the following express language in the last sentence of ¶2 Article 16.5 of the National Agreement: " [I]f the Union or the employee initiates a timely grievance prior to the effective date of the action and if the grievance is timely appealed to Step 2, the grievant shall not begin to serve the suspension until after the Step 2 decision has been rendered". The undisputed facts of record and the plain words of the Agreement language persuade me that the Union carried its initial burden of making out a *prima facie* showing that the contracting Parties mutually intended no such thing.

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[4] At the risk of redundancy, I reiterate previous disclaimers that no opinion is expressed or implied in this decision on the countervailing positions of the Parties regarding whether filing a formal Step 3 appeal is a contractual necessity when a Step 2 grievance is"deemed to move" to the next Step of the grievance-arbitration procedure under the provisions of Article 15.3.C.

[5] *See also* page 5, footnote 4 of the NPMHU brief, *viz.*, "the NPMHU readily acknowledges that 'if there has been no Step 2 meeting' on a grievance owing to a failure of some kind on the NPMHU's part—for example, the failure by a Union representative to attend a Step 2 meeting timely scheduled by the Postal Service—the Service would ***not*** on account of that NPMHU failure be precluded from issuing a Step 2 decision on the grievance". (Emphasis in original).

Those undisputed facts of record in this case show that the Union or employee timely initiated the grievance and timely appealed the grievance to Step 2, that the Employer failed to timely schedule the Step 2 meeting and that the Employer "rendered" the Step 2 decision long after the grievance had been properly progressed to Step 3. The Postal Service responds that an untimely Step 2 decision issued in the absence of a Step 2 meeting and after the grievance is at Step 3 has the same force and effect under Article 16.5 as a timely issued Step 2 decision rendered after a timely Step 2 meeting because neither Article 15.2 nor 15.3 expressly state that a Step 2 decision belatedly rendered after the grievance has been progressed to Step 3 has no force and effect under the last sentence of ¶2 of Article 16.5 and because the last sentence of ¶2 of Article 16.5 does not expressly state that to have force and effect for the purpose of that sentence the Step 2 decision referenced therein must have been timely rendered before the grievance was progressed to Step 3. The Employer's "lack of express language" theory is misplaced and unpersuasive because it stands logic, reason and the so-called "plain-meaning rule" on its head.

The lack of such express disclaimer(s) is not fatal to the Union's grievance because the necessary implication of the cited Agreement provisions is that a Step 2 decision must be timely rendered while the grievance is still at Step 2 to have contractual validity, force and effect for the purpose of the last sentence of ¶2 of Article 16.5. Courts and arbitrators routinely recognize that it is proper and fitting to give effect to the manifest intent of contracting parties plainly evidenced in the "necessary implications" of their express contract language.[6] Such judicious inference of mutual intent founded in the logical, reasonable, natural and necessary implications of express contract language is readily distinguishable from improper arbitral rewriting of the Agreement.[7]

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[6] Indeed, discernment of mutual intent through necessary implication is particularly appropriate in the interpretation and application of a collective bargaining agreement, which is"more than a contract; it is a generalized code to govern the myriad of cases which the draftsmen cannot wholly anticipate. . .The collective agreement covers the whole employment relationship." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-82, 80 S.Ct. 1347, 46 LRRM 2416 1960, citing, at 363 U.S. 579 n.6, Cox, "Reflections Upon Labor Arbitration", 72 Harvard. L. Rev. 1482, 1498-99 (1959).

[7] *See* USPS and NALC/APWU (Intervenor) Case H4N-3U-C-58637/H4N-3A-C-59518, National Award, (Mittenthal, Arb., August 3, 1990) and USPS and NALC Case G9ON-4G-D93040395, National Award, (Mittenthal, Arb., August 18, 1994).

Experienced practitioners and arbitrators understand that a collective bargaining agreement is not (and cannot reasonably be expected to function as), an ersatz "Napoleonic Code"; addressing in express language every consequence and contingency that flows logically from agreed-upon contractual provisions. For example, it would be odd indeed if the parties to this collective bargaining agreement had found it necessary to specify expressly in Articles 15.3.C. or 16.5 that they did not mutually intend that the Employer could circle back unilaterally to Step 2, after the grievance was properly progressed to Step 3, to issue a belated Step 2 decision it had failed to render in a timely manner when the grievance was at Step 2 for the purpose of requiring a grievant to start serving a 14-day disciplinary suspension which had been tolled pending rendition of the Step 2 decision. To the contrary, the reasonable, logical and necessary implication of the plain language of Articles 15.3.C and 16.5 is that a Step 2 decision must be rendered in a timely manner and before the grievance is progressed properly to Step 3 to have any validity and contractual force or effect under the last sentence of ¶2 of Article 16.5.

Although obviously not binding in this National Arbitration, the decision of the United States Court of Appeals for the Second Circuit in Eastman Kodak Co. v. STWB, Inc., 452 F.3d 215 (2d Cir. 2006), which was rendered shortly after the hearing in this case, lends strong support to this common sense reading of Articles 15.3C and 16.5. The Eastman Kodak decision involved an ERISA regulation adopted by the United States Department of Labor ("DOL")—dubbed the "deemed exhausted" provision/regulation by the Second Circuit—which provides in full:

> In the case of the failure of a[n] [ERISA] plan to establish or follow claims procedures consistent with the requirements of this section, a claimant shall be deemed to have exhausted the administrative remedies available under the plan and shall be entitled to pursue any available remedies under section 502(a) of the Act on the basis that the plan has failed to provide a reasonable claims procedure that would yield a decision on the merits of the claim.

[*See id.* at 221 (quoting 29 C.F.R. § 2560.503-1(*l*)).]

The Second Circuit agreed with the DOL that the "deemed exhausted" regulation properly was interpreted to foreclose the defendant ERISA plan from "effectively 'undeem[ing]' exhaustion by enacting, for the first time, procedures that complied with the claims regulation after [plaintiff] filed suit and after failing to offer an appropriate procedure in the many months preceding

[plaintiff's] lawsuit." *Id.* at 222 (emphasis added). As the appellate court succinctly put it, "[g]iving retroactive effect to a plan amendment in these circumstances . . . *plainly conflicts with the 'deemed exhausted' regulation.*" *Id.* (emphasis added). And, as the appellate court added: "The 'deemed exhausted' provision was plainly designed to give claimants faced with inadequate claims procedures a fast track into court—*an end not compatible with allowing a 'do-over' to plans that failed to get it right the first time.*" *Id.* (emphasis added). Applying that reasoning to the facts of this case, to allow the Postal Service a unilateral "do-over" of Step 2, after a grievance properly has been progressed to Step 3 under the "deemed to move" provision of Article 15.3C of the National Agreement, because of the Postal Service's failure to get the contractually-required Step 2 procedures right the first time, would plainly conflict with the mutual intent of the Parties, as manifested in the plain language and the logical, reasonable and necessary implications of Articles 15.2, Step 2 (c), 15.3.C and the last sentence of ¶2 of Article 16.5 (formerly 16.4) of the USPS/NPMHU National Agreement.

In my considered judgement, the Union carried its ultimate burden of persuasion in this case that a Step 2 decision issued after the grievance has been "deemed to move" properly to Step 3, by dint of Article 15.3.C, lacks contractual validity, force or effect to implement a 14-day suspension under the last sentence of ¶2 of Article 16.5 (formerly 16.4) of the National Agreement.

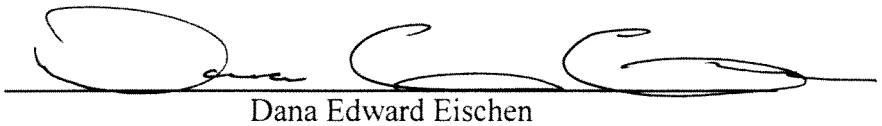
USPS/NPMHU NATIONAL ARBITRATION PROCEEDINGS

Case No. 194M-11-C-98072898

AWARD OF THE IMPARTIAL ARBITRATOR

1) A Step 2 decision issued by the Postal Service after the grievance has been progressed **properly** to Step 3 in accordance with the "deemed to move" provisions of Article 15.3.C, **because of** failure by the Employer to schedule a Step 2 meeting within the time provided in Article 15.2 Step 2 (c) (including mutually agreed to extension periods), has no validity, force or effect under the last sentence of ¶ 2 of Article 16.5 (formerly 16.4) of the USPS/NPMHU National Agreement.

2) Jurisdiction is retained for the sole purpose of resolving any disputes which may arise between the Parties regarding the meaning, application or implementation of this Award.



Dana Edward Eischen
Signed at Spencer, New York on January 9, 2009

STATE OF NEW YORK
COUNTY OF TOMPKINS } SS:

On this 9th day of January 2009, I, DANA E. EISCHEN, hereby affirm and certify, upon my oath as Arbitrator, that I am the individual described herein, that I executed the foregoing instrument as my Award in this matter and acknowledge that I executed the same.