NATIONAL ARBITRATION
Supplemental Award No.1 Concerning Remedy
Case No. 095R-4()-C 02101267 ("Mail Count Conduct")

In the Matter of the Arbitration Between

UNITED STATES POSTAL SERVICE

- and -

NATIONAL RURAL LETTER CARRIER'S ASSOCIATION

Subject: Remedy Implementation

Dana Edward Eischen, Arbitrator

Appearances

For the NRLCA: Peer & Gan, LLP

by Michael Gan, Esq.
and
Dennis Clark, Esq.

For the Postal Service: Lynn D. Poole, Esq.
Manager, Arbitration

PROCEEDINGS

Under date of May 15, 2007, I issued an 88-page Opinion and Award deciding the above-referenced matters, the Award portion of which reads in pertinent part as follows:

Case No. 095R-4()-C 02101267 ("Mail Count Conduct")

The Postal Service did violate the National Agreement, before and during the 2002 NMC, by instructing and requiring managers and supervisors, to "target and correct" count totals in Column J, Column Q and Column R of Form 4239 which exceeded certain national average "benchmark/target/threshold" standards unilaterally established, issued, promulgated and enforced by Postal Service managers.

REMEDY

1) The counts or results of the 2002 NMC relative to Columns J-Q and R are hereby rendered null and void.

2) The Postal Service is directed to "re-build" the Standard Hours of each rural route counted during the tainted 2002 NMC, using the data set for Columns J-Q and R from the mail count of that particular route which most recently precedes the 2002 NMC and the 2002 NMC data set for all other elements except Columns J-Q and R, and to calculate for each such rural route constructive Evaluated Hours based on that "hybrid" mail count data;

3) The Postal Service is directed to pay to each regular and relief carrier serving on the rural routes counted during the 2002 NMC, for the time period beginning with the effective date of the 2002 NMC evaluated pay and ending with a new evaluation based upon the properly conducted mail count of that particular route which next follows the 2002 NMC, the difference between the "hybrid" evaluated pay calculated in accordance with ¶ 2 of this Award and the 2002 NMC evaluated pay invalidated by ¶ 1 of this Award.

4) In accordance with the last sentence of Article 15, §5 of the Agreement, costs of the arbitration of these two consolidated cases are assessed 2/3 to the Postal Service and 1/3 to the NRLCA.

5) Arbitral jurisdiction is retained to resolve any disputes which may arise between the Parties regarding the meaning, application or implementation of this National Arbitration Award in Cases Nos. Q95R-4Q-CO2101253 and Q95R-4Q-CO2101267.

After receiving that decision, the Postal Service proposed and the Parties discussed settling on an alternative liquidated remedy; which they discussed at some length, while simultaneously engaging in negotiations for a new Collective Bargaining Agreement. After those discussions about an alternative remedy for the Postal Service's proven contract violations during the 2002 NMC stalemated in late 2006, however, the following exchange of correspondence ensued:

USPS Contract Administrator William Daigneault to NRLCA President Donnie Pitts (11/28/2006)

> The purpose of this letter is to notify the NRLCA how the Postal Service intends to carry out the remedy ordered by Arbitrator Eischen in case numbers Q95R-4Q-C 02101253 and Q95R-4Q-C 02101267 because the parties have so far been unable to negotiate a mutually acceptable compliance plan.
>
> As you are aware, the award rendered the results of columns J, Q, and R from the 2002 mail count null and void. Implementation of the award requires the Postal Service to recalculate route evaluations for the 69,569 routes counted during the 2002 national count. Arbitrator Eischen directed the Postal Service to "re-build" the standard hours for each of the 69,569 routes by substituting the results of columns J, Q, and R from the mail count that most recently precedes 2002 while retaining the remaining results from the 2002 count. Arbitrator Eischen referred to the resulting calculation as the "hybrid" evaluation.
>
> To comply with this directive, the data in columns J, Q, and R for each route involved in the 2002 national count will be replaced with the data in columns J, Q, and R from that route's most recent previous national count (2000, 1999, or 1998). Each route will have to be manually rebuilt to include any and all route adjustments through the route's next mail count. Pay adjustments will be made automatically to the carriers who served the route during the time in question. Preliminary analysis of mail count data indicates that the hybrid evaluations will produce the following three general results: no payment, an underpayment, or an overpayment to the carrier. The hybrid evaluation applies to carrier compensation for the period beginning May 4, 2002, through the effective date of the route's next mail count. Interim adjustments to the route between May 4, 2002, and the route's next mail count will apply to the hybrid evaluation and may result in an increase or decrease in compensation.
>
> If the hybrid evaluation for the 2002 count increases the route's evaluated weekly hours in accordance with Article 9.2.C.6, carriers serving the route will receive back pay. The Postal Service estimates that approximately 21 percent of the hybrid evaluations will result in back pay. Because Arbitrator Eischen denied the NRLCA's request for interest, the back pay will not include interest. If the hybrid evaluation is the same as the 2002 mail count evaluation, carriers serving the route will not receive back pay. Approximately 66 percent of the hybrid evaluations fall into this category. If the hybrid evaluation reduces the route's evaluated weekly hours in accordance with Article 9.2.C.6 as compared to the 2002 mail count evaluation, carriers serving the route will receive a letter of demand in the amount of the overpayment. Approximately 13 percent of the hybrid evaluations fall into this category.

Any reduction in route evaluations results from adherence to Arbitrator Eischen's formulation as set forth in his award and the language of the current collective bargaining agreement. The Postal Service will not collect interest on the amounts of the overpayments.

Approximately two thirds of the reductions in the hybrid routes (or 9 percent of the total) are expected to result from reduced hours within the same route classification. For example, if a 42K route is reduced by one evaluated hour as a result of creating the hybrid route, the route will now be classified as a 41K route. The remaining one third of the reductions is expected to result from a change in route classification. For example, the evaluation of a 46H route that increases one hour will become a 43J, which will reduce the evaluation by three hours. However, when a route classification changes from an H to a J, H to a K, or J to a K, the carrier will receive the corresponding number of X days (days off with pay) for the additional days worked during the period in question.

All of the above estimates are based on data that includes 63,789 rural routes out of the 69,569 routes counted during the 2002 national count. There is no data for the remaining 5,780 routes, of which 2,410 new rural routes were created between the 2000 national count and the 2002 national count. The remaining 3,370 routes were not counted during the 2000, 1999, or 1998 national counts and it is not practical to review national count data prior to 1998 because it is likely that the route has been involved in a subsequent special mail count for which the Postal Service has not retained the data. The Postal Service will treat these routes like the 66 percent of the total routes where the hybrid evaluation is the same as the 2002 mail count evaluation.

Calculating the hybrid evaluation for 63,789 routes for each carrier to which it will apply will require a substantial amount of time and resources. While the Postal Service cannot provide a better estimate until we begin the rebuilds, we believe it will take well over a year to complete these adjustments.

Please let me know whether you have any issues with our plan to implement this award. If you have any other questions concerning this matter, feel free to contact me.

* * * * * *

NRLCA President Donnie Pitts to USPS Contract Administrator William Daigneault (12/15/2006)

Thank you for your letter dated November 28, 2006, which details the Postal Service's plan for compliance with Arbitrator Eischen's May 15, 2006, Award and remedy in case numbers Q95R4Q-C 02101253 and Q95R-4Q-C 02101267 (2002 National Mail Count).

The Postal Service is correct that the parties have been unable to negotiate a mutually acceptable compliance plan. We had several meetings following the receipt of Arbitrator Eischen's Award during which we attempted to convince you that the Postal Service's proposed compliance plan was severely flawed. Now that we have the Postal Service's official position and see that nothing has changed, the parties are left with no choice but to seek the assistance df Arbitrator Eischen to resolve our disputes. As you know, Arbitrator Eischen retained jurisdiction to resolve any disputes over the "meaning, application, or implementation" of his Award.

The following represents the NRLCA's initial response to the Postal Service's November 28, 2006, letter which should clearly identify the areas of dispute.

1. We disagree with the Postal Service's position that rural carriers on approximately 13% of the routes will receive letters of demand and be required to pay monies to the Postal Service "'in the amount of the overpayment." In re-building each of the 69,569 routes, inevitably some of them will result in lower evaluations than resulted from the tainted 2002 Mail Count. This is particularly possible with routes that had not been counted in a number of years and with routes that experienced growth since they were last counted prior to 2002. In such cases, it is our insistent position that none of the carriers serving those routes will lose any money as a result of the Award. Arbitrator Eischen spoke only of payments by the Postal Service to carriers in order to heal the "proximate damage" caused by the Postal Service's violation of the National Agreement.

2. We disagree with the Postal Service's position that rural carriers serving on routes created after the 2000 National Mail Count but before the 2002 National Mail Count are not entitled to a remedy. We do not believe that Arbitrator Eischen intended that the carriers serving on the 2,410 "new routes" (those created after the 2000 National Mail Count) should not receive a remedy. We believe that Arbitrator Eischen will fashion a remedy for those routes so that the Postal Service does not gain the unfair result of benefitting from its "egregious"2002 violations with respect to those routes.

3. We also disagree with the Postal Service's position that the 3,370 routes that had not been counted since 1998 should not receive a remedy "because it is likely that the route has been involved in a subsequent special mail count for which the Postal Service has not retained the data." Assuming those routes were counted in special counts, the Postal Service should not be excused for providing those carriers an appropriate remedy simply because it has not retained the special mail count data needed to complete a re-build pursuant to the Award. The Postal Service should not be permitted to benefit because it, the perpetrator of the egregious 2002 violations, has not retained necessary data to comply with the Arbitrator's Award.

4. We advised you during our discussions on a mutually acceptable compliance plan that the question of interest remains an issue. n our initial grievance filed with the Postal Service, the NRLCA demanded that all carriers "be made whole in any all respects". Interest is a commonly recognized component of a make-whole remedy. Thus, we believe that we properly requested interest at the inception of the grievance and that it was not, therefore, a new issue raised for the first time in our post-hearing brief. Thus, we will seek reconsideration of the Arbitrator's denial of pre-Award interest.

In addition, you have indicated that the Postal Service has not begun the re-build process and that "it will take well over a year to complete these adjustments." It has already been seven-months since the Award issued, and given the Postal Service's time line for compliance; we believe that rural carriers are also entitled to post-Award interest from May 15, 2006, until payments are made to the affected carriers.

We will provide a copy of your November 28, 2006, letter to me and this response to you directly to Arbitrator Eischen to help expedite the resolution of our differences. While the

> NRLCA does not believe that a hearing is necessary, it would like the opportunity to brief the issues in dispute. That said, the NRLCA will be guided by whatever course of action Arbitrator Eischen deems appropriate.

Thereafter, respective counsel for the Parties forwarded to me the above-quoted correspondence and jointly invoked my retained jurisdiction to resolve such disputes over the "meaning, application, or implementation" of the Remedy set forth in my May 15, 2006 Award, *supra*. Based on procedures established in a joint conference call on January 23, 2007, Counsel filed and exchanged supplemental briefs regarding those disputed points on February 28, 2007 and subsequently filed supplemental reply briefs dated April 2, 2007.

DISCUSSION

There were 69,569 rural routes counted in the 2002 national mail count. Of those, the Postal Service has identified 63,789 routes as to which the most recent national mail count preceding 2002 occurred in 2000, 1999 or 1998. Based on a projected "rebuild" of those routes using the preceding mail count J-Q-R data for each route, the Postal Service estimates that approximately 21 % of those routes will result in hybrid evaluations higher than the tainted 2002 evaluations, and thus carriers on those routes will receive back pay. USPS estimates that approximately 66% of the routes will result in hybrid evaluations the same as the 2002 tainted evaluations, and thus carriers on those routes will receive no back pay. As to these two categories of routes, the Association and the Postal Service appear to be in agreement.[1]

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[1] The Association avers that because it has not yet had access to any of the Postal Service data or computations it accepts, for present purposes but without prejudice, the Postal Service's representations of its computations and projected results.

The remaining 13% of the 63,789 routes fall into two categories: 1) approximately 9% are projected to have "hybrid" evaluations lower than the tainted 2002 evaluations, within the same route classification (*e.g.*, from a 42K route to a 41K route); 2) the remaining 4% have higher projected rebuilt standard hours, but result in lower "hybrid" pay evaluations because a change in route classification would occur which provides relief days in lieu of monetary compensation (*e.g.*, from an H route to a J route). As to both of these categories, the Postal Service proposes to send the affected carriers "letters of demand" requiring that they "pay back" to the Postal Service the amount of "overpayment" they have received as a result of the tainted 2002 national mail count. As to this proposal, the Association and the Postal Service most definitely disagree.

Of the remaining 5,780 routes (69,569 total routes less 63,789 discussed, *supra*,), c. 2,410 are new rural routes created between the 2000 and 2002 national mail counts (and thus never previously counted), and c. 3,370 routes were not counted during the 2000, 1999 or 1998 national mail counts. As to the former routes, the USPS proposes no remedy and as to the latter routes, the Postal Service's position is that "it is not practical to review national count data prior to 1998 because it is likely that the route has been involved in a subsequent special mail count for which the Postal Service has not retained the data." As to these proposals, the Association and the Postal Service also most definitely disagree.

Although I found the supplemental briefs and reply briefs very informative, no useful purpose is served by reiterating herein all of the points and authorities articulated by respective Counsel in expounding upon the various issues and positions raised in the Daigneault/Pitts correspondence, *supra*. In addition to those very helpful briefs, in preparing this response I also reviewed the

transcript of proceedings from the arbitration hearings, the original briefs and reply briefs, relevant provisions in the governing National Agreement and relevant provisions in the Handbook PO-603.

Among other recognized authorities cited in the briefs, I carefully considered §6(B)(1) of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, and Opinion No 22 of the NAA-CPRG, concerning appropriate counterbalancing between the doctrine of *functus officio* and the proper exercise of arbitral jurisdiction retained at the request of the Parties to oversee remedy implementation. *See* Rehmus, The Code and Postaward Arbitral Discretion, *Proceedings of 42nd Annual Meeting of the National Academy of Arbitrators* 127 (1990); Ellmann, Functus Officio Under the Code of Professional Responsibility: The Ethics of Staying Wrong, *Proceedings of the 45th Annual Meeting of the National Academy of Arbitrators* 190, 198 (1993); Dunsford, The Case for Remedial Jurisdiction in Labor Arbitration Awards, 31 *Georgia Law Review* 201 (1996). *See also* The Common Law of the Workplace: The Views of Arbitrators, 2nd Ed., p. 63, §1.110, T. J. St. Antoine, Editor (NAA/ BNA: 2005); FMCS Memorandum of March 3, 1980 to persons on its Roster of Arbitrators, as quoted in F. Elkouri and E. Elkouri, How Arbitration Works, 283, n. 265 (4th ed. 1985); Retaining Jurisdiction, *AAA Study Time*, July 1980, as quoted in F. Elkouri and E. Elkouri, How Arbitration Works, 258, n. 156 (4th ed. 1985);and, Labor and Employment Arbitration (Bornstein, Gosline, and Greenbaum, general editors) at §1.04 [4] [c], pp. 1-52 (Matthew Bender:2006).

Finally, I gave full consideration to the provisions of an October 3, 1975 Memorandum of Agreement between the Postal Service and its four major unions, including the National Rural Letter Carriers' Association, which states, in relevant part, as follows:

> It was agreed that sound labor relations policy and the arbitration processes established under Article XV would be better served by precluding requests for reconsideration by either a Union or the Postal Service for reconsideration of arbitration awards. Accordingly it was agreed that, beginning with the date of this letter, no requests or motions for reconsideration of arbitration awards would be filed by any Union signatory to the 1975 National Agreement or by the Postal Service... nothing herein is intended to preclude any right that any party may have to seek judicial review of an arbitrator's award. Nor is anything herein intended to preclude an arbitrator from correcting clerical mistakes or obvious errors of arithmetical computation.

Based on careful consideration of all of the forgoing, I hereby issue the attached Supplemental Award No.1 Concerning Remedy, wherein I exercise my retained jurisdiction to resolve disputes which have arisen between the Parties regarding the meaning, application or implementation of my National Arbitration Award in Cases Nos. Q95R-4Q-CO2101253 and Q95R-4Q-CO2101267. Proper exercise of that power, however, requires that I must decline the unilateral invitation of the USPS to explore "alternative methods of providing remedial relief rather than attempting to precisely gauge the amount for each and every carrier separately" as well as the unilateral plea of the NRLCA to "reconsider" my previous decision concerning its request for pre-Award interest.[2] However, I will take under consideration the NRLCA's request that I reserve the right to enter an award of post-Award interest in the event the Association makes a persuasive showing of undue delay on the part of the Postal Service in adhering to the terms of the May 15, 2006 Award and the attached Supplemental Award No.1 Concerning Remedy of June 15, 2007.

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[2] It should be made clear that the Parties remain free to agree on any and all "alternative methods of providing remedial relief" which they find mutually acceptable in lieu of my Award of May 15, 2006 and the attached Supplemental Award No.1 Concerning Remedy of June 15, 2007. However, I am not free to reconsider issues I have already decided therein or to pursue alternative methods of providing remedial relief absent mutual authorization by the Parties.

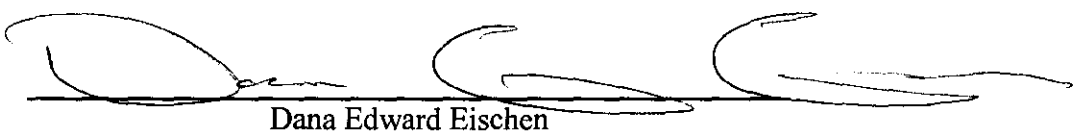
Supplemental Award No.1 Concerning Remedy
Case No. 095R-4()-C 02101267 ("Mail Count Conduct")

1) On approximately 5,780 rural routes counted during the tainted 2002 NMC for which the Postal Service now reports a lack of viable pre-2002 data (approximately 2,410 "new routes" created after the 2000 National Mail Count and approximately 3,370 routes not counted since 1998 "because it is likely that the route has been involved in a subsequent special mail count for which the Postal Service has not retained the data"), the Postal Service is directed to implement and apply ¶¶ 2 and 3 of the May 15, 2006 Award by adding 13.18 minutes to the Columns J-Q and R data set from the discredited 2002 NMC mail count of each such rural route and thus calculate reconstructed Evaluated Hours for each such rural route.

2) The May 15, 2006 Award makes no provision for issuance of "letters of demand" to recover retroactively from rural carriers any alleged "overpayments" resulting from the implementation and application of ¶¶ 2 and 3 of that Award and the provisions of Article 9.2.C.6 of the National Agreement. That issue was not ripe or adequately presented for consideration during the arbitration proceedings, hence no such "letters of demand" are expressly or implicitly sanctioned by the meaning, application or implementation of my National Arbitration Award of May 15, 2006 in Cases Nos. Q95R-4Q-CO2101253 and Q95R-4Q-CO2101267.

3) The Postal Service is directed to pay to each regular and relief carrier serving on the rural routes counted during the 2002 NMC, for the time period beginning with the effective date of the 2002 NMC evaluated pay and ending with a new evaluation based upon the properly conducted mail count of that particular route which next follows the 2002 NMC, the difference between the "hybrid" evaluated pay calculated in accordance with ¶ 2 of the May 15, 2006 Award, as augmented by ¶¶ 1 and 2 of this Supplemental Award No. 1.

4) In accordance with the last sentence of Article 15, §5 of the National Agreement, costs of this Supplemental Award No. 1 Concerning Remedy are assessed ½ to the Postal Service and ½ to the NRLCA.



Dana Edward Eischen
Signed at Spencer, New York on June 15, 2007

STATE OF NEW YORK SS:
COUNTY OF TOMPKINS

On this 15th day of June 2007, I, DANA E. EISCHEN, upon my oath as National Arbitrator, do hereby affirm and certify, pursuant to Section 7507 of the Civil Practice Law and Rules of the State of New York, that I have executed and issued the foregoing instrument and I acknowledge that it is my Opinion and Supplemental Award No.1 Concerning Remedy in Case No. 095R-4()-C 02101267 ("Mail Count Conduct").