American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

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

From: Greg Bell, Director
Industrial Relations

Date: December 22, 2006

Re: Supplemental Award on Remedy for Sunday Premium Award

Enclosed you will find a copy of a national-level award by Arbitrator Das denying the APWU's position that the arbitrator's Sunday Premium Award should be applied retroactively to all employees on a nationwide basis that were denied Sunday premium under circumstances where they requested a temporary schedule change for personal convenience. He concluded that "the holding in the Sunday Premium Award applies prospectively to all bargaining unit employees, but that only those employees who had filed a timely grievance (or on whose behalf such a timely grievance had been filed by a local union) are eligible for retroactive payment in accordance with the Sunday Premium Award." *(AIRS #44848 – USPS #I90C-1I-C 910325156 & H7C-4S-C 29885; 12/11/2006)*

This case arose after Arbitrator Das sustained the APWU's grievance and issued an award on April 15, 2005 ruling that "[a]n eligible employee who is scheduled by management to work and does work on a nonovertime basis on a Sunday, even if the employee was scheduled on Sunday pursuant to a request for a temporary schedule change for personal convenience, is entitled to Sunday premium pay under Article 8.6 of the National Agreement." *(AIRS #42272)* The parties subsequently agreed that this award should be applied prospectively to all bargaining unit employees and also that any employee who had filed a timely grievance concerning the nonpayment of Sunday premium while working a temporary schedule change for personal convenience would be entitled to pay in accordance with the Sunday Premium Award. However, the Postal Service did not agree to apply the remedy retroactively to other employees who were deprived of Sunday premium under the same circumstances as in the national award. Thereafter, the parties agreed to return the remedy portion of the award to Arbitrator Das for resolution.

The APWU argued that a retroactive remedy should be applied to all employees that were denied Sunday premium in the same circumstances covered by Das's award, and this

remedy should be applied retroactively to October 7, 1988, when ELM Issue 11 was issued which was the origin of this dispute.[1] The NPMHU intervened in the dispute and joined in APWU's position but asserted, in the alternative, that the remedy at a minimum should be retroactive to June 30, 1993, which was 14 days prior to the date on which the issue decided in the Sunday Premium Award was first appealed to the national level at Step 4. The Postal Service maintained that there was no basis for granting a retroactive remedy except to employees who had filed timely grievances in this case which included Minneapolis/St. Paul BMC employees on whose behalf a class action grievance was filed that became the underlying grievance at Step 4, along with any grievances on the same or substantially similar issues that were held in abeyance pending resolution of the Minneapolis/St. Paul BMC grievance.

Arbitrator Das rejected the unions' arguments on the basis of Arbitrator Mittenthal's "High Point Award" in case no. H1C-3A-C 5465 (1983) *(AIRS #26)*. This award involved the appropriate remedy for a prior award that sustained a grievance challenging the Postal Service's refusal to pay out-of-schedule premium to temporary supervisors. The dispute arose because the Postal Service only paid employees covered by the 12 grievances [that served as representative grievances] and others whose grievances had been held in abeyance pending issuance of the award. Thereafter, other employees who had worked as temporary supervisors during the period covered by the Mittenthal award filed grievances seeking payment of out-of-schedule pay for that time period, and one of those grievances was referred to Step 4. The "High Point Award" resolved that grievance, and indicated that "[n]owhere in Article XV is there any indication that the parties wished 'interpretive issues' to be excluded from [the fourteen day time limit for initiating a grievance]. Hence, any employee-supervisor improperly denied out-of-schedule premium had 14 days to grieve after he or the APWU had knowledge (or constructive knowledge) of the denial."

Das reasoned that "Arbitrator Mittenthal's ruling was firmly anchored in his reading of the terms of Article 15 of the National Agreement" and "[a]s such, it is precedent to be followed absent exceptional circumstances not established in this case." He stressed that "in the over 20 years since the High Point Award, the parties have not applied a national level arbitration award to grant a retroactive remedy to employees not covered by timely grievances in cases where a local grievance raising an interpretive issue was appealed or referred to Step 4." Das thus concluded that "[i]n a case such as this, … the precedent established in the High Point Award, which the parties have not departed from in subsequent national arbitration cases where a local grievance(s) is appealed or referred to Step 4, precludes me from granting a nation-wide retroactive remedy as sought by the APWU and NPMHU."

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[1] The Postal Service subsequently withdrew the 1988 ELM change in response to an Article 19 grievance filed by the APWU. However, the Postal Service maintained that the protested change to Section 434.31 was merely one of clarification and did not represent a change in policy. Despite the withdrawal of the disputed change, the underlying grievance was filed at Step 1 at the Minneapolis/St. Paul Bulk mail Center as a class action on behalf of all employees at the BMC who were denied premium pay for hours worked on Sundays pursuant to temporary schedule changes for personal convenience. The local class action grievance was appealed to regular arbitration and subsequently referred and appealed to Step 4 as an interpretive dispute.

Arbitrator Das indicated, however, that the issue of whether or not a grievance initiated at the national level raising an interpretive issue under Article 15.3.D. "would result in all affected employees being entitled to a retroactive make whole remedy, if the grievance is sustained, is not an issue in this case, and no opinion is expressed on that question in this decision." Moreover, he said that he was not reaching an opinion on the issue of "remedial issues that arise in the context of an Article 19 proceeding, which can only be initiated at the national level." Das did note that the Postal Service acknowledged in its brief that an Article 19 dispute, if timely, could cover all employees affected by a changed rule or policy, assuming the policy or rule is implemented.

Enclosure

GB/MW:jm
OPEIU #2
AFL-CIO

National Arbitration Panel

In the Matter of Arbitration	)	
	)	
between	)	
	)	
	)	
United States Postal Service	)	**Case No.**
	)	
and	)	**I90C-1I-C 910325156**
	)	**H7C-4S-C 29885**
American Postal Workers Union	)	
	)	
and	)	**Supplemental Award**
	)	**(Remedy)**
National Postal Mail Handlers Union - Intervenor	)	

Before: Shyam Das

Appearances:

For the Postal Service:	**H. Alexander Manuel, Esquire** **Kimber A. Proud, Esquire**
For the APWU:	**Melinda K. Holmes, Esquire**
For the NPMHU:	**Bruce R. Lerner, Esquire** **Abigail V. Carter, Esquire**

Place of Hearing: **Washington, D.C.**

Date of Hearing: **November 17, 2005**

Date of Award: **December 11, 2006**

Relevant Contract Provisions: Article 8.6 and Article 15

Contract Year: 1987-1990

Type of Grievance: Contract Interpretation

Award Summary

The remedial issue raised in this arbitration is resolved on the basis set forth in the last paragraph of the above Findings.

Shyam Das, Arbitrator

On April 15, 2005, I issued the following Award (Sunday Premium Award) in this national level interpretive case:

> An eligible employee who is scheduled by management to work and does work on a nonovertime basis on a Sunday, even if the employee was scheduled on Sunday pursuant to a request for a temporary schedule change for personal convenience, is entitled to Sunday premium pay under Article 8.6 of the National Agreement.

The parties subsequently agreed that the Sunday Premium Award would be applied prospectively to all bargaining unit employees. They also agreed that any employee who had filed a timely grievance concerning the nonpayment of Sunday premium while working a temporary schedule change for personal convenience is eligible for payment in accordance with the Sunday Premium Award. They did not agree on application of a retroactive remedy to other employees.

The American Postal Workers Union (APWU) and Intervenor National Postal Mail Handlers Union (NPMHU) contend that a retroactive remedy should be applied on a national basis to all employees who were denied Sunday premium in circumstances covered by the Sunday Premium Award. The APWU argues that this remedy should be applied retroactive to October 7, 1988 when ELM 11 was issued. The NPMHU supports the position taken by the APWU but argues, in the alternative, that the remedy, at a minimum, should be retroactive to June 30, 1993, which is 14 days prior to the date on which the issue decided in the Sunday Premium Award was first appealed to the national level at Step

4. The Postal Service maintains there is no proper basis in this case to grant a retroactive remedy except to employees who filed timely grievances, including the underlying grievance in this case.

The underlying grievance was filed on August 31, 1990 at Step 1 at the Minneapolis/St. Paul Bulk Mail Center as a class action on behalf of all employees at the BMC who were denied premium pay for hours worked on Sundays pursuant to temporary schedule changes for personal convenience. The grievance was in response to a memorandum by the Acting BMC Manager stating that Sunday premium would no longer be paid in such circumstances. The memorandum quoted Section 434.31 of the ELM as set forth in ELM Issue 11, dated October 7, 1988, which stated that Sunday premium does not apply to a temporary schedule change at the employee's request.[1]

The Minneapolis/St. Paul BMC grievance progressed through the grievance procedure. Following the Postal Service's denial of the grievance at Step 3 and its appeal to regular arbitration, the APWU's Director of Industrial Relations appealed the grievance to Step 4. Following a discussion at

[1] The ELM did not specifically refer to the applicability of Sunday premium in these circumstances before Issue 11. The Postal Service subsequently withdrew this and other changes in ELM 11 (which had been carried over into Issue 12), in response to an Article 19 grievance filed by the APWU. As more fully discussed in my Sunday Premium Award decision, the Postal Service maintains that the protested change to Section 434.31 was merely one of clarification and did not represent a change in policy.

Step 4, the Postal Service denied the grievance, and the Union appealed it to national level arbitration, ultimately resulting in the Sunday Premium Award.

APWU POSITION

The APWU points out that the parties' specific remedial dispute is one of scope: which employees should get a retroactive remedy and how far back that remedy should reach. In this case, the Union argues, the grievance was national in scope and inclusive of a national remedy for all employees negatively impacted by the Postal Service's violation of Article 8.6. Moreover, this retroactive remedy should begin to run with the Postal Service's issuance of ELM 11 which gave rise to the instant dispute.

The APWU maintains that the retroactive remedy in this case should not be dictated by remedies in other cases, and should be determined on the nature of the Step 4 dispute itself, and not simply how the dispute came to be. As a national level case, the Step 4 dispute in this instance presented an interpretive issue resulting in an arbitration award that can be applied retroactively and directly. This case does not require the existence of specific individual grievances in order to derive or apply the appropriate remedy. This case not only is capable of broad direct application, but requires such a remedy by the very terms of the parties' substantive dispute.

A uniform remedy based on the terms of the award, rather than the varied grievance activity of employees wrongly denied Sunday premium, not only is the only reasonable remedy, but it is easily capable of application retroactive to when the Postal Service first espoused its improper interpretation of Section 8.6 of the National Agreement in 1988. All that is necessary is to identify the employees who were improperly denied Sunday premium in the covered circumstances. While that may not be a simple task, other settlements agreed to by the parties have involved a similar effort and the parties have cooperated time after time in identifying the employees to receive a remedy.

The Union distinguishes this case from cases in which the interpretation rendered at the national level cannot be applied to individual employees without additional fact development. Examples of the latter type of national award are Case No. H7C-4S-C 3749 (Mittenthal 1998) (Fargo Award); Case No. H7T-3W-C 12454, et al. (Mittenthal 1993) (Travel as Work Award); and Case No. Q98C-4Q-C 00100499 (Das 2001) (Casuals in Lieu of Award).[2] In those cases the parties intended application of the national award to existing and future grievances. They were not cases which directly resolved a certain set of fact circumstances like the instant case.

[2] Although the APWU's brief cites Case No. Q94C-4Q-C 98038916 (Das 2002) as the "Casuals in Lieu of Award", that was a different case regarding the counting of casuals. In context, it is reasonably clear that the Union intended to refer to the earlier 2001 decision cited here.

The APWU contends that this case is similar to other cases in which a national level remedy has been applied retroactively. These include Case No. Q90C-6Q-C 94042169 (Das 1998) (Nixon Day of Mourning Award), and H4C-NA-C 77, H4N-NA-C 93 (Mittenthal 1988) (90/10 Award). The Union also cites a number of Step 4 settlements where the parties agreed to provide a retroactive remedy on a national basis. Examples of such settlements include disputes relating to pay anomaly overpayments (1996), the improper crediting of service during employees' first weeks of service (2001) and a promotion pay dispute (1990). Most recently, in March 2004, the parties entered into such a settlement in resolving a national level dispute regarding the nonpayment of Sunday premium for hours not actually worked by employees who are in a continuation of pay (COP) status or on court or military leave. The latter settlement provided a remedy to all affected employees on a nationwide basis retroactive to issuance of the ELM provisions which instituted the new Postal Service policy protested by the APWU. The Union modeled its proposed remedy in this case on the agreed-to remedy in the March 2004 settlement.

The APWU stresses that by the time the present dispute reached Step 4 of the grievance procedure, it assuredly expanded beyond just the circumstances in the Minneapolis/St. Paul BMC facility at which the underlying grievance was filed. At Step 4 there was no reference to any local facts and the parties stated their respective positions broadly on a national basis. The parties' intent, in terms of issue and remedy, was unequivocally broad, and was not limited to establishing standards for future

arbitral application. As APWU Director of Industrial Relations Greg Bell testified, the Union's intent in pursuing this interpretive dispute was to remedy the Postal Service's violation of the National Agreement wherever and whenever it occurred. Bell also stated that this was consistent with the APWU's practice of not filing successive grievances over each alleged violation after an interpretive dispute was refined. To do otherwise, as Bell explained, would needlessly overwhelm the grievance system.

The APWU further argues that equity cuts in favor of the Unions' remedial position. Upon the issuance of ELM 11, which included the first express written instruction by the Postal Service that it would not pay Sunday premium in the circumstances addressed by this case, the APWU promptly challenged both the form and substance of this new policy. At that point, the Postal Service was on notice that it proceeded at its own peril if it continued to press and apply the policy that the APWU challenged as contractually improper. Even after the Postal Service withdrew its written instructions contained in ELM 11 and ELM 12, the dispute continued because the Postal Service refused to disavow its new interpretation of the National Agreement. The Postal Service had full control to mitigate its potential damages, but consciously decided to maintain and apply its policy. A broad retroactive remedy in this case is necessary to ensure that the remedy for a national level contract violation has both a curative effect and discourages future violations. The remedy sought by the Union also is not punitive, prohibitive or reliant on guesswork.

The Union rejects the Postal Service's theory, espoused by its witness Pat Heath, that somehow the appropriate remedy in national level cases is dictated by where in the grievance process a dispute originally arose. The Postal Service relies on a study by Heath indicating that all disputes which arose from local grievances can only result in a retroactive remedy to individual employees with their own grievances. The evidence, however, does not support the conclusion that the parties implicitly or explicitly agreed to such a rule. Rather, as Union witness Bell testified, remedy is the product of a particular dispute and the Union's intent on an appropriate remedy. The remedies applied in various past cases do not, by themselves, explain he parties' remedial understanding and intent, and the results of the Postal Service's study therefore do not explain how or why those results occurred. The Postal Service has not demonstrated that the conclusions it draws from the results of its study are anything more than coincidence, or that the Unions are bound in this dispute by the scope of retroactive remedies in other cases. As Arbitrator Mittenthal opined in Case No. H1C-3A-C 5465 (1983) (High Point Award), both the nature of the grievance and the intent of the parties in litigating a case at the national level are far more dispositive of a remedy than the grievance's origination.

NPMHU POSITION

Initially, the NPMHU stresses that in formulating remedies an arbitrator has broad discretion limited only by the collective bargaining agreement itself. This discretion should be exercised on a case-by-case basis, based on the particular facts and circumstances presented. Moreover, with regard to contract violations adversely affecting the pay of employees, make whole remedies are generally preferred. Not only do arbitrators have broad discretion to formulate appropriate remedies, but because the purpose of remedying a contract violation is to place the parties in the position they would have been absent the violation, arbitrators normally exercise that power to award make whole remedies especially where the violation resulted in monetary losses.

Although the NPMHU supports the position taken by the APWU, the NPMHU also offers an alternative argument. It asserts that, at a minimum, the remedy should be nationwide and retroactive to June 30, 1993, which is 14 days prior to the date on which the issue decided by the Sunday Premium Award was first appealed to the national level at Step 4.

The NPMHU stresses that, regardless of whether a grievance arrives at Step 4 at the national level by appeal or referral from the local or regional level under Article 15.2, Step 3(e) or by direct appeal at the national level under Article 15.3.D, once the underlying grievance is appealed to the national level at Step 4 both the Union and the Postal Service

at the national level are fully aware of the pending issue. The Postal Service therefore cannot claim that a make whole monetary remedy retroactive to 1993 is beyond what the Postal Service reasonably should have anticipated would result if the pending grievance was resolved in the Union's favor either through settlement or arbitration.

The NPMHU points out that there are many examples of prior cases initiated at Step 4 in which fully retroactive relief has been granted by national arbitrators through decision or has been agreed to by the parties through settlement, notwithstanding the fact that all employees injured by the contract violations had not filed grievances at the local level and were not covered by timely filed class action grievances.

Addressing the Postal Service study, presented at arbitration through its witness Pat Heath, the NPMHU acknowledges this study suggests that in most, if not all, national arbitration cases where a remedy for a grievance originally filed at the local level at Step 1 was made retroactive -- a total of 15 cases -- the scope of the remedy was limited to the grievant(s) who filed the initial grievance. The NPMHU emphasizes, however, that the Postal Service is incorrect in suggesting that these cases stand for the proposition that the parties or arbitrators have rejected a nationwide retroactive remedy in these cases because they initially were filed as local grievances rather than being initially filed as national grievances. To the contrary, in all

15 of those cases, it appears that the parties did not seek a retroactive remedy and the arbitrators did not reject one.

More critically, and directly contrary to the Postal Service's position in this case, the NPMHU argues, there is absolutely no basis, contractual or otherwise, upon which to distinguish the scope of remedies potentially available between cases that are referred to Step 4 after initially being filed at the local level and cases that are initiated at the national level at Step 4. The parties know from the moment the case is either appealed to or filed at Step 4 that the case presents a national interpretive issue of general application. From that date forward the parties are on notice that the case, if resolved in favor of the Union by either settlement or arbitration, may require a nationwide remedy. It therefore necessarily follows that the eventual nationwide remedy should be retroactive to the date on which the case was appealed to or filed at Step 4 (or, under governing precedence, to 14 days prior to that date).

The NPMHU contends that application in this case of a nationwide remedy retroactive to June 30, 1993 will best effectuate the intent of the parties, serve generally-applicable notions of equity, and prevent the Postal Service from receiving an unjustified windfall resulting from its own violation of the National Agreement.

Fashioning a national make whole award in this case, the NPMHU asserts, is the most direct method of implementing the

intent of the parties in agreeing to the Sunday premium pay provision in Article 8.6. Moreover, if the Postal Service's position that a retroactive remedy is never appropriate for a case arising at the local level that was appealed to Step 4 were adopted, then along with filing a notice of appeal to the national level at Step 4, the Unions will be forced in each such case to send out notices to over 300,000 employees in thousands of postal facilities instructing them to file a grievance and to appeal any subsequent denials of those grievances. Such an irrational process -- which would result in the filing of tens of thousands of grievances each time that a case that may affect the pay or the benefits of numerous employees is appealed to the national level -- could not possibly have been intended by the parties when they agreed on the Step 4 appeal process.

In addition, the Postal Service should not be rewarded -- by being permitted to keep the Sunday premium pay it should have paid to employees -- simply because the Postal Service failed to maintain records once the underlying issue was appealed to the national level as a nationally interpretive dispute at Step 4.

The NPMHU further points out that the provisions in Article 15, cited by the Postal Service, providing for a "representative grievance" in cases where there are multiple grievances involving the same or similar issues or facts simply adopt a mechanism for the efficient handling of multiple grievances in circumstances when more than one grievance is filed. Nothing in those provisions affirmatively requires the

filing -- either by individual employees or local union representatives -- of more than one grievance when there are issues affecting employees nationwide already pending at the national level at Step 4.

EMPLOYER POSITION

The Postal Service contends that Article 15 of the National Agreement mandates that grievances be timely filed in order to be valid, or the claims are waived. This includes grievances which present an interpretive issue and are heard at the national level. See Arbitrator Mittenthal's 1983 High Point Award. Accordingly, the only grievants entitled to back pay are employees of the Minneapolis/St. Paul BMC and those with related, timely and pending grievances.

The Postal Service insists that appeal of a local grievance to the interpretive step does not expand the scope of a retroactive remedy for that grievance beyond employees at the facility where the original grievance arose. This point is corroborated by the contractual provisions in Step 3(e) of Article 15.2 regarding the designation of a "representative grievance" where more than one grievance has been filed involving the same issue. That provision expressly states that arbitral resolution of the representative grievance is to be applied to the other pending grievances involving the same or substantially similar issues or facts, and that disputes as to the applicability of the resolution of the representative grievance shall be resolved through the grievance arbitration

procedure. The Postal Service points out that acceptance of the Unions' argument that mere appeal of a Step 1 grievance to national arbitration expands the remedy retroactively to all employees at all facilities throughout the nation, whether or not any of them had a grievance pending, would render the provisions of Article 15 discussed above entirely meaningless. Moreover, if it were true that the remedy in such a case would apply to all employees at all facilities there would have been no need in Article 15 to provide the procedure to be followed to determine whether an award was applicable to a particular pending grievance.

The Postal Service stresses this is not a case of first impression. In his High Point Award, Arbitrator Mittenthal definitively determined the proper scope of interpretive awards concerning grievances that are initiated at Step 1 and later appealed to Step 4 to resolve a question about the meaning of the contract. Pursuant to the parties' settled principles of *stare decisis*, that decision should inform the arbitrator's award in this case. Arbitrator Mittenthal's decision is directly on point and the Unions have not offered any reason why it should not be applied to this case.[3]

[3] Subsequent to the filing of post-hearing briefs in this case, the Postal Service submitted an August 20, 2006 decision by Arbitrator Richard Bloch in a case between the Postal Service and the National Rural Letter Carriers Association (NRLCA). U.S. Postal Service and NRLCA, Case No. B95R-4B-C 9904059. The Postal Service asserts that the Bloch decision is further support for its position in this case. The Unions responded to the submission of the Bloch decision, pointing out reasons why

The Postal Service cites Arbitrator Mittenthal's decision in the Fargo Award as indicating that the parties implicitly acknowledged that the retroactive scope of a remedy following a national interpretive award did not apply nationwide, but only to other pending grievances. In that case, the Union made no effort to obtain a nationwide back pay remedy after its merits position had been upheld in an interpretive award. Instead, the Union recognized that the interpretive award applied to all other pending cases and asked the arbitrator to so rule. Although the arbitrator declined to rule on the issue, as it had not been presented to him in the grievance, that case illustrates the retroactive scope of an interpretive award.

The Postal Service points to the parties' consistent past practice in all Article 15 national interpretive cases initiated at Step 1 as demonstrating that only employees who presented timely grievances have received a back pay remedy after resolution of an interpretive question by an arbitrator. The Postal Service stresses there never has been a back pay award providing a remedy to an employee who did not have a timely pending grievance under Article 15 where a grievance was initiated in Step 1 and later appealed to national arbitration to resolve a disputed question about the meaning of the contract. This is reflected in the comprehensive study

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it is distinguishable and why it should not be followed in this case.

conducted by Postal Service witness Labor Relations Specialist Pat Heath.

The Postal Service also argues that the reference by the APWU to the March 2004 settlement of another case involving Sunday premium pay does not provide a basis for deciding in the Unions' favor in this case. That settlement concerned a challenge by the Union protesting a change in the ELM under Article 19. Disputes of that nature challenge the propriety of the changes being made, that is whether the changes violate the National Agreement or, if not, whether the changes are fair, reasonable, and equitable. Such disputes, if timely, could cover all employees affected by the changed rule or policy, assuming the new rule or policy is implemented. In that way, Article 19 differs significantly from the process created by Article 15, which allows an employee or Union at the local level to present a grievance that a Postal Service supervisor or manager violated the contract in some parochial manner. Moreover, the fact that the parties voluntarily agreed to settle one case by paying employees nationwide retroactively does not create an obligation to resolve all other cases (especially those with limited application) in the same way, unless the agreement itself so provides, which it does not. Finally, that settlement was executed in 2004, so it cannot reach back 14 years to create a precedent for the resolution of a dispute that arose in 1990.

The Postal Service also insists that reliance upon the parties' application of the Nixon Day of Mourning Award is

misplaced, because there the Union had filed a Step 4 grievance on behalf of all affected employees within the required 14-day time limit, so quite naturally a remedy was applied to all affected employees. Here the only timely grievance covered Minneapolis/St. Paul BMC employees, together with any grievances on the same or substantially similar issues that had been held in abeyance. Similarly, the Union's reliance on other settlements of timely grievances involving 90/10 staffing, pay anomaly overpayments and crediting of service is misplaced. Those settlement agreements applied to the employees covered by the Step 4 grievances, and those grievances were raised within the time limits set forth in the Agreement. Thus, by their terms, those settlements provided remedies to those who grieved, but those settlements do not help the non-grievants in this case.

The Postal Service further asserts that the grievance process is not debilitating. If the Postal Service breaches the National Agreement, the Agreement establishes a way to resolve such breaches -- employees or the Union present timely grievances setting forth their contentions. There is nothing debilitating about that process, even if it means a multitude of grievances are filed. Indeed, large numbers of grievances have been filed with respect to many similar issues, and the Agreement has a process to resolve them, too -- a representative grievance is selected by the Union, presented to arbitration, and, if sustained, applied to all other timely, pending grievances of the same or related issues. Moreover, to the extent both parties agree the above process is inadequate in

some way, the process may be adjusted in bargaining, as the parties did subsequent to the filing of the present grievance when they adopted a provision in Step 3(f) of Section 15.2 permitting the Union to file a single grievance challenging a policy promulgated in a postal district or area, in order to discourage the filing of multiple local grievances.

FINDINGS

Article 15 provides the contractual framework for resolution of the present dispute regarding the application of a retroactive remedy in this case.[4]

Grievances can be initiated by any employee or by the local Union at Step 1 of the grievance procedure, as set forth in Article 15.2. (Certain grievances can be initiated at Step 2, pursuant to Article 2 and Article 14.) Under Article 15.2, a grievance initiated at Step 1 (or Step 2) must be initiated within 14 days of "the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause." Pursuant to Article 15.3.B, if a grievance is not filed within the prescribed time limit it is waived.

The President of the Union also can initiate a grievance in an interpretive dispute at the Step 4 level

[4] The underlying grievance in this case arose under the 1987-1990 National Agreement. All contractual references in this decision are to the 1987-1990 Agreement unless otherwise specified.

pursuant to Article 15.3.D. Article 19 provides a separate procedure to be applied when the Postal Service proposes to change parts of handbooks, manuals or regulations that directly relate to wages, hours, or working conditions. Article 19 issues may be submitted to arbitration by the Union at the national level consistent with that procedure.

If a grievance filed at Step 1 (or Step 2), such as the underlying grievance in this case, is denied at Step 3, the Union may appeal the grievance to regional arbitration, provided the Step 3 decision states that the case does not involve an interpretive issue of general application. Article 15.2, Step 3 further provides:

> (e) If either party's representative maintains that the grievance involves an interpretive issue under the National 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....

In addition, Article 15.4.B.5 provides:

> If either party concludes that a case referred to Regional Arbitration involves an interpretative issue under the National Agreement or some supplement thereto which may be of general application, that party may withdraw the case from arbitration and refer the case to Step 4 of the grievance procedure.

Notably, Article 15 contains no provision expanding -- or limiting -- the scope of a grievance that is appealed or referred to Step 4 in accordance with these provisions.[5] There is no dispute, however, that the resolution of the interpretive issue raised in a grievance appealed or referred to Step 4, either by the parties at the national level or by a national arbitration decision, is controlling on a national basis.

Arbitrator Mittenthal's 1983 High Point Award is of critical importance in deciding the issues presently before me. Prior to January 1980 the Postal Service had been paying temporary supervisors an out-of-schedule overtime premium under the terms of the National Agreement. In January 1980 the Postal Service ceased such payments, taking the position that persons serving as temporary supervisors were not "employees" for purposes of the National Agreement. This change in policy resulted in numerous grievances being filed at Step 1 in various locations. A large number were appealed to regional arbitration. Twelve of those grievances that then had been

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[5] In this case, the Union's Director of Industrial Relations notified the Postal Service on July 14, 1993 that the Union was "appealing the referenced grievance to Step 4 in accordance with Article 15, Section 2." As the Union previously had appealed the grievance to regional arbitration on January 18, 1991 -- where it presumably was still pending on July 14, 1993 -- it would seem that the "appeal" to Step 4 technically was a referral under Article 15.4.B.5. For purposes of deciding the present issues, there is no meaningful distinction between an appeal and a referral. Neither the Union's appeal/referral of the underlying Minneapolis/St. Paul BMC grievance to Step 4 nor its subsequent appeal to national arbitration included any reference to the remedy sought by the Union.

appealed or referred to Step 4 were appealed by the APWU to national arbitration. Arbitrator Mittenthal heard those grievances in September 1981. In an award issued on January 27, 1982, Case No. A8-W-939 et al., Arbitrator Mittenthal granted the grievances, holding that "the employees in question were entitled to receive the out-of-schedule overtime premium" in accordance with the National Agreement, and that "they should be compensated for their loss of earnings." As he stated in his subsequent High Point Award:

> The Postal Service proceeded to pay all employees covered by these twelve grievances and apparently others as well whose grievances had been held in abeyance pending the issuance of my award. And, according to statements made in the instant arbitration hearing, it has paid the out-of-schedule premium when applicable to all employee-supervisors since January 27, 1982.

After Arbitrator Mittenthal's ruling in Case No. A8-W-939 et al., more grievances were filed covering employees who had worked as temporary supervisors between January 1980 and February 1982 seeking reimbursement for out-of-schedule premium not paid to them during that period. One of those grievances, filed as a class action in Step 1 in High Point, North Carolina, then was submitted to Arbitrator Mittenthal, after having been appealed or referred to Step 4. The High Point Award resolved that grievance.

In his High Point Award, Arbitrator Mittenthal stated that there were four distinct questions placed before him, and

that: "The first concerns the scope of my original award in Case No. A8-W-939 et al, whether it applies only to the twelve grievances listed on the first page of such award or to all employees and post offices nation-wide." In deciding that first question, Arbitrator Mittenthal stated (footnotes omitted):

> The earlier award stated that "the grievances are granted" and that "the employees in question..." were to be compensated for the out-of-schedule premium pay they were improperly denied. I was plainly referring to the twelve grievances which were submitted to me at the start of that arbitration hearing. When I mentioned "the employees in question...", I was alluding to the employees involved in these twelve grievances. That was my intention. I see no reason to enlarge the award made in the earlier case.
>
> The difficulty here stems from the failure to distinguish between matters of substance and procedure. It is true, as the APWU stresses, that arbitration at the national level is "only [for] cases involving interpretive issues under this Agreement or supplements thereto of general application..." It is true too that the arbitrator's decision on such "interpretive issues" is "final and binding." Together these principles suggest the proper scope of the earlier award. My interpretation of Article VIII, Section 4-B covered the cases then before me, the twelve grievances submitted by the APWU. My interpretation also covered all future cases concerning out-of-schedule premium pay for employees serving as temporary supervisors. To this extent, my ruling dealt with all employees and all post offices nation-wide. Any

lesser impact would deny my award the "interpretive..." force the parties contemplated for national-level arbitration.

All of these observations relate to the substantive question, to the basic "interpretive issue." They do not pertain to procedure. To read the earlier award as granting money relief to all employee-supervisors, nation-wide, who were denied out-of-schedule premium between January 1980 and late January 1982 would be to ignore the procedural requirements for a valid grievance. Consider the language of Article XV, Section 2, Step 1(a). It says a grievance must be discussed with supervision "within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause." This requirement appears to apply to <u>all grievances</u> including those which raise "interpretive issues." Nowhere in Article XV is there any indication that the parties wished "interpretive issues" to be excluded from this timely discussion (i.e., timely filing) procedure. Hence, any employee-supervisor improperly denied out-of-schedule premium had 14 days to grieve after he or the APWU had knowledge (or constructive knowledge) of the denial. To rule otherwise would allow the employee or the APWU to evade this procedural requirement by the simple expedient of alleging an "interpretive issue." That could hardly have been what the parties intended.

My conclusion is that the earlier award should have reimbursed only those employees covered by the twelve listed grievances. Any other employees who have a claim to out-of-schedule premium must grieve if they wish relief but their grievances, for the reasons

> expressed here and in Part III of this opinion, would be subject to the timely discussion (or filing) requirement. The "interpretive issue" decided in the earlier award applies to all employees throughout the Postal Service.
>
> (Underlining in original.)

It should be noted that Arbitrator Mittenthal, in stating that the 14-day requirement applies to all grievances, indicated in a footnote that one exception "may be" interpretive issues initiated in Step 4 by the national Union under Article 15.3.D.

The APWU's attempt to distinguish the High Point Award on the grounds that Arbitrator Mittenthal concluded on the basis of the grievance papers that "this is strictly a High Point grievance" misses the mark. That was not a reference to his original award in Case No. A8-W-939 et al., but to one of the grievances that was filed after his original award -- the one presented to and decided by him in the High Point Award.[6] There also is no reason to distinguish the breadth or scope of the interpretive issue presented to Arbitrator Mittenthal in Case No. A8-W-939 et al. from that presented and decided by me in the Sunday Premium Award. In both cases, a particular grievance(s) filed in Step 1 raised an interpretive issue of general application that the Union appealed or referred to Step 4 and then appealed to national arbitration. There is no indication that the Step 4 discussion and arbitration of the interpretive

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[6] The quoted statement, on page 7 of the High Point Award, is in a section captioned "Scope of Current Award".

issue in the case heard by Arbitrator Mittenthal was any less broad -- or more focused on local facts -- than in the case before me.

The NPMHU points to Arbitrator Mittenthal's statement in the High Point Award that the reference in his original award to "the employees in question" was to the employees in the 12 grievances then before him, and maintains that "Arbitrator Mittenthal found it unwise to expand the scope of his decision after the fact." That is not how I read the High Point Award. Arbitrator Mittenthal confirmed that his intention in the original award was to provide a remedy only to the employees in the 12 grievances before him, but then went on to provide a detailed contractual explanation for why the remedy in his original decision necessarily was limited to those 12 grievances.

The NPMHU also argues that to the extent the High Point Award could be read to suggest that the scope of a national arbitrator's remedial authority is different when the underlying case is appealed or referred to Step 4, in contrast to when the case is initiated at Step 4, it is simply wrong.[7]

[7] The NPMHU further points out that the High Point Award is not binding on the NPMHU which had a separate National Agreement. The issue here, however, is the appropriate retroactive scope of a national arbitration decision involving an APWU grievance filed at Step 1 that was appealed or referred to Step 4 by the APWU. Prior to its intervention at arbitration, the NPMHU had no involvement in that grievance. Whether the APWU's appeal or referral of an APWU grievance to Step 4 broadens the scope of

Arbitrator Mittenthal's ruling was firmly anchored in his reading of the terms of Article 15 of the National Agreement. As such, it is precedent to be followed absent exceptional circumstances not established in this case. Notably, in a July 15, 1999 letter to the Postal Service regarding implementation of the Fargo Award (APWU Exhibit 32), the APWU's Director of Industrial Relations insisted that Arbitrator Mittenthal's ruling on another issue decided in the High Point Award had to be followed. Citing a 1998 national decision by Arbitrator Snow, Case I90V-4I-C 94005141, the APWU asserted:

> As Arbitrator Snow ruled in his decision, Arbitrator Mittenthal's Highpoint [sic] ruling is binding on other arbitrators and on the parties....
>
> Thus, Arbitrator Mittenthal established the pertinent binding interpretation concerning the limitation of remedies based on the 14-day limitation on filing grievances under the National Agreement. Arbitrator Snow held, in what was also a final and binding award, that Arbitrator Mittenthal's
>
> > Highpoint Award is a national level arbitration decision binding on the current arbitrator unless modified by negotiations of the parties.
>
> (Snow Award at 14.) Neither Arbitrator's Award has been challenged by the Postal

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the grievance for purposes of applying a retroactive remedy is an issue to be decided under the APWU National Agreement.

> Service. Both awards are final and binding on the parties in other cases.

No subsequent national arbitration decision has been cited that deviated from the relevant holding in the High Point Award. Arbitrator Mittenthal's 1988 90/10 Award involved grievances initiated by two national Unions at Step 4. Moreover, the arbitrator pointed out in that case that neither individual employees, nor local unions were in possession of the information needed to enforce their rights under Article 7.3.A, and that the duty imposed on the Postal Service under that provision "is an obligation owed largely to the Unions as representatives of the employees" -- an obligation they properly were enforcing in that case. My 1998 Nixon Day of Mourning Award also involved grievances initiated by two national Unions at Step 4. Those grievances protested action taken by the Postal Service on a national basis on a single occasion. They were filed within 14 days of that action, and encompassed all affected employees.

Equally significant, it appears on this record that in the over 20 years since the High Point Award, the parties have not applied a national level arbitration award to grant a retroactive remedy to employees not covered by timely grievances in cases where a local grievance raising an interpretive issue was appealed or referred to Step 4.

Article 15.2, Step 3(f) includes provisions for holding multiple grievances pending at Step 3 while a "representative" grievance is appealed to Step 4 -- if either

party's representative maintains it involves an interpretive issue of general application -- or to regional arbitration, and for application of the resolution of the representative grievance to other pending grievances.

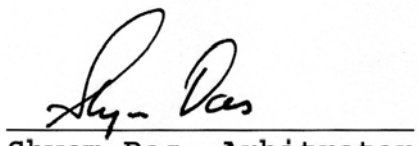
In resolving grievances or disputes, the national parties, of course, may agree on any sort of remedy. They also may agree, when a particular local grievance(s) is appealed or referred to Step 4, that any retroactive remedy ultimately granted in that case will apply to all other similarly situated or affected employees from that date forward -- or even back to an earlier date -- so as to eliminate the need for additional individual grievances to be filed.

As the Postal Service agreed, a Union also could initiate a national level grievance raising the interpretive issue under Article 15.3.D. Whether or not that would result in all affected employees being entitled to a retroactive make whole remedy, if the grievance is sustained, is not an issue in this case, and no opinion is expressed on that question in this decision. Moreover, no opinion is expressed with respect to remedial issues that arise in the context of an Article 19 proceeding, which can only be initiated at the national level. I note, however, that the Postal Service in its brief acknowledges that an Article 19 dispute, if timely, could cover all employees affected by the changed rule or policy, assuming the new rule or policy is implemented.

In a case such as this, however, the precedent established in the High Point Award, which the parties have not departed from in subsequent national arbitration cases where a local grievance(s) is appealed or referred to Step 4, precludes me from granting a nation-wide retroactive remedy as sought by the APWU and NPMHU. Accordingly, I conclude that the holding in the Sunday Premium Award applies prospectively to all bargaining unit employees, but that only those employees who had filed a timely grievance (or on whose behalf such a timely grievance had been filed by a local union) are eligible for retroactive payment in accordance with the Sunday Premium Award.

AWARD

The remedial issue raised in this arbitration is resolved on the basis set forth in the last paragraph of the above Findings.



Shyam Das, Arbitrator