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. Q06C-4Q-C 11182451 |
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| and | ) | |
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| AMERICAN POSTAL WORKERS UNION, AFL-CIO | ) | |
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BEFORE: Shyam Das

APPEARANCES:

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| For the Postal Service: | Julienne W. Bramesco, Esq.<br>Redding C. Cates, Esq. |
| For the APWU: | Darryl J. Anderson, Esq. |
| Place of Hearing: | Washington, D.C. |
| Dates of Hearing: | November 12, 2015<br>November 13, 2015 |
| Date of Award: | August 18, 2016 |
| Relevant Contract Provision: | Article 32.2 |
| Contract Year: | 2010-2015 |
| Type of Grievance: | Contract Interpretation |

Award Summary:

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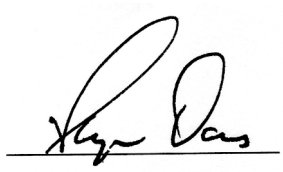
The Postal Service violated the National Agreement by notifying the Union of HCR contracts after they have been let. The Postal Service is ordered to cease and desist such violations and to comply with the notice and procedural provisions of Article 32.2.B before it awards a Highway Contract Renewal (HCR) contract.

The Postal Service also is ordered to comply with the following remedy:

(1) Within six months of the date of this Award (unless otherwise agreed), the Postal Service shall convert the 110 (or whatever number there continue to be) disputed routes remaining in service (out of the original 212 cited violations) to PVS service for a four-year period.

(2) By agreement, the parties may substitute other route(s) to be converted to PVS service pursuant to this order based on particular circumstances.

(3) I retain jurisdiction to resolve any matters relating to implementation of this remedy.



Shyam Das, Arbitrator

This grievance was filed by the APWU on April 19, 2011, alleging that the Postal Service had continuously violated the provisions of Article 15 and 32 by notifying the National Union of Highway Contract Renewal (HCR) contracts after they have been let. The Union cited 212 violations that occurred in 2010. The Union asked for a comprehensive remedy requiring that the 110 disputed routes remaining in service be converted from HCR routes to PVS routes for the regular HCR contract period of four years. The Union is also seeking compensation for the time after the violations when the routes have remained in service as HCR routes.[1]

The parties exchanged 15-Day letters on May 31, 2011. At an initial arbitration hearing on September 4, 2014, the Postal Service requested bifurcation to determine whether the remedy for violations of Article 32.2 previously had been adjudicated, Case No. Q94V-4Q-C 96044758 (Das 2004), hereinafter referred to as the St. Petersburg Award. On March 16, 2015, I issued an Interim Award in the present case, which included the following Findings:

[1] The Union requests: (1) that the 110 HCR contracts at issue that are still in existence be terminated and the work in question assigned to PVS employees for a regular-contract standard four-year period; (2) that, as compensation for the violation of Article 32.2 by contracting out under the HCR contracts that are now inactive, the bargaining unit be awarded compensation in the amount of $61,678,277; (3) that, as compensation for the wrongful contracting out of bargaining unit work under the 110 active contracts at issue, the bargaining unit be awarded compensation in the amount of $265,082,961 for fiscal years 2010 through 2015; (4) that, as compensation for any further delay in assigning this work to PVS employees, the bargaining unit be awarded compensation in the amount of $10,195,499 (or the appropriate proportion of that amount if some of the work is assigned to PVS) for each pay period after the Award in this case in which any of the 110 active HCR contracts has not been terminated and the work has not been assigned to PVS employees; (5) that the parties be instructed to meet and seek to reach an agreement on a remedy for all like or related violations of Article 32.2 that have occurred since the filing of the dispute in this case and that are the subject of a pending dispute between the parties; (6) that the Postal Service be ordered to cease and desist from failing to comply with the procedural requirements of Article 32.2; (7) that the Arbitrator retain jurisdiction to resolve any dispute about the implementation of this remedy award; and (8) that the Arbitrator retain jurisdiction to resolve any dispute over the validity of the various reasons offered by the Postal Service for its non-compliance with Article 32.2, including:

- That the renewed contracts were emergency contracts
- That the renewed contracts were short-term contracts
- That the renewed contracts were temporary contracts
- That the renewed contracts were being extended to permit compliance with Article 32.2.

In my 2004 St. Petersburg Award, which involved an admitted Article 32.2 notice violation involving work in St. Petersburg, I rejected the Union's contention that a uniform compensatory remedy such as it was seeking was required in all such cases. I held that "a determination that one remedy fits all Article 32.2 notice violation cases is not warranted." I provided a list of factors "an arbitrator conceivably could properly consider in fashioning a remedy for a violation of Article 32.2 of the sort at issue in this case."[3] The statement of my Award was as follows:

> The National Agreement does not mandate the remedy sought by the Union for notice violations under Article 32.2. The issue of remedy in the underlying grievance involving HCR 33549 in St. Petersburg is remanded to the local level, including regional arbitration if necessary.

The grievance in that particular case, as in the present case, was initiated at Step 4. Article 32.2 notice violation grievances prior to the St. Petersburg case, to my knowledge, had been filed and grieved locally and -- if they went to arbitration -- were arbitrated at the regional level.[4] I treated the issue of remedy as one that would turn mostly on local facts, which in a case like that -- which the Postal Service claimed was an isolated instance of a notice violation -- was appropriate. In that case, I did not focus on the fact that notice under Article 32.2 and the procedure triggered by such notice occurs at the National level, that is, between Postal Headquarters and the National Union.

Res judicata does not apply in this case. In St. Petersburg the Union was seeking a uniform remedy for every Article 32.2 notice violation regardless of other circumstances. I ruled against that. Here, the Union asserts the need and right to obtain an

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[3]The Postal Service conceded that the compensatory remedy the Union sought in that case could be appropriate in a particular case -- meaning a particular individual case -- depending on the circumstances.

[4] The Postal Service more generally maintained in that case that National level arbitrators consistently had rejected Union demands for blanket remedies, and, instead, remanded grievances from the National level to the regional level for resolution.

effective remedy at National arbitration for what it alleges is a systemic and pervasive failure by the Postal Service at the National level to provide the required Article 32.2 notice in literally hundreds of cases. The Union alleges that the Postal Service knowingly and repeatedly violated Article 32.2 and characterizes the Postal Service's action as, in effect, an abrogation of the parties' contract. Whatever the merits of the Union's contentions or its proposed remedy, this grievance raises different issues than the St. Petersburg case. Moreover, the Union's complaint really cannot be addressed on a case-by-case basis particularly at the regional arbitration level. The St. Petersburg Award rejected the notion of one remedy fits all Article 32.2 notice cases. It did not address the issue of a comprehensive remedy for the sort of National level violation of Article 32.2 alleged by the Union in this case.

The Postal Service further argues that the Union has not identified an interpretive issue to be decided in this case, pointing out that there is no dispute regarding the language of Article 32.2 and that the issue of remedy was presented and decided in the St. Petersburg Award.

To be sure, the Union cannot simply consolidate multiple separate notice violation claims each of which needs to be considered on its own merits with respect to whether there was a violation and, if so, what is the appropriate remedy. That would not raise an interpretive issue. But if the evidence establishes what the Union alleges in this case -- a wholesale abrogation or disregard of the notice requirements in Article 32.2 by the Postal Service at the National level -- then the issue of whether the Postal Service's actions or inactions warrant the sort of comprehensive and extraordinary remedy the Union seeks -- which can only be obtained in National arbitration -- could constitute an interpretive issue for purposes of Article 15. See my decisions in the September 6, 2002 Interim Award in the St. Petersburg case (Case No. Q94V-4Q-C 96044758) and in Case Nos. Q06C-4Q-C 10032106/10005587 (2010) and the National Awards cited therein.

The provisions in Article 15.2.Step 1(a) allowing for a class action grievance relate to class actions arising in a single office, not the situation posited here by the Union. And the Union's ability to possibly file an unfair labor practice claim before the NLRB does not mean it is foreclosed from seeking a remedy under the grievance and arbitration provisions of the National Agreement.

> Accordingly, I conclude that National arbitration of this grievance is not barred by res judicata and that, as set forth above, this grievance may present an interpretive issue properly to be decided in National arbitration. That will depend on the evidence developed at a hearing on the merits.

INTERIM AWARD

> The arbitrability or jurisdictional issues raised by the Postal Service in opposition to arbitration of the Union's Step 4 grievance in this case are resolved on the basis set forth in the final paragraph of the above Findings.

There is no dispute that the Postal Service has nearly always used two types of services side by side for highway movement of mail: Highway Contract Services, which are contracted services, and Postal Vehicle Services (PVS) which is made up of APWU MVS craft employees. Article 32.2.A provides:

> The American Postal Workers Union, AFL-CIO, and the United States Postal Service recognize the importance of service to the public and cost to the Postal Service in selecting the proper mode for the highway movement of mail. In selecting the means to provide such transportation the Postal Service will give due consideration to public interest, cost, efficiency, availability of equipment, and qualification of employees.

Article 32.2 requires the Postal Service to provide the Union at the National level with notice, which includes certain information, prior to the installation of HCR service so that the Union can provide a bid for that work.[2] This information, as specified in Article 32.2.C, includes:

> 1. A statement of service including frequency, time of departure and arrival, annual mileage, and proposed effective date of contract.
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> 2. Equipment requirements. If not comparable to standard USPS equipment available at that facility, the reasons

[2] Article 32.2.G defines the routes that are subject to Article 32.2. Generally excluded are routes longer than 350 miles round-trip or more than 8 hours in operating time from terminus to terminus.

therefore along with the cubic foot justification are to be provided.

3. A statement as to whether the proposed contract is a renewal of an existing contract and/or a partial or completely new contract solicitation.

4. For contract renewals, the current contractual cost is to be provided along with any specifics, if the terms of the renewal are modified to whatever degree.

5. If the new contract solicitation replaces in part or in whole existing Postal Vehicle Service (PVS) service, specifics as to the existing PVS service are to be provided as to the span of operating time, equipment utilization, annual cost, how the PVS employees impacted will otherwise be utilized and the projected United States Postal Service cost for subcontracting the work in question.

The Agreement also specifies in Article 32.2.B, the time period for the exchange of information and meetings between the parties:

> This information will be furnished at least sixty (60) days prior to the scheduled Installation of the service. Within forty (40) days of being furnished such information, the Union may request a meeting to discuss specific contract(s). Within forty-five (45) days of being furnished such information, the parties will exchange the basic cost analyses in order to facilitate discussions. The parties will meet on or before the sixtieth ($60^{th}$) day. <u>At no time will the subject highway contract(s) for which a meeting has been requested be awarded prior to the actual meeting.</u>
>
> (Emphasis added.)

The Postal Service acknowledges that it provided late notice -- after the HCR contracts had been renewed -- during the period covered by this grievance, but stresses that the parties subsequently engaged in the substantive procedures outlined in Article 32.2.B as referenced above. The parties held meetings, exchanged documents, and discussed the relative costs of HCR versus PVS. The parties disagree about whether those meetings truly afforded the Union the opportunity to make a competitive bid for the contracted services or if they were merely perfunctory and meaningless since the contracts already had been awarded.

APWU POSITION

The Union contends that the Postal Service's use of HCR contractors is excessive and inefficient. More importantly, the Union has done all it can to get the Postal Service to comply with Article 32.2 and it argues that it is entitled to an effective remedy now. The Union presented arguments and testimony which it says show why a prospective remedy is necessary to correct the contract violations in this case and why the remedy can be provided without imposing an undue hardship on the Postal Service.

At the outset, the Union stresses that HCR routes are contracted out bargaining unit work, and that all 212 contracts at issue in this case had been renewed before the Postal Service gave Article 32.2 notice to the Union. In every case, the Union provided a cost estimate for the PVS to perform the service in question and requested an Article 32.2 meeting. No manager with Surface Transportation Operations (STO) responsibilities participated in the discussions. Of the 212 routes in the original dispute, 110 are ongoing. The contracts all began in 2010 and expired in 2014, and the Union received renewal notices on fewer than 50 of them.

By way of background, the Union asserts that Article 32.2 procedures were generally followed until around 2008, but the Union considered the process to be unfair and regularly voiced its complaints to the Postal Service. As Union witnesses testified, the Union's major complaints, besides its confirmed belief that non-notifications were widespread, were that the cost comparisons being done by the Postal Service were incorrect and unfair, and that the Postal Service paid no attention to the Union's arguments on other factors the Postal Service had to give due consideration under Article 32.2. In particular, it points to changes in Form 5505 made in 1992, which the Union failed to timely grieve under Article 19. These changes and the manner in which the Postal Service administered Form 5505 resulted in: (i) double counting of trucks; (ii) overstatement of PVS management and tort costs and understatement of HCR administrative costs; and (iii) failure to take into account Postal Service payment of HCR fuel costs. The Postal Service also ignored information about overlapping runs that could be

combined to save money, part-time flexible drivers not working full time, full-time drivers on standby time, and idle trucks that could be used to haul mail then being hauled by HCRs.

The 212 violations at issue here, the Union maintains, are part of a broader pattern of violations that began years earlier and continued after this dispute was filed in 2011. The remedies requested by the Union are based on those 212 violations, but the Postal Service has not complied with Article 32.2 in any case since 2010, which means there are many more than 212 cases at issue and there is a need for the remedies sought by the Union.

The Union asserts that Labor Relations representatives sought to characterize later violations as efforts to comply with the contract. Many of the violations in this case were repeated four years later when the contracts in dispute were renewed. In the St. Petersburg case, the Union was seeking a uniform remedy to be applied in individual cases. Here, the Union says it is seeking a remedy for the wholesale violation of Article 32.2. The Union also claims that after St. Petersburg, the Postal Service moved to dismiss article 32.2 arbitrations at both the regional and the national level. The Postal Service, having established through the St. Petersburg arbitration that remedies must be sought case by case at the local level, then sought to cut off Regional Arbitration of cases that originated at the local level, on the ground that the 32.2 notice obligation is owed to the National Union, not to the locals. It was simultaneously opposing the Union in this case on the ground that is was necessary to seek remedies for the notice violations at issue by proceeding to Regional Arbitration, and arguing in Regional Arbitration that Regional Arbitrators have no jurisdiction over such cases because the notice obligation is owed to the National Union. The Union argues that the Postal Service, by moving to dismiss this case on the ground that the St. Petersburg Award precluded the Union from seeking the remedy it seeks here, was trying to force all 212 violations at issue down into a Regional Arbitration system where they could be defeated, or at least neutralized, one by one. Moreover, at the Regional level, no effective remedy could be provided for the systemic and wholesale violations of Article 32.2 that occurred at the National level.

According to the Union, the Louisville Dynamic Routing Project, paid for by the Union, shows how the Postal Service can convert HCR Contracts to PVS and save money. The

Union paid more than $900,000 to Satish Jindel and SJC Consulting, Inc. in an effort to persuade the Postal Service that, by using the flexibility and cost-saving features of the 2010 National Agreement and by combining PVS and HCR Routes, the Postal Service would find that using the PVS would be less costly than subcontracting the highway transportation of mail. Jindel, who was introduced to the Union through his consulting work with the Postal Service, developed, and SJC Consulting carried out, what the Union now refers to as the Louisville Dynamic Routing Project. Jindel concluded, as supported by his testimony at arbitration, that by using route optimization combining PVS and HCR routes, and by using PSEs as permitted under paragraph 2 of the parties' Motor Vehicle Craft Jobs MOU, substantial savings could be obtained.

The Union also insists that converting all 110 remaining HCR Routes in dispute to PVS would not be costly for the Postal Service. The Union's principal consulting economist, Kathryn Kobe, compared the cost of the still-operating HCR contacts -- using costs provided to the Union by the Postal Service under paragraph 2 of the 2010 MOU on Motor Vehicle Craft Jobs -- with the costs that the Postal Service would incur if it were to use PVS employees to perform the same work.[3] Kobe testified about her calculations for the first and third quarters in 2015. In Quarter 1, 2015, in 41 cases, which represent 41% of the 110 active routes, the estimated costs for the PVS routes were the same or lower than those for HCR routes. The total cost by which the PVS estimates exceeded the HCR estimates for all 110 active routes was $3.5 million. In Quarter 3, 2015, in 57 cases, which represent 52% of the 110 active routes, the estimated costs for the PVS routes were the same or lower than those for the HCR routes. The total cost by which the PVS estimates exceeded the HCR estimates for all 110 active routes was $1.6 million. The Union notes that the cost differential between the PVS and HCR is small, and the Postal Service data is not as reliable as it should be. The Postal Service could

[3] Under paragraph 2 of the MOU, in addition to agreeing to convert a minimum of 600 HCR routes to PVS without reference to the relative cost of the two services or any other factor, the Postal Service agreed to a joint review of approximately 8,000 other existing HCRs to determine whether the contracts for those routes could be terminated and the routes converted to PVS routes without increasing Postal Service costs.

reduce costs further by combining HCR routes with PVS routes -- the Louisville Dynamic Routing concept -- and be certain that overall costs would be lower than current costs.

The Union stresses that there is precedent for the remedies it requests in this case.[4] The language of Article 32.2.B is mandatory and unambiguous: "At no time will the subject highway contract(s) for which a meeting has been requested be awarded prior to the actual meeting." It asserts that if the language were applied literally, then all 212 routes at issue in this case were subcontracted in violation of a condition precedent, and those subcontracts are void, or voidable. The Union references the time limits in other articles of the CBA, but says that in this case it is not suggesting that every Postal Service failure to provide an Article 32.2 notice 60 days before installation of the service is as fatal as a Union failure to grieve a discharge within 14 days or a Union failure to file an Article 19 challenge within 90 days. Rather than arguing, as it did in the St. Petersburg case, that a single standard should be set and applied to all similar cases, here the Union is asserting that the Postal Service engaged in a protracted, willful, wholesale violation of Article 32.2. The Union is seeking a remedy sufficiently effective to compensate for the 212 violations that occurred in the context of what it contends was the virtual abrogation of Article 32.2 by the Postal Service.

Although the Union distinguishes this case from the St. Petersburg case, it discusses the six St. Petersburg factors and how each might be applied to this case. Additionally, the Union cites as a seventh factor "the nature of the bargaining relationship," which was mentioned by Arbitrator Mittenthal in a passage from a 1989 decision (Case Nos. H1C-NA-C 97 et al.) quoted in the St. Petersburg Award. The first factor is whether the specific work at issue previously was performed by Postal Service employees or was new work. Here, the Union argues that this criterion favors their requested remedy. The Postal Service has acknowledged the interchangeability of PVS and HCR work and under the terms of the 2010 National Agreement, the HCR routes will not cost significantly more when converted to PVS and may cost less. The second factor is whether the Union was deprived of a meaningful opportunity to propose alternatives to subcontracting or -- as the Postal Service claimed in the

[4] The monetary remedies requested by the Union were calculated by Kobe based on labor costs using the contractual bargaining unit wage rates specified in Article 32.2.

St. Petersburg case -- whether the verifiable difference in costs was so great that there is no chance that the Union could have persuaded the Postal Service to assign this work to its employees. The Union explains that the phrase "meaningful opportunity to propose alternatives to subcontracting" has two components, (1) the opportunity to meet in good faith to propose alternatives and show why PVS would be a better choice than the pending HCR route, and (2) the substance of the proposed alternatives. According to the Union, the evidence shows that the Postal Service knowingly, willfully, and intentionally denied the Union a meaningful opportunity to make proposals and present evidence under Article 32.2. Additionally, the Postal Service distorted substantive information made available to the Union by overstating PVS costs and understating HCR costs. The third factor is whether there are circumstances other than costs that might have come into play, such as in this case that, at the time the violations at issue occurred, there was excess PVS capacity. The fourth factor is the nature of the circumstances which resulted in the failure to provide notice to the Union, and the fifth factor is whether this was a very rare inadvertent exception -- as the Postal Service claimed in the St. Petersburg case -- or was just one example of a more widespread failure to provide notice -- as the Union's witness suggested might have been the case. The Union argues with regard to these two factors that the Postal Service's widespread violations of Article 32.2 in the present case were knowing and willful. The sixth factor is the nature of the impact of the subcontracting on the bargaining unit. The Union contends that had the Article 32.2 meetings been held in good faith, they might have been productive. The seventh factor is the nature of the bargaining relationship. The Union stresses that this factor weighs heavily in favor of awarding an effective remedy for the violations at issue now. The Postal Service has tried to gain Postal Service compliance with Article 32.2 for years with no results. A direction that the Postal Service merely start complying with Article 32.2 in the future would be no remedy at all.

The Union also points to arbitration precedent which it claims supports the provision of a strong remedy in this case. Arbitrators have broad powers to fashion necessary and appropriate remedies.[5] That authority extends to remedies for violation of contract provisions that do not expressly make provision for a remedy in the event they are breached.

[5]See: Case No. H4N-NA-C-21 et al. (Mittenthal 1986), citing United Steelworkers of America v. Enterprise Wheel & Car Corp., 80 S. Ct. 1358, 1361 (1960).

Additionally, the arbitrator needs creativity and a deep understanding of the parties' relationship.[6] Here, the Postal Service continuously violated the requirements under Article 32.2. There is strong precedent holding that the Postal Service cannot avoid a remedy in this case by arguing that, even if it had complied with Article 32.2 and given due consideration to all the factors there, no work would have been awarded to the Union. The Union cites Case No. Q94V-4Q-C 96044758 (Das 2004) where the following passage from Arbitrator Mittenthal in Case Nos. H1C-NA-C 97 et al. (1989), was adopted:

> 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 case here is not one of an isolated and inadvertent event. The Postal Service violated Article 32.2.B in a wholesale manner and did nothing to correct those violations. It renewed hundreds of HCR contracts without giving due consideration to the factors it must consider under Article 32.2 before it awards or renews a contract. Furthermore, the Union points out that in the AOI subcontracting case, Case No. Q94T-4Q-C 97031616 (Interim Supplemental Award) (Das 2013), a simplistic "do-over" approach as proposed by the Postal Service was found not to be appropriate. The Union stresses that in that case I wrote: "I am not persuaded that directing the parties to reenact the Article 32 [Section 1.B] process more than 15 years after the fact -- with the Postal Service in control of the final outcome -- would be an appropriate remedy in this case." Instead, the parties were directed to present evidence and arguments taking into account the discussion of remedy in the St. Petersburg case. Therefore, the Union asserts that giving the Postal Service a "do over" is not appropriate.

As several National Arbitrators have recognized, the Union asserts, the procedures required by Article 32.1.B and Article 32.2.B are an integral part of the "due consideration" of five factors that is required by Article 32.1.A and Article 32.2.A. The Union

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[6] See: Case No. H7C-NA-C 36 et al. (Mittenthal 1994); and Case No. H4C-NA-C 77 et al. (Mittenthal 1988).

presents information in the Article 32.2 meeting based on those five factors: "public interest, cost, efficiency, availability of equipment, and qualification of employees." Thus, the Union argues that the notice and meeting provisions of Article 32.2.B are part and parcel of the due consideration requirements of Article 32.2.A. According to the Union, without hearing the facts and arguments provided by the Union in the Article 32.2 meeting, the Postal Service cannot give issues relating to subcontracting due consideration. Because the notice must be accompanied by detailed information, which is then followed by a meeting, much more is at stake than just notice. The Union contends that the Postal Service is not giving the specified factors due consideration unless it considers the information and arguments presented by the Union before it makes its decision to award or renew the contract. The Union stresses that the gravamen of the requirement in 32.2.B is that "[a]t no time will the subject highway contract(s) for which a meeting has been requested be awarded prior to the actual meeting."

The Union insists the Postal Service misstated the issue in this case when it said it would like it to be: "[w]hat's the appropriate remedy for a procedural violation to Article 32.2.B when the Postal Service fails to timely notify the Union of HCR renewals." The actual issue, the Union insists, is about what remedy to apply for 212 documented and undenied violations that occurred in 2010, when the Postal Service had completely stopped providing timely notices and meetings under Article 32.2. This case is not a re-play of the St. Petersburg case, but must be informed by the evidence presented here. Also, more than notice occurs under Article 32.2. B. The Union reiterates that notice under 32.2.B initiates and underpins the due consideration requirement of 32.2.A.

Finally, the Union asserts that the Postal Services arguments are unavailing. Notice and meeting after the contract is awarded and the work has begun is not compliance under the contract. Article 32.2 makes it clear that notices, exchanges of information and meetings are to take place prior to the scheduled installation of service. Notice and meetings after the contract is awarded plainly is in violation of the contract. The Union stresses that the Postal Service presented no evidence that the late notices led to meetings and information exchanges that were the equivalent of timely compliance. The absence of any STO manager at any meeting makes it clear that no STO manager was giving any serious attention to what the

Union was saying in the untimely meetings. Restoration of the status quo ante in this case requires that the contracts awarded without prior compliance with Article 32.2 be rescinded. The additional remedies requested by the Union are required to provide a meaningful remedy to the Union in this case. It is not possible, here, literally to restore the status quo ante. Even if it were feasible to reenact the Article 32.2 process, the reenactment would provide no remedy for the willful violations of the requirements of Article 32.2 that occurred in this case.

## POSTAL SERVICE POSITION

The Postal Service argues that the Unions demand for damages is unjustified and unsupported. The Postal Service acknowledges its procedural violations, but points out that those violations did not preclude the Union from actively engaging with management in the substance of the Article 32.2.B renewal process. There is neither legal nor factual support for an award that includes massive monetary back pay and a redistribution of work to the Union moving forward at greater cost to the Postal Service. The Postal Service insists that the Union should not be awarded a windfall or what would amount to punitive damages.

The Postal Service stresses that an arbitration remedy must find its essence in the agreement. Although an arbitrator has broad discretion to construct an appropriate remedy, there are certain guiding principles established in arbitration precedent that are reflected in Elkouri and Elkouri, How Arbitration Works 18-16 (7th ed. 2012) (Kenneth May, Ed.). The purpose of an arbitration remedy is to restore the status quo; that is, to place the parties in no better or worse position than they would have been in had there been no contract violation. Damages must be proven with reasonable certainty and should normally correspond to the specific monetary losses suffered. Speculative damages are to be avoided.

The Postal Service insists the Union's request that the bargaining unit be awarded all HCR work and economic damages for years of work performed by HCRs is groundless. The Union has not shown that "but for" the tardy notice of renewal, the Postal Service would have removed the work for each and every HCR contract and awarded the work

to the Union. The Postal Service argues that the Union has not proved this causal connection, which is necessary in order to be entitled to damages.

The Postal Service contends that the Union got everything it was entitled to under Article 32.2.B. The Union was not financially damaged by the tardy notice because the Postal Service gave it every benefit of the bargain. The Postal Service complied with the other provisions of Article 32.2 once notice was provided. The Union had the chance to present its cost comparison information, which the Postal Service says is all that is required under Article 32.2. The Postal Service acknowledges the late notices, but stresses that the evidence shows a continuous and consistent attempt on the part of the Postal Service to comply with the spirit -- if not the words -- of the contract provision.

The Postal Service explains that in 2013 it attempted to rectify the contract violation by awarding certain HCR contracts on a temporary extension basis so that the parties could have the opportunity to meet and discuss the renewal before a final, more long-term contract was entered into. The Postal Service stresses that it never refused to meet or respond to the Unions information requests and it fully participated in the process.[7] The process required by Article 32.2 was completed, the Postal Service stresses, despite the late notice.

The Postal Service argues that the Union is asking the arbitrator to re-write the contract. The Union introduced much of its evidence as background in an attempt to use this grievance as an opportunity to advance its real claim: that the Postal Service allegedly fails to properly compare HCR and MVS costs for certain routes that the Union contends it can perform more cheaply. Although there are some limitations on subcontracting, Article 32.2.B does not change the Postal Services right to subcontract if the proper procedures are followed. The Union is not seeking a remedy for late notice, the Postal Service insists, but is seeking a remedy to re-write contract language that it does not like.

[7] The Labor Relations Specialist who met with the Union testified that she served as a liaison between STO managers and the Union, obtaining and providing information when requested by the APWU.

The Postal Service argues that a cease and desist order is the only appropriate remedy for the notice violation in this case. The cease and desist remedy has been used in the past where the Union suffered no quantifiable harm. The Postal Service contends that precedent shows that arbitrators have not awarded monetary relief for an Article 32 subcontracting violation where the bargaining unit did not suffer any monetary harm. Here, the HCRs in question were existing contracts, thus no employee was harmed when the work continued to be performed by HCR. Also, the employees who were engaged in PVS work continued to do their work without interruption. The HCRs in question were not new contracts -- the work at issue was HCR work -- yet the Union argues that the arbitrator should award them this work because they can do it more cheaply. However, Article 32.2 only gives the Union the opportunity to bid for the HCR work, and does not guarantee receiving the work.

The Postal Service asserts that the Union has not demonstrated that the Postal Service's tardy notice would have made a substantive difference in the ultimate decision to continue to subcontract the work. The evidence suggests that the Postal Service would still have renewed the HCRs. It also points to one of the Union's own witnesses, Satish Jindel, who suggested that under current working conditions it was more efficient for the Postal Service to use HCRs than PVS. The issue of whether the HCR or PVS employees can perform a route more cheaply is not at issue in this case. The time to litigate the proper cost comparison method is in the actual grievances addressing that issue.

The Postal Service further argues that the arbitrator should not consider the Union's expert report on damages to calculate a monetary remedy for two reasons. The Union's economist, did not establish causation between the alleged harm resulting from the Postal Services failure to timely notify the Union and the calculation performed. Also, even setting the issue of causation aside, this report should not be relied upon to support a damage calculation because Kobe made a series of errors in her calculation methodology. One example is that she mistakenly used a figure from the Make and Model Report that represented all Postal Vehicles, instead of the subset of the figure that represented the actual number of trucks used by PVS. Because of the mistakes she made there is no way that Kobe's report could be considered an accurate representation of damages.

Finally, the Postal Service says that not only was the Union not financially harmed because of the late notice, but also the Postal Service did not benefit by it. There were no cost savings, because it continued to pay employees and contractors, and it renewed routes that were already contracted out. It did not save any time, because it continued to send people to attend meetings. Moreover, the Postal Service stresses that it did not receive unfair profits by remaining with its HCR contractors, because those were already existing agreements.

## FINDINGS

Article 32.2.B of the National Agreement provides that the requisite notice ("information") "will be" furnished to the Union at least sixty days prior to the scheduled installation of highway contract service. This includes HCR renewals. The Union has forty days in which to request a meeting to discuss a specific contract. The parties then are to exchange basic cost analyses within forty-five days and meet on or before the sixtieth day since the notice. In no uncertain terms, Article 32.2.B states:

> At no time will the subject highway contract(s) for which a meeting has been requested be awarded prior to the actual meeting.

Timely notice is a necessary prerequisite for the Union to exercise its right to request a meeting before which the Postal Service is proscribed from awarding a highway contract.

The Postal Service in this case has not disputed that during 2010 and in subsequent years it engaged in wholesale and repeated violations of its obligation not to award an HCR contract before: providing notice, giving the Union the opportunity to request a meeting, and, if a meeting is requested, exchanging basic cost analyses and meeting with the Union to discuss the subject contract. The Postal Service has not offered an explanation for why it failed to comply with Article 32.2.B or to take effective corrective action even after the filing of this National grievance in 2011.[8] Consistent with my March 16, 2015 Interim Award in

[8] The Postal Service claims it did attempt to comply with the spirit -- if not the words -- of Article 32.2.B and it cites the awarding of temporary extension contracts in 2013 to allow additional

this case, the Union has presented an interpretive issue for purposes of Article 15. A remedy for this extraordinary notice violation -- involving notice to be given to the Union at the National level -- is not one that effectively can be dealt with at the local level or through separate grievances tied to individual HCRs.

The Postal Service claims that the Union nonetheless got the full benefit of its bargain with the Postal Service when notices ultimately were provided after the HCR contracts had been awarded. According to the Postal Service, the Union then had the opportunity -- which it evidently availed itself of -- to request a meeting and the parties then proceeded in accordance with the procedures in Article 32.2.B. But discussion and review and consideration by the Postal Service of the factors in Article 32.2.A after a service contract has been let cannot be presumed to be equivalent to the procedure the National Agreement provides for and, critically, is not what the parties bargained for.

A cease and desist order, as the Postal Service proposes, of course, is warranted. It is proper and necessary, but is not by itself sufficient given the nature of the Postal Service's violation, including that it was systemic, knowing and not shown to have resulted from circumstances beyond management's control. At the same time, any additional remedy must be related to and proportional to the harm -- as best it can be determined -- to the Union and the bargaining unit.

This case is about the Postal Service's failure to timely comply with the notice and discussion provisions and the "At no time..." provision in Article 32.2.B. This case does not encompass issues relating to the Union's myriad complaints regarding the substance of the cost analyses and the discussions between the parties and their impact on the Postal Service's application of the "due consideration" provision in Article 32.2.A. Much of the Union's evidence, ostensibly presented as background, focused on those other issues. The Union is correct that the notice requirement in Article 32.2.B initiates the process that leads to exchange of cost analyses, discussion and ultimate consideration by the Postal Service of the factors in Article

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time to follow the procedure mandated by the contract, but it did not establish that it had brought the process back into compliance. Moreover, as the Union urges, this use of temporary contracts may not have been authorized by Article 32.2.

32.2.A, but the import of this evidence was to show that, from the Union's perspective, in most HCR contract renewal cases -- even where timely notice was provided and Article 32.2.B procedures adhered to -- the Union effectively was confronted with a stacked deck -- in part because of its own failure years ago to challenge revisions to Form 5505.

The Union cites two decisions by Arbitrator Mittenthal in support of its monetary remedy claim in this case. The first case, Case No. H4C-NA-C 77 et al. (1988), involved the Postal Service's widespread and continuing violations of a requirement that 90% of the workforce be full-time employees. Arbitrator Mittenthal rejected Postal Service arguments against granting specific relief for those violations in a National level grievance. But his award provided for back pay to part-time employees who would have been converted to full-time status if the Postal Service had complied with the contract. These were identifiable employees who had lost earnings as a result of the Postal Service's violation. The second case, Case No. H7C-NA-C 36 et al., involved the Postal Service's repeated violation of a 5% cap on the hiring of casual employees. The work performed by the excess casuals was work that contractually should have been performed by bargaining unit employees. Although he recognized that there was only a slim possibility of identifying the injured employees, Arbitrator Mittenthal remanded the remedy question to the parties for further consideration, concluding that: "Some form of monetary remedy is plainly justified." In that case, however, not only was the actual harm to the bargaining unit -- if not identifiable employees -- clear, but, as Arbitrator Mittenthal stressed:

> It [the Postal Service] had been ordered by an earlier award to 'cease and desist' from exceeding the casual ceiling. Notwithstanding this order, it plainly exceeded the casual ceiling in some twenty different accounting periods over five years.

The situation in the present case differs in that there is little likelihood, as a general matter, that even if the Postal Service had provided timely notice and otherwise followed the procedure mandated by Article 32.2.B the Postal Service would have retrieved the HCR work at issue for performance by the bargaining unit rather than renewing the contracts.[9] The Union's own evidence supports this conclusion. Other changes -- not at issue in this case

[9] The result in some individual cases may be different, but those cases are not before me.

-- would have been required for the Union to make any substantial inroads. Moreover, in this case, the Postal Service was not in violation of an existing cease and desist order.[10]

In sum, I am not persuaded that granting the Union's requested monetary remedy is appropriate or justified in this case. As previously indicated, however, the Postal Service's widespread and repeated disregard for the requirement of timely notice and continuing violation of the "At no time..." provision in Article 32.2.B requires more than a cease and desist order. The Postal Service had ample opportunity to correct its ways and has offered no compelling explanation for not having done so in response to this 2011 grievance.

Accordingly, in addition to a cease and desist order directing the Postal Service to comply with the notice and procedural provisions of Article 32.2.B before it awards an HCR contract, I will grant the following remedy:

(1) Within six months of the date of this Award (unless otherwise agreed), the Postal Service shall convert the 110 (or whatever number there continue to be) disputed routes remaining in service (out of the original 212 cited violations) to PVS service for a four-year period.[11]

(2) By agreement, the parties may substitute other route(s) to be converted to PVS service pursuant to this order based on particular circumstances.

Part of the context I have taken into account in providing this particular remedy is that the Postal Service's violation of Article 32.2 is not limited to the 212 cited violations that occurred in 2010, but has been widespread and repeated. Together with the cease and desist order, this is

[10] Such an order is included in the remedy to be granted in this case, and any future violations will have to be evaluated for remedy purposes in that context.

[11] I recognize that the Postal Service may be required to idemnify contractors, but that is a risk it took by awarding contracts in contradiction to Article 32.2.B.

intended to remedy the harm to the Union and the bargaining unit arising from these violations and to impress upon the Postal Service its obligation to fully comply with the procedures it agreed to with the Union.

## AWARD

The Postal Service violated the National Agreement by notifying the Union of HCR contracts after they have been let. The Postal Service is ordered to cease and desist such violations and to comply with the notice and procedural provisions of Article 32.2.B before it awards a Highway Contract Renewal (HCR) contract.

The Postal Service also is ordered to comply with the following remedy:

(1) Within six months of the date of this Award (unless otherwise agreed), the Postal Service shall convert the 110 (or whatever number there continue to be) disputed routes remaining in service (out of the original 212 cited violations) to PVS service for a four-year period.

(2) By agreement, the parties may substitute other route(s) to be converted to PVS service pursuant to this order based on particular circumstances.

(3) I retain jurisdiction to resolve any matters relating to implementation of this remedy.

Shyam Das, Arbitrator