

NATIONAL ARBITRATION PANEL

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In the Matter of the Arbitration )  
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between )  
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UNITED STATES POSTAL SERVICE ) Case No. Q10C-4Q-C 16050516  
 )  
and ) Supplemental Remedy Award  
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AMERICAN POSTAL WORKERS )  
UNION, AFL-CIO )  
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BEFORE: Shyam Das

APPEARANCES:

For the Postal Service: Terence F. Flynn, Esq.  
Lauren E. Weaver, Esq.

For the APWU: Melinda K. Holmes, Esq.

Place of Hearing: Videoconference

Dates of Hearing: December 3, 2020  
December 4, 2020  
February 10, 2021

Date of Award: September 16, 2021

Relevant Contract Provisions: Article 1.6.B, Global Settlement MOU  
and Global Settlement Remedy Agreement

Contract Year: 2010-2015

Type of Grievance: Contract Interpretation

Award Summary:

As set forth in the above Findings, I grant the following remedy in this case:

The Postal Service is directed to pay a total of \$20.5 million in back pay to be distributed: (1) to affected bargaining unit employees as determined by the Union; or if that option is declined by the Union (2) to clerks who worked in offices where the PMEOD function was enabled based on the relative number of days they worked during the period that function was enabled.

I retain jurisdiction for 60 days over any issues relating to implementation of this remedy that the parties are unable to resolve.

A handwritten signature in black ink, appearing to read "Shyam Das", is written over a horizontal line.

Shyam Das, Arbitrator

## BACKGROUND

Q10C-4Q-C 16050516  
Supplemental Remedy Award

On December 8, 2017, I issued my Award in this case (Merits Award) which provides:

Unilateral deployment and use of the Postmaster End of Day button is not consistent with the parties' agreement in Paragraph 2.A of the December 5, 2014 Global Settlement Remedy Agreement.

The Postal Service is directed to cease use of the PMEOD button absent an agreement with the Union that permits its continued use. As soon as practicable, appropriate software changes are to be made to disable the PMEOD function. The issue of back pay remedy for the violations that have occurred is returned to the parties to determine an appropriate remedy that is fair and reasonable taking into account all relevant factors. I retain jurisdiction over the issue of remedy in the event the parties are not able to resolve it.

(Emphasis added.)

Relevant portions of the decision in the Merits Award state as follows (footnotes omitted):

## BACKGROUND

On March 8, 2011, the APWU and the Postal Service agreed to a Global Settlement Memorandum of Understanding resolving longstanding disputes regarding supervisors' performance of bargaining unit work under Article 1.6. The Global Settlement identifies bargaining unit work hour limits for postmasters and supervisors.... This case involves Level 18 offices where, under the Global Settlement, a postmaster is permitted to perform no more than 15 hours of bargaining unit work per week.

The Global Settlement provides that: "All time the supervisor or Postmaster spends staffing the window during the day will be counted toward the permissible bargaining unit work limits." The APWU appealed an interpretive dispute over this language to arbitration (Case No. Q11C-4Q-C 11311239). On March 29, 2013, this Arbitrator issued the Global Settlement merits award, finding that "staffing the window" applies to "all time the supervisor or postmaster is covering the window, which, in the absence of a clerk, includes all time the window is open." The parties ultimately sought a remedy determination from the Arbitrator. On October 16, 2013, this Arbitrator issued the Global

Settlement Remedy Award, which granted the Union a monetary remedy for violations of the Global Settlement from the effective date of the merits award. The parties subsequently entered into a Global Settlement Remedy Agreement (GRSA), dated December 5, 2014.

In the present National dispute, initiated in December 2015, the Union alleges that the Postal Service is in violation of the GSRA, which states in relevant part:

1. The USPS reaffirms that the performance of bargaining unit work by postmasters/supervisors may not exceed the bargaining unit work hour limits established in the Global Settlement....  
Postmasters/supervisors in offices covered by the Global Settlement will record their time spent performing bargaining unit work on any day of the service week, including "all time spent staffing the window" as defined in the Das award in Case No. Q11C-4Q-C 11311239.,,,
  2. The method for postmasters/supervisors recording such time will be in accordance with the Global Settlement.
    - A. In the event that both a clerk and a postmaster/supervisor are staffing the window at the same time, all time that the postmaster/supervisor is logged into POS (*defined to mean the entire period from start of day to end of day*) will be counted as bargaining unit work. The postmaster/supervisor must include this time on the PS Form 1260 as bargaining unit work....
- \* \* \*
3. The USPS will develop a modified, automated PS Form 1260 to be used by all postmasters/supervisors, covered by this agreement, to record the performance of bargaining unit work on a daily basis. This modified PS Form 1260 will be used to provide a report to the American Postal Workers Union Headquarters level, in an electronic format, every four week reporting period with information needed to monitor compliance with the provisions

of the Collective Bargaining Agreement and this Agreement....

4. Whenever the bargaining unit work hours limit is exceeded in a service week, the USPS will pay the time in excess of the limit to the appropriate clerk, as determined by the local union, at the applicable rate, using a lump sum payment through TACS AdjustPay. This remedy should be implemented in a timely fashion and normally should not require the filing of a grievance....

This is the third installment of disputes over implementation of the GSRA. In the first two cases, the Arbitrator established basic principles that are applicable here. The first case concluded that the language in the Global Settlement saying all time the supervisor or postmaster spends staffing the window means all time the postmaster is covering the window, which, when no clerk is present, means the entire time the office is open. In the subsequent remedy proceeding in that case, the Arbitrator affirmed the automatic remedies agreed upon by the parties, whereby a postmaster going over her weekly limit triggers a presumptive remedy for the bargaining unit employee who should have been assigned the work. The Arbitrator noted that, particularly in offices with no clerk, the Postal Service has agreed to provide the data to the Union to show where the violations had occurred so the automatic remedy could be applied by the parties without having to resort to arbitration.

...The Union alleges in this grievance that postmasters are not reporting all their time on the window. In particular, the Union [protests the deployment and use of a so-called Postmaster End of Day (PMEOD) button as part of RSS which replaced the POS ONE technology.]

\* \* \*

### FINDINGS

When the parties agreed to the GSRA, the Postal Service was well aware that the Union was not agreeable to measuring time spent staffing the window based on when a postmaster logged on to POS and logged off. That required only pushing a button, and the Union presciently was concerned that postmasters might seek to reduce the time they had to report on Form 1260 as performing bargaining unit work by logging off and on between

transactions, even though they actually were staffing the window in the interim. The Union also wanted a means to verify the times reported by postmasters on the 1260s. This was the basis for APWU Assistant Director Brooks' proposal -- ultimately accepted by the Postal Service -- to define time spent logged into POS "*to mean the entire period from start of day to end of day.*" End of Day was a specific event consisting of four steps: advance deposit, final remittance, verification of supporting documentation and a Form 1412 closeout. As part of the End of Day process, the computer-generated 1412 provided the start and end times for a postmaster staffing the window that could be used to verify the information reported on Form 1260. Under the GSRA, the parties also agreed that the information on the 1260s was to be transmitted to the Union on a monthly basis and, where time limits were exceeded, payments were to be made to appropriate clerks without the need to file individual grievances.

Until the Postal Service's development of the PMEOD button in late 2015, there was only the one four-step End of Day process. If a postmaster performed more than one End of Day in a workday, this entire process had to be completed on each occasion just as if it were the final End of Day for that individual. The Postal Service, which did not include the Union in its development and deployment of the PMEOD button, acknowledges that use of the PMEOD button does not constitute completion of a full End of Day. The PMEOD button takes a second to push, in contrast to the approximately five minutes (the Postal Service's estimate) needed to perform a full four-step End of Day. Although it is documented on a Form 1412, a PMEOD otherwise is very analogous to logging off POS, which the Postal Service had proposed, but which the Union successfully resisted. Use of the PMEOD button makes it easier and possibly more tempting for a postmaster concerned about not exceeding the 15-hour weekly limit to use the PMEOD button on a transactional or other reduced time basis.... While the Postal Service may be correct in asserting that such underreporting could have occurred even prior to deployment of the PMEOD button, it is not unreasonable for the Union to conclude that it is more likely to occur with the introduction of the PMEOD button, which was only developed after the parties agreed to the GSRA and when the Postal Service was having to make large payouts for violation of the 15-hour limit.

It is true, as the Postal Service stresses, that each use of the PMEOD button continues to generate a Form 1412, which includes the start of day and End of Day times, and that the

parties have access to these 1412s. But reviewing 1412s, to determine whether they provide a basis to conclude or infer misuse of the PMEOD button to underreport time actually spent staffing the window, takes time and effort and any disputes would have to be handled on an individual basis at the local level. This is not the equivalent of the End of Day measure agreed to by the parties.

For these reasons, I have to conclude that the protection afforded the bargaining unit in Paragraph 2.A of the GSRA has been lessened to a meaningful extent by the Postal Service's deployment of the PMEOD button.... Unilateral implementation of the PMEOD button under the present circumstances was not consistent with the parties' agreement in the GSRA on the mechanism for determining time spent staffing the window.

The Postal Service will be directed to cease use of the PMEOD button absent an agreement with the Union that permits its continued use. As soon as practicable, appropriate software changes are to be made to disable the PMEOD function. Although the Union has requested that the arbitrator provide a specific back pay remedy for the violations that have occurred, I am returning that issue to the parties to determine an appropriate remedy that is fair and reasonable taking into account all relevant factors, including the fact that use of multiple End of Days to provide clerk break and lunch relief is not inconsistent with the Global Settlement and GSRA. I will retain jurisdiction over the issue of remedy in the unlikely event the parties are not able to resolve it.

(Emphasis added.)

My prediction that it was unlikely that the parties would not be able to resolve the back pay issue on the basis set forth in the Merits Award turned out to be wrong. Some three years later, my retained jurisdiction was invoked. On the eve of arbitration, the Postal Service provided its calculation of damages, which it based on a statistical analysis. The Union finds that unacceptable. It insists that the Postal Service must calculate actual lost earnings caused by the Postal Service's violation on the same basis as the Union demanded in the initial arbitration proceeding that resulted in the Merits Award.

## POSTAL SERVICE CALCULATION OF DAMAGES

The Postal Service asserts that no later than December 22, 2017, it had fully disabled the PMEOD button and functionality, and that all remnants of the software were eliminated by February 13, 2018. Its calculation of its proposed back pay remedy is described in its brief as follows (citations omitted):

### 1. Determining a Statistically Valid Sample

After promptly complying with the cease and desist provisions of the merits award, Headquarters Labor Relations began gathering data to determine an appropriate back pay remedy. In order to calculate the amount of bargaining-unit hours that had been worked by postmasters or supervisors on a given day in a given office, the Postal Service needed to gather PS Form 1412s from the individual Level 18 offices.

Because Form 1412s are stored in hard copy in the individual post offices, collecting and analyzing all of the Form 1412s from the 7,404 Level 18 offices with access to the PMEOD button would have been a years-long undertaking. In order to create an accurate liability calculation that would not unduly delay the disbursement of back pay to the affected members of the APWU, the determination was made to collect Form 1412s from a representative sample of Level 18 offices.

...Dr. Park [a Postal Service labor economist] determined that Form 1412 data from a representative sample of 200 Level 18 offices would yield a liability calculation that was statistically valid, after taking into account potential non-response rates from the selected offices.

Dr. Park also determined the appropriate proportionate distribution of selected offices by area, in order to ensure that the sample was not biased toward any single geographic area. ...[A]reas with a larger population of Level 18 offices... would be proportionately more represented in the random sample than an area with fewer Level 18 offices.... Dr. Park then generated a sample of 200 offices using the randomizer algorithm within Microsoft Excel, which she validated as random and representative.... ...Dr. Park's sampling methodology eliminated the potential for manipulating or



skewing the data based upon suspected use or non-use of the PMEOD button in given regions.

## 2. Collection and Collation of the Sampled 1412 Data

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Of the 200 offices initially selected by Dr. Park, the Postal Service received Form 1412s from 143 of those offices. This exceeded the minimum response number of offices that were required in order to ensure that the sample was statistically valid, as determined by Dr. Park.

## 3. Creation of the Analysis Spreadsheets and Calculation of the Remedy

\* \* \*

For each of the 143 reporting offices, Labor Relations first determined whether the reporting office had multiple start and end times identified on its Form 1412s. Offices that did not have multiple start and end times identified on its Form 1412s were excluded from further analysis. 76 offices, or 53%, of the responsive offices had multiple uses of the PMEOD button.

For offices in which multiple start and end times were identified, Labor Relations reviewed each daily Form 1412 and entered the date of the Form 1412, the time that the postmaster first logged onto the RSS system (referred to as the "First PMEOD time" on the spreadsheet), and the time that the postmaster used the PMEOD button for the last time (referred to as the "Last PMEOD time" on the spreadsheet). The spreadsheet automatically calculated the time that a postmaster spent performing bargaining-unit work, both in hours and in minutes, based on the first and last PMEOD time recorded.

Logs from each Level 18 post office with multiple start and end times recorded on its Form 1412 were then used to identify the weekly number of hours in excess of the 15-hour cap. Any hours in excess were then manually compared to the weekly Web1260 hours to ensure that the overage was not already accounted for and paid to the APWU in accordance with the GSRA. For the purposes of determining the monetary liability in this case, the total number of hours that a postmaster was in violation of the 15-hour cap on bargaining-unit work for any

given week in a particular office was calculated by subtracting the already paid Web1260 hours from the Form 1412 hours as determined by the spreadsheet. Labor Relations then divided the total number of hours in violation for a particular office by the total number of weeks that office had access to the PMEOD button in order to create an average weekly hours violation for that office.

#### 4. Determining the Total Monetary Liability

After creating a weekly hours violation for all 76 of the offices that used the PMEOD button multiple times per day in the sample, Labor Relations then created an overall average liability amount using the proportion of offices that used the PMEOD button multiple times and the average number of hours that exceeded the 15-hour cap. On average, 3,935 out of the 7,404 Level 18 offices with the PMEOD button enabled (53.14%) were determined to be in violation of the 15-hour cap on supervisors performing bargaining unit clerk work. Those 3,935 offices ran an average of 1.58 hours -- or 94.8 minutes -- over the 15-hour cap over the course of 90.9 weeks, the average period during which the PMEOD button was in effect.

Once the overall average number of hours in excess of the 15-hour cap and the average number of weeks that the Level 18 offices had access to the PMEOD button were calculated, Dr. Park then confirmed the statistical validity of the results using the Bonferroni correction [a multiple comparison correction used when several dependent or independent statistical tests are being performed simultaneously]. ...[M]ultiplying the number of affected offices, the average amount of hours in excess of the 15-hour cap, and the average number of weeks that Level 18 offices had access to the button by the average straight-time pay rate for the affected bargaining-unit employees yields an overall liability calculation of \$14.7 million.

The 95% confidence analysis [considered standard in statistical analysis] performed by Labor Relations indicated that the true value of the liability in this case, if all 7,404 Level 18 offices with access to the PMEOD button were surveyed, lies somewhere between \$8.9 million and \$20.6 million. ...[B]ased on the representative sample and analysis conducted by Labor Relations, there is only a 2.5% chance that the liability in this case exceeds \$20.6 million -- and there

is a corresponding 2.5% chance that the true liability is less than \$8.9 million.

...Taking into account the APWU's stated desire that the orders specify a method of allocating back pay liability, the Postal Service suggested that the arbitrator could, in lieu of leaving distribution up to the APWU, as has been done in other national level cases, specify that the \$14.7 million award be distributed either equally among the affected APWU employees on the rolls at the 7,404 Level 18 offices where the PMEOD button was enabled during the liability period [from May 1, 2015, when the PMEOD functionality was first rolled out, through February 13, 2018, when all remnants of the software were eliminated from the RSS system], or on a proportionate basis based on the number of days employed on the rolls as a clerk during the liability period. The...[Postal Service] included both a list of eligible employees as well as a spreadsheet reflecting the precise proportionate allocations to employees under either method.

#### APWU PROPOSED BACK PAY REMEDY AWARD

The Union, in response to a request by the Arbitrator, proposed the following

Award:

In order to rectify the miscounting of hours using the PMEOD function, the Postal Service must recalculate the hours of bargaining unit work performed by postmasters on the window in Level 18 offices using the method set out in the Global Settlement Remedy Agreement. In each office that used or is using the PMEOD function (which is a process of a postmaster toggling on and off the RSS program whether by use of the PMEOD button or other means), the Postal Service must recalculate the amount of bargaining unit work performed by the postmaster on the window starting from the time the postmaster first logged in to the RSS program until the time the postmaster completed the final four-step End of Day function. There should be no deduction from the recalculated time for time spent by a postmaster covering clerk breaks or lunch relief. The back pay period will include any weeks from when the original PMEOD button was deployed to an office until such time as the PMEOD function is no longer used. This

may include offices in which the original PMEOD button was disabled or removed, but in which the resulting system still allows the postmaster to toggle on and off the RSS program without completing a final four-step End of Day function. The Postal Service should use the Form 1412 to determine the time of the final End of Day, which will be the version of the Form 1412 showing all of the money collected on the window that day accounted for in "AIC 752 (cash remitted)". The Postal Service will share the Form 1412's and the Unit Clerk Remittance Reports with the National Union at its request.

The Postal Service is directed to make PMEOD function back pay payments in accordance with the processes in the GSRA and the JCIM. If the re-calculation of the time spent by postmasters performing bargaining unit work using the methodology described above results in the total number of hours reported on the e1260 either exceeding the 15-hour limit or exceeding the hours already paid out under the GSRA for a 15-hour violation, bargaining unit members identified by the Union as appropriately compensated for the Postal Service's violation will be made whole at a rate consistent with the parties' agreement in the JCIM. The Postal Service is liable for any incorrect payments to bargaining unit employees, including overpayments, underpayments, or employees entitled to payment who were not paid at all, that were directed based on information provided by the Postal Service or official postal records used to identify the employees designated by the Union for payment.

The Postal Service is directed to comply with its obligations to calculate the back pay remedy in accordance with this Award within 90 days of the date of this Award. Any continuing violations will be corrected in accordance with the GSRA, and the Postal Service will not make any operational changes that frustrate the intent or terms of the GSRA. I will direct the parties to submit a status report 45 days from the date of this Award so that any issues implementing this methodology can be resolved expeditiously and not add further delay.

As payments are made, the Postal Service will promptly provide the Union with a payment compliance report that includes the employee paid, the amount, the office, and the number of hours paid on.

I retain jurisdiction over the issue of the back pay remedy in the event the parties are unable to resolve any matters relating to implementation of the remedy provided for herein.

POSTAL SERVICE POSITION

The Postal Service asserts that the sole issue in this case is whether its proposed remedial order providing for a lump sum back pay award of \$14.7 million, to be distributed either equally or proportionately to eligible affected clerks, is fair and reasonable, taking into account the relevant factors identified by the Arbitrator in the Merits Award.

The Postal Service stresses that the Merits Award did not purport to address or remedy any and all conceivable violations of the GSRA; nor did the GSRA purport to address any and all conceivable violations of the 15-hour cap on supervisors performing bargaining unit work. Rather, the GSRA established an approach for efficiently and expeditiously resolving contemporaneous, week-to-week excess hour violations at the local level. This arbitration, however, concerns a national-level retrospective analysis covering over 90 weeks of use of a discrete software feature unilaterally implemented on the RSS system long after negotiation of the GSRA and now discontinued. Nothing in the GSRA suggests the parties contemplated using the approach outlined therein to resolve disputes of this kind. Moreover, in remanding the case to the parties, the Arbitrator declined to adopt the same process for adjudicating back pay liability that the Union again proposes here.

The Postal Service asserts that the appropriate back pay remedy should be premised on actual data, rather than presumptions, and should be tailored to make eligible clerks whole for lost work opportunities during the period that the PMEOD button was available to postmasters in Level 18 offices. Furthermore, the remedy should provide prompt make whole relief that will bring this longstanding grievance to a final and definitive close. The Postal Service insists that its proposed remedial order does just that and that adoption of its proposed order is well within the authority possessed by the Arbitrator.<sup>1</sup>

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<sup>1</sup> The Postal Service did submit an alternative proposal under which the Union would be involved in what the Postal Service sees as a collaborative approach, requiring the involvement and participation of both parties in a structured statistical damage analysis. The Union made clear, however, that it had no interest in such an alternative. So I see no reason to further consider it.

The Postal Service points out that arbitrators often rely on reasonable suppositions and best estimates in fashioning remedies and that nothing precludes the use of well accepted and validated statistical methods and data. It cites, as a prime example, this Arbitrator's decision in the AOI Remedy Final Supplemental Award (AOI Remedy Award), Case No. Q94C-4Q-C 97031616 (Das, 2014). In the present case, the Postal Service argues, statistical sampling is the only practical method to collect and present the relevant data to formulate a reasonable approximation of damages within an acceptable timeframe. Manually gathering, inputting and analyzing all of the hard copy Form 1412 documentation from the 7,404 offices, assuming it still exists, would be a massive and time-consuming undertaking.<sup>2</sup> Moreover, collection and analysis of the data would only be the start, as there inevitably would be additional litigation over the host of other specific issues the Union argues must be determined on an individualized basis, such as which employees would have worked the contested hours on a given date, at what rate of pay and whether any employees might have converted to career status, and, if so, when.

With respect to rate of pay, the Postal Service maintains it has justified its use of the straight-time rate in its calculations. Most of the clerk craft employees in Level 18 offices are part-time flexible (PTF) employees, who do not necessarily work a standard 40-hour schedule. Moreover, it would be nearly impossible to determine on a daily basis how many hours each PTF in each office would have worked, because there are too many variables at play.

The Postal Service asserts that even if it would be possible to calculate damages in the manner suggested by the Union, that does not mean that it is the only or the best approach in light of all relevant remedial factors. The Postal Service reiterates that the parties never envisioned the GSRA as a device for resolving a case such as this, and that it is ill-suited to that purpose.

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<sup>2</sup> Postal Service witness Grisham stated that, based on the Postal Service's experience performing the analysis of the sample, a full analysis of all 7,404 offices would take over 100,000 work hours.

The Postal Service also points out that the statistical data it presented was relatively basic and straightforward, and it disputes the Union's argument that reliance upon statistical evidence somehow would fundamentally alter the character of national level arbitrations. The Postal Service is not suggesting that statistical sampling is warranted as a general matter, but proposes it only on the totality of the unique circumstances of this case.

The Postal Service contends that issuance of a lump sum award to be distributed to identified active clerks is consistent with the parties' practice of settling national level disputes, prior Postal arbitrations and general make-whole remedial principles. It stresses that payments from the proposed liability pool will be made only to those clerks who worked at the Level 18 offices where the PMEOD function was unilaterally implemented and would be allocated -- at the Arbitrator's discretion -- either equally or proportionately based on days on the rolls during the liability window. The proposed award would specifically identify both the eligible employees and the amounts to which they would be entitled, as well as provide for a reserve to address subsequent claims that might arise. The Postal Service stresses that its proposal errs on the side of over-inclusion by not deducting time spent on the window by postmasters covering clerk breaks and lunches, even though the Arbitrator specifically noted that such deductions would not be inconsistent with the GSRA.

The Postal Service points out that the analysis of the data from all 7,404 Level 18 offices reflects that the actual liability falls somewhere between \$8.9 million and \$20.5 million. Hence, any award within that window would be justifiable. The \$14.7 million back pay award proposed by the Postal Service is the average of those amounts.

Finally, the Postal Service argues that its back pay proposal is consonant with the nature of the wrong, compensating clerks for potential lost work opportunities, rather than punishing the Postal Service because postmasters or supervisors spent more than their contractually permitted hours assisting customers and processing transactions in furtherance of the Postal Service's vital public mission.

UNION POSITION

The Union contends that back pay should be determined by applying the GSRA and recalculating postmaster hours to correct for use of the PMEOD button. Once the hours are corrected by applying headquarters data to make a postmaster's time on the window start and stop when the window was opened and closed to the public, the parties should continue to follow the GSRA process for determining the back pay rate and the payee. The Union insists that the Arbitrator has no discretion to ignore the GSRA which dictates how back pay is calculated and paid for precisely the kind of violation the Postal Service committed with the PMEOD button. The Postal Service's complaint that retroactive compliance with the GSRA is too time-consuming must be rejected. Compliance with the GSRA, the Union maintains, is possible and realistic.

The Union asserts that, particularly because this matter is now three years older, the Arbitrator should begin with the default recalculation that the hours the window was open to the public in offices with the PMEOD button be the measure of a postmaster's hours of bargaining unit work. Absent evidence on Form 1412s that mitigate these hours, the total hours the window was open on a day a postmaster covered the window should be used to assess against the 15-hour limit.<sup>3</sup>

The Union points out that arbitrators normally order the Postal Service to use its records to recreate what would have been the employee's work hours without the Postal Service's violation, and to base back pay on those hours. It adds that this Arbitrator followed such a standard in remedying the Postal Service's first Global Settlement Violation on mis-measuring time spent working the window.<sup>4</sup>

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<sup>3</sup> Official reports indicate the time the window was open to the public and who was working on the window on a particular day.

<sup>4</sup> The Union also cites a decision by Arbitrator Goldberg in Case No. Q10C-4Q-C 15206043 (2017), involving Postmaster Reliefs performing bargaining unit work.



The Union maintains that beginning with a default assumption that postmasters' hours match the hours the window was open is an appropriate remedial approach that allows the process to move forward based on official information readily available to the parties. If, however, the Postal Service can produce Form 1412s that show fewer hours for the postmaster, that proof can adjust the hours counted against the 15-hours limit. While the Arbitrator noted in the Merits Award the possibility that a postmaster covering for a clerk on a break or lunch was not necessarily inconsistent with the GSRA, there should be no deduction for breaks or lunches in recalculating postmasters' time performing bargaining unit work. As the Postal Service found in doing its survey, the nature of the Postal Service's violation of the PMEOD button and how it is reflected on the Form 1412 makes it too difficult and too uncertain to determine which starts and stops were legitimately for clerk breaks or lunches. Moreover, the Global Settlement's "bright line" limits and requirement that postmaster hours be worked consecutively strongly suggests that the parties never intended postmasters to bounce off and on the window, even for clerk breaks.

The Union asserts that if the Postal Service wants a specific accounting of hours in an office, it could follow its agreement and have postmasters recalculate their hours based on office hours or Form 1412s. Instructing each postmaster to recalculate his or her hours increases the number of people performing that task from a handful to thousands, significantly decreasing the time needed to review and recalculate hours, and is the method called for in the GSRA. The Union also stresses that back pay will not cure all harms caused by the Postal Service's violation. PTFs may have lost out on conversion opportunities in addition to back pay for the hours postmasters spent performing their work.<sup>5</sup>

Absent reaching a settlement with the Union, the Union contends, the Postal Service should be directed to recalculate hours and notify the Union of violations arising from the recalculated hours within 90 days of the remedy award. It should also be directed to submit a status report 45 days from the date of the remedy award so that any issues with its

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<sup>5</sup> The Union does not seek actual conversions as part of the remedy in this case.

recalculations can be resolved expeditiously. The Union further requests that the Arbitrator retain jurisdiction over the back pay calculation.

The Union insists that the Postal Service's demand that the Arbitrator order a total back pay figure based on its unilaterally derived estimates is terribly misplaced and would have serious negative consequences. Basing back pay on averages and estimates without the restorative correction of postmasters' hours establishes troubling arbitral precedent and encourages poor practices and under-reporting among managers and postmasters in the field. Relying on statisticians and economists to estimate back pay for Postal Service violations may cause a dramatic unwanted change in arbitrating remedies and put a new burden and expense for critiquing and countering the Postal Service's numbers on the Union. Replacing the contractually mandated remedy with statistical likelihoods degrades compliance and fails to foster accountability among the managers who violated the contract. The Arbitrator should not replace a negotiated agreement with unilateral estimates from the violating party.

Moreover, the Union points out, the Postal Service's numbers indicate that eliminating the PMEOD button only modestly increased 15-hour violations during the period in issue when the record shows that its deployment cut such violations more than in half.<sup>6</sup> That is not what the Union saw in the field and the Postal Service offers no explanation for its miraculous improvement in Global Settlement compliance during that period. Even if the Postal Service's survey is statistically legitimate and the randomness of how offices are selected maintains the statistical accuracy of the results -- which the Union cannot attest to -- the survey's small size, its exclusion of serious violators, and its results expressed as averages that do not match any person's lived experience certainly will be viewed suspiciously by local unions and clerks.

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<sup>6</sup> The Union offered data showing actual hours violations during and immediately prior to use of the PMEOD button, which began to be rolled out in May 2015. Consistent with a 2016 Postal Inspector General's report that due to management actions to reduce postmaster hours the number of hours exceeding the 15-hour limit decreased by 65% from October 1, 2015 to March 4, 2016, the Union's data showed violations were cut in half once the PMEOD came into use. Immediately prior to launching the PMEOD button, the Union adds, the Postal Service exceeded the 15-hour limit by well over half a million hours in just four months which was worth at least \$5 million per week.

Finally, the Union points out that, unlike in the AOI Remedy Award, there is no need in this case to guess what would have happened if the Postal Service had not violated the GSRA. It is plain from postal records how much time postmasters spent performing bargaining unit work in excess of the 15-hour limit. Back pay can be determined with certainty for the Postal Service's violation using a reasonable application of the parties' GSRA.

### FINDINGS

In a 1989 decision involving these same parties which I have cited in prior cases, Case Nos. H1C-NA-C 97 et al., Arbitrator Mittenthal stated:

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

The remedy issue to be decided here, based on my retained jurisdiction in the Merits Award, concerns the issue of back pay. The merits Award, which was issued at the end of 2017, provides in relevant part:

The issue of back pay remedy for the violations that have occurred is returned to the parties to determine an appropriate remedy that is fair and reasonable taking into account all relevant factors. I retain jurisdiction over the issue of remedy in the event the parties are not able to resolve it.

In the Findings that the Award was based on, I stated:

Although the Union has requested that the arbitrator provide a specific back pay remedy for the violations that have occurred, I am returning that issue to the parties to determine an appropriate remedy that is fair and reasonable taking into account all relevant factors, including the fact that use of multiple End of Days to

provide clerk break and lunch relief is not inconsistent with the Global Settlement and GSRA. I will retain jurisdiction over the issue of remedy in the unlikely event the parties are not able to resolve it.

In or about May 2020, more than two years after the Merits Award was issued, my retained jurisdiction was invoked. As their respective proposed remedies make clear, the parties have different notions of the appropriate back pay award and how it should be determined.

The Union contends that the GSRA is controlling and spells out the only proper remedy. The Postal Service disputes this and argues that the provisions of the GSRA which the Union cites are not applicable here. The Postal Service maintains that its proposed statistical sampling remedy is fair and reasonable and consistent with the Merits Award. The Postal Service further asserts that the Union's proposed remedy is far less practicable, would unduly delay implementation of the remedy, would require expenditure of substantial resources that can be better used elsewhere and would not produce a result that is any more accurate a measure of actual harm to the bargaining unit.

The back pay remedy in this case is in the nature of a make whole remedy designed to reasonably place the affected bargaining unit clerks in the position they likely would have been in if there had been no violation by the Postal Service. In the Merits Award proceeding, the Union requested a back pay remedy based on the GSRA provisions it continues to insist are controlling in this supplemental proceeding. If I had concluded that such a remedy was contractually required, as the Union asserts it is, I would have granted that remedy. I rejected granting the Union's requested remedy.

The automatic remedy provided for in the GSRA is generated when a postmaster exceeds the weekly 15-hour limit. This is determined based on the Form 1260s submitted by postmasters recording their hours performing bargaining unit work, which are provided in electronic format to the Union at the national level on a weekly basis. The Form 1412s, which are maintained only in hard copy format and are voluminous, are available for the local parties

to use as a means to check the accuracy of the submitted Form 1260s. The Form 1412s are not used to generate automatic or presumptive remedies. The GSRA, together with the JCIM, provide the means to determine the payee(s) and the amount of pay to be provided as a remedy when the Form 1260s show a postmaster working excessive hours without the need to file a grievance.

In my Award, I did more than return the calculation of back pay to the parties. I directed the parties “to determine an appropriate remedy that is fair and reasonable taking into account all relevant factors.” One of those factors, as I indicated in the Findings, was that the use of multiple End of Days to provide clerk break and lunch relief is not inconsistent with the Global Settlement and GSRA. In other words -- and this is significant relative to the purpose of a make whole remedy -- if the Postal Service had not violated the parties’ agreement by installing and using the PMEOD button, postmasters could have, and likely would have to some extent, used more than one End of Day to provide such relief coverage without violating the agreement.<sup>7</sup>

The Union’s contention that all time between when the postmaster first logged on to POS/RSS and when the final End of Day occurred necessarily should be treated -- for remedy purposes in this case -- as time spent performing bargaining unit work goes too far. Moreover, the Union’s assertion that -- absent proof to the contrary -- the default position should be that when the postmaster is present the total number of hours the window was open on a particular day (even if a clerk also was present) should be considered as hours the postmaster worked the window goes even further.

The Postal Service’s proposed back pay remedy is based on Form 1412s generated during the period the PMEOD was in use collected from a statistical sampling of affected post offices. As noted, the 1412s are the only documents with the relevant information.

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<sup>7</sup> The purpose of using End of Day in the GSRA, as found in the Merits Award, was to prevent postmasters who were covering the window from instantaneous signing off from POS/RSS on a transaction basis, as the PMEOD button was observed being used at the Mt. Vernon post office when representatives of the parties visited that location in July 2016.

The Union challenges this proposed remedy on various grounds. Primarily, it rejects any form of sampling and insists on use of the actual hours at each of the almost 7,500 Level 18 post offices in issue. The Union also argues that the sampling of post offices may be inadequate to produce a good analysis in part because of the particular locations that were surveyed and the limited number that responded to the survey. The Union, consistent with its overall position, rejected the opportunity proffered by the Postal Service in its alternate proposed remedy to participate in the selection of the post offices to be sampled. The Union also expresses great skepticism as to the results of the survey reported by the Postal Service, stressing that the record shows violations of the 15-hour limit declined dramatically after the PMEOD button was implemented, and yet the Postal Service's survey purports to indicate that its use accounted for only a relatively small portion of that decrease. The evidence does not show that the Postal Service's statistical methodology -- which is relatively straightforward -- was designed or likely to result in undercounting of postmasters' hours. The survey's results are expressed as averages, and the experiences in different post offices -- some of which did not make use of multiple PMEODs -- no doubt varied. Moreover, as the Inspector General's Report cited by the Union indicates, management took other actions to reduce the number of hours postmasters performed bargaining unit work. It is not possible to attribute the overall sizeable reduction during this period only to use of the PMEOD button.

The Postal Service's proposed remedy notably treats all the time between when the postmaster first logged in to RSS until the postmaster's final End of Day as time spent working the window. So the major difference between the parties is whether to use the Postal Service's statistical survey or to collect, if possible, and analyze all the Form 1412s at almost 7,500 post offices for an average period of 90 weeks. I am not convinced that the latter would provide a significantly different or more exact overall make whole remedy so as to justify the huge expenditure of time -- whether at the national or local level -- and inevitable further delay in bringing this long-running dispute to a close and providing make whole relief to the affected employees.

I understand the Union's seeking to have back pay go to each affected bargaining unit member based on the specific violations in that employee's workplace. But we

are dealing with almost 7,500 post offices over an average period of 90 weeks, and increased precision is to be weighed against the delay and cost of attaining it. And, as already noted, the Union's methodology does not factor in all circumstances that might be relevant in determining exactly what likely would have happened if there had been no PMEOD button. To offset the relatively reduced precision of the Postal Service's proposed remedy, however, I find it fair and reasonable to grant a total award of \$20.5 million -- the upper amount of the range of actual liability which statistically corresponds to only a 2.5% chance that true liability is greater than that amount.

I have considered, but am not persuaded by, the Union's other arguments opposing a remedy based on a statistical sampling, including its citation of prior national arbitration decisions. The award in this case, it should be stressed, is based on and confined to the totality of the relevant facts and circumstances. It does not establish -- and is not to be cited as -- a precedent for other remedy cases which necessarily will depend on their own facts and circumstances, relevant contractual provisions and the exercise of the arbitrator's range of discretion.

As for distribution of the \$20.5 million award of total back pay in this case, it either is to be distributed: (1) to affected bargaining unit employees as determined by the Union; or if that option is declined by the Union (2) to clerks who worked in offices where the PMEOD function was enabled based on the relative number of days they worked during the period that function was enabled.

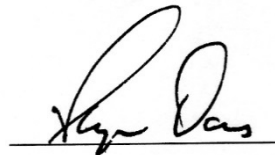
On balance, I find the awarding of \$20.5 million, based on the Postal Service's statistical sampling and analysis, to be distributed as provided for herein to be a more appropriate remedy under all relevant circumstances than that advocated for by the Union in this case.

AWARD

As set forth in the above Findings, I grant the following remedy in this case:

The Postal Service is directed to pay a total of \$20.5 million in back pay to be distributed: (1) to affected bargaining unit employees as determined by the Union; or if that option is declined by the Union (2) to clerks who worked in offices where the PMEOD function was enabled based on the relative number of days they worked during the period that function was enabled.

I retain jurisdiction for 60 days over any issues relating to implementation of this remedy that the parties are unable to resolve.

A handwritten signature in black ink, appearing to read "Shyam Das", is written over a horizontal line.

Shyam Das, Arbitrator