National Arbitration Panel

In the Matter of Arbitration	)	
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	)	
between	)	
	)	
	)	**Case No.**
United States Postal Service		**Q98C-4Q-C 02013900**
	)	
and		
	)	
American Postal Workers Union	)	

Before: Shyam Das

Appearances:

For the Postal Service:	**Patrick M. Devine, Esq.** Marisi Ridi, Esq.
For the APWU:	**Melinda K. Holrnes, Esq.**
Place of Hearing:	**Washington, D.C.**
Dates of Hearing:	**February 17-18, 2005** **July 11-12, 2005** **November 2-3, 2005**
Date of Award:	**November 16, 2006**
Relevant Contract Provision:	**Article 19, and** **Handbook MS-47**
Contract Year:	1998-2000
Type of Grievance:	**Contract Interpretation**

Award Summary

The Union's challenge to the revised MS-47 issued by the Postal Service in 2001 is sustained on the basis set forth in the above Findings.

Shyam Das, Arbitrator

This case arises under Article 19 of the 1998-2000 National Agreement, which provides in relevant part:

> **Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.**
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> **Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Union at the national level at least sixty (60) days prior to issuance. Proposed changes will be furnished to the Union by hard copy or, if available, by electronic file. At the request of the Union, the parties shall meet concerning such changes. If the Union, after the meeting, believes the proposed changes violate the National Agreement (including this Article), it may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. Within fifteen (15) days after the issue has been submitted to arbitration, each party shall provide the other with a statement in writing of its understanding of the precise issues involved, and the facts giving rise to such issues. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement,**

shall be furnished to the Union upon issuance.

On August 9, 2001 the Postal Service informed the Union that it was revising Handbook MS-47, Housekeeping Postal Facilities, and provided the Union with a draft copy of the revised MS-47. The parties met on September 28 and October 11, 2001, to discuss the proposed changes. The parties have significantly different views as to the tenor and content of the discussions that took place. Suffice it to say the meetings did not result in consensus on whether the changes met the criteria in Article 19. The Postal Service subsequently published the new MS-47 (2001 MS-47) with an effective date of December 31, 2001. In the meantime, the Union submitted its challenge to the revised MS-47 to arbitration on October 15, 2001.

The first MS-47 was issued in 1974. It was replaced in 1983. The 1983 MS-47 remained in effect until it was replaced by the 2001 MS-47 at issue in this case. Both the 1974 MS-47 and the 1983 MS-47 stated that the Handbook "concerns itself principally with staffing and scheduling" relative to custodial maintenance. In each of those Handbooks staffing entailed a three-step procedure in which a building inventory is taken, frequency of performance is determined and staffing requirements are developed.

The 1974 MS-47 established fixed frequencies for how often particular areas and components of postal facilities are to be cleaned. In a 1981 National Arbitration Award in Case No. A8-NA-0375 (Gamser Award), Arbitrator Howard Gamser rejected the

Postal Service's contention that the 1974 MS-47 was merely a guide and that management had the right "to change forms, formulae, frequencies of cleaning as set forth in the Handbook", provided it maintained a satisfactory level of cleanliness. The opinion in the Gamser Award states:

> It must be apparent that if the USPS were going to design a system which would insure the maintenance of standards of cleanliness and safety in its buildings, and provide such detailed guidance to the field as is contained in the MS-47 Handbook, the question of frequency of performance could not be left open ended. To do so would give no assurance whatsoever that such standards of cleanliness and safety would be met. If the officer in charge at each postal facility or the responsible official in each region or district could set frequencies of performance, and lower them at will, a deterioration of cleanliness and safety standards could surely result. There is a Postal Service commitment to the maintenance of a clean and safe working environment. The Handbook criteria, both dealing with unit performance as well as frequencies, provide assurance that this commitment will be kept.
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> * * *
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> By requiring that the Postal Service adhere to the standards or criteria for unit performance as well as frequencies contained in the MS-47 Handbook, this Arbitrator is not imposing a manning floor or any manning commitment upon the Service in carrying out its maintenance responsibilities. The Service is required to instruct its facilities to employ these unit performance criteria and frequency standards in

> determining the number of man hours which will be required to perform the tasks at hand. Whether the man hours thus required are filled by employing overtime or by the reassignment of employees from activities in which they might otherwise have been engaged, not prescribed by standards or criteria in some other handbook, manual or published regulation, is a management decision.
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> For the reasons outlined above, the Arbitrator is of the opinion and must find that the provisions of Article XIX impose upon the Service a duty to abide by the criteria or standards established in the MS-47 Handbook for both unit performance as well as frequencies. The unilateral determination to depart from those standards, and particularly from the minimum frequencies contained in the Handbook, have resulted in violations of Article XIX. Article XIX incorporates by reference these working conditions into the collective bargaining agreement. Such modifications thus unilaterally imposed by management which have an adverse impact upon the tenure of employment or the workload of the employees affected must be rescinded.

In 1982, the Postal Service proposed revisions to MS-47 which the parties discussed in accordance with Article 19. The proposed revisions eliminated all frequencies of performance, leaving that to be determined by local management. In an Article 19 grievance, the Union vigorously opposed this attempt to promote flexibility by eliminating frequencies, fearing that local management would seek to cut costs, thereby reducing jobs and the level of cleanliness. The parties ultimately reached a compromise which was incorporated into the

1983 MS-47. The parties agreed on a range of frequencies, the top of which was the frequency previously mandated in the 1974 MS-47. At a given facility, local management could select the frequency for particular tasks within the specified range, commensurate with the Postal Service's responsibilities for maintaining a clean, healthy and safe work environment for postal employees and customers. Management could not go below the bottom frequency without first notifying the Union and justifying the deviation. Moreover, Section 116 of the 1983 MS-47 provided:

> Once a custodial staffing level is determined using the procedures in this handbook, that staffing level must be maintained. If conditions arise that warrant a change in staffing, the entire staffing procedure must be redone, i.e., new forms must be completed.

The parties also entered into a Settlement Agreement on April 20, 1983 (1983 Settlement Agreement), which states as follows:

> SETTLEMENT AGREEMENT
>
> The undersigned parties, by and through their respective representatives agree to the following provisions for the purpose of settlement of the pending grievance in Case No. H1C-NA-C-46.
>
> 1. The parties agree to the MS-47 Handbook, "Housekeeping-Postal Facilities" as revised (4/13/83) as found in Attachment One to this settlement agreement.

> **2. The Postal Service will not implement frequencies below the specified ranges contained in Attachment One without providing the union, at the Regional level, with the relevant document(s) justifying the reduced frequency(ies). Documentation will be provided to the union upon tentative Regional approval of a lower frequency than found in the revised MS-47 and the APWU will have an opportunity to meet with Regional management prior to implementation of a frequency(ies) below those delineated in Attachment One. If there is a disagreement between the parties as a result of this meeting, the dispute is a proper subject for the grievance-arbitration procedure.**
>
> **3. The Postal Service agrees that due to the implementation of the revised MS-47, employees on the payroll as of the date of this settlement will not be involuntary excessed outside the commuting areas of their present work location, nor will their hours be reduced due to the implementation and utilization of the revised MS-47.**
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> **4. The union agrees to withdraw the grievance scheduled for arbitration on April 29, 1983, on or before April 20, 1983.**

Earl Ray Cox retired from the Postal Service in 2000. He had served as a headquarters postal maintenance specialist. He currently is employed by a consulting firm. Sometime after the 2000 collective bargaining negotiations, and following his retirement, Cox was asked by Gerald Bohan, Manager for Maintenance Policies and Programs, to rewrite the MS-47 Handbook. Bohan, according to Cox, wanted to give the facility manager "the ability to react to different conditions or varying

conditions on a day by day or whatever is necessary basis." Cox testified on direct examination:

> He [Bohan] felt that the old MS-47 was very strict whenever you sit down and you try to project into the future exactly how many times you will do something. And Gerry wanted something that gave the facility manager more flexibility to manage the operation based upon the needs.
>
> Q So as I understand it, once that manager made -- filled out the 4839 for the scheduling worksheet, essentially the manager was stuck with that, the calculations that followed thereafter; is that correct?
>
> A He could change it, but to change it, you had to go back through and redo the entire staffing package according to the manual itself. Anything that warranted a change required that the entire package be redone. So there was no ability to react quickly.
>
> Q Okay. So, then, let's hear, in a sentence or two, what is the problem with the old MS-47?
>
> A The strictness of trying to sit down and project into the next 52 weeks what I am going to be doing and 20 percent of those weeks are an anomaly because it doesn't have full 7 days work or 5 days -- 6 days work because of holidays, annual leave, whatever.
>
> Q Well, describe for us what a common anomaly would be that arose under this -- under the old MS-47 then.
>
> A Any small facility that is closed on a holiday, when you sit down and do your

> 4839, your scheduling worksheet, you put in for basically five or six-day operations. Most of the time it is six. So that you are saying that that office is open six days and you plan for 52 weeks that it is going to be open six days a week for 52 weeks when in reality, when you put in the holidays, it is only open for 42 weeks on Monday because you have your 10 holidays or -- I use Monday. Some of the holidays float, but there is only, you know -- 10 of the 52 weeks there is normally an anomaly there.
>
> Q And what is the problem? How is that a problem?
>
> A You had no way to manage it. To be honest, most of the time when it is not done, it is like the Line-J case we had where the facility was closed on Monday or basically closed on Monday and the argument from the APWU was that we should have done the work anyway.

Cox explained how he went about preparing the new MS-47. He reviewed a marked up copy of the 1983 MS-47 that management had used in discussing some proposed changes with the Union in 1994. (Although those discussions were "good", nothing more was done at that time.) Cox said he also looked to see what private industry was doing. Specifically, he checked out a college website and saw that the college had combined a lot of their various space types in order to more easily manage, that is, budget for, custodial work. In order to determine how much work needs to be done, Cox asked all of the Postal Service areas to send him their existing MS-47 staffing surveys. He received about 500 surveys. Of this total, about 400 were from facilities with a total area of 15,000 sq. ft. or more, where he

could assume they had a custodial employee. The other 100 facilities were small enough that they likely were covered by the parties' Memorandum of Understanding regarding Subcontracting Cleaning Services (Subcontracting MOU), and the work could be contracted out. He disregarded those smaller facilities. The remaining 400 facilities were about 10% of the total postal facilities with 15,000 sq. ft. or more, and Cox considered them to be a representative sample. The purpose of gathering this data was to enable Cox to calculate the midrange of cleaning frequencies in the then current MS-47 staffing surveys.

The new 2001 MS-47 consists of the following five chapters:

Chapter 1 - Introduction
Chapter 2 - Determining Workload
Chapter 3 - Estimating Workhour Budget
Chapter 4 - Inspections
Chapter 5 - Performance Standards

As in the prior MS-47, a building inventory (Form 4869) is still completed as before. The performance standards -- minutes per square foot of cleaning, or per fixture or component, etc. -- essentially are the same as before, but they no longer include any frequencies. The prior workload analysis and summary (Form 4852), which was used to calculate the total workload (minutes per year) and the total number of employees needed to perform that workload for staffing purposes, is not part of the 2001 MS-47. In its place is an entirely new procedure which culminates in a Budget Worksheet, which is supposed to be prepared at each facility on an annual basis.

All of the areas included in the building inventory that are to be cleaned on a frequent basis, at least once a week, are grouped into four broad space types -- administrative, common, customer and workspace -- and the total square feet (in 1,000s) for each space type is calculated.' Using the 400 staffing surveys he received from the field, Cox calculated area servicing factors to be used to estimate the number of annual workhours for each of the four space types.[2] These area servicing factors reflect the average number of workhours (per 1000 sq. ft.) for cleaning all of the areas in each space type as shown on the 400 staffing surveys.

Cox also calculated three project factors to cover interior work performed on a less frequent basis. In reviewing the annual workhours (per 1000 sq. ft.) allocated to this project work on the staffing surveys he had collected, Cox determined that the average tended to "move" depending on whether the building size was between 15,000 to 35,000 sq. ft., 35,000 to 100,000 sq. ft. or over 100,000 sq. ft. So he developed three project factors (per 1000 sq. ft.) corresponding to these building size ranges. Finally, he established a uniform exterior factor of 3.52 annual workhours per 1,000 sq,

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[1] Toilets now are included in the appropriate space type on the basis of their square footage, not the number of fixtures to be cleaned, as before.

[2] There are a total of eight area servicing factors: one each for administrative and customer areas and three each for common and workspace areas, depending on whether the facility is a 1-tour, 2-tour or 3-tour facility.

ft. of exterior space, This factor was derived from the parties' agreement in the Subcontracting MOU that taking care of 500,000 sq. ft. of exterior space equals the work year (1760 hours) of one employee.

The Budget Worksheet is prepared by applying the appropriate square footage to the corresponding budget factor to calculate the number of workhours for area cleaning, project and exterior work for that particular facility. These are then totaled. The 2001 MS-47 directs the preparer to compare this total to the facility's anticipated LDC 38 (custodial) workhour usage in the current fiscal year. This comparison, Cox explained, basically "tells you where you are compared to the average". Section 3.1.2.1 of the of the 2001 MS-47 states:

> If there is a significant difference between the usage and the average, you should consider the following:
>
> If the usage is less than the average, review any inspection reports, PS Form 4851, if available, to determine if there are any recurring unsatisfactory items.
>
> If there are no recurring unsatisfactory items, determine if any reductions in servicing can be implemented without creating a safety and health hazard.
>
> <u>If reductions can be made, reduce the number of calculated workhours for that space type to generate a new total.</u>
>
> If the usage is greater than the average, review work schedules to determine if tasks are being performed unnecessarily. At a

minimum, the review should include the following:

(1) Are unoccupied areas of the workroom floor being serviced?

(2) Is there a mix of policing and cleaning in all areas? Policing tasks are light cleaning tasks whereas cleaning tasks are more deep cleaning tasks.

(3) Are areas receiving more servicing than necessary?

(4) Are storage areas being serviced more than necessary?

(5) Are occupants assisting by disposing of food debris, trash, paper bathroom waste, and cardboard in proper containers? All postal employees are responsible for properly disposing of trash, etc. in designated containers.

(6) Are the most efficient methods, materials, and equipment being used?

(7) Are building services personnel aware of their responsibilities and work schedules?

(8) Is local management providing oversight of the building services maintenance program?

(9) Has project work been performed as scheduled?

(10) Are there any unique areas or components that require additional or special servicing?

> **If reductions can be made, reduce the number of calculated workhours for that space type to generate a new total.**
>
> **After completing the reviews, enter the current year budget in the Current Fiscal Year LDC 38 Budget space provided; estimate the number of workhours that will be requested for building services maintenance; enter that number in the Number of workhours requested space provided, and forward to the appropriate higher level authority for approval or revision.**
>
> **(Emphasis added.)**

Cox explained that in filling in the number of workhours requested, some managers will put in the average, some will put in less, and some will put in what their budget was last year. More fundamentally, he said, since custodial employees cannot be fired or laid off, a manager has to request the number of workhours needed to cover the number of custodial employees at that facility.[3]

Section 3.1.3 (Budget Objective) of the 2001 MS-47 states:

> **The objective is to use the minimum resources necessary to maintain the facility in a clean, safe, and healthful condition that is consistent with the conditions set**

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[3] **There was testimony from other Postal Service witnesses that in preparing these Budget Worksheets, their areas also add hours for wash up time, breaks, and training, which were included on the old Form 4852, but are not factored into the Budget Worksheet.**

> forth in Section 4.2 [Inspection Techniques] of this manual.

Section 3.1.4.3 (Scheduling) states:

> In contrast to previous methods of scheduling the building services maintenance tasks, frequencies of service are not predetermined or fixed. Any combination of service (cleaning, policing, or no service) may be used at any time provided that the facility is maintained in a clean, safe, and healthful condition that is consistent with the conditions set forth in Section 4.2 of this manual. For example, cleaning or policing of some areas may be increased during periods of high activity and reduced or eliminated during low activity periods. The deployment of automated mail processing equipment and the reduced manual handling of mail has decreased the amount of litter such as, facing slips, strings, and rubber bands on the floor. As mail volume decreases, or as more mail bypasses an office, or does not require manual handling, servicing frequencies should be adjusted downward. Other factors, e.g., heavy snowfall, shortage of personnel, operational requirements, or the current cleanliness of the facility may require schedule adjustments on a daily basis.
>
> Any combination of full-time and part-time employees may be scheduled to perform the building services maintenance tasks.

The new MS-47 also contains other changes and revisions. Most of these, the Postal Service asserts, involved "simple combination, management, 'wordsmithing', and 'borrowing' of terms and principles carried over from the prior version of

the MS-47." The Postal Service acknowledges there no longer is a provision guaranteeing that once a staffing level is determined it will be maintained, absent a change in circumstances that would necessitate redoing the entire staffing procedure. But the Postal Service asserts that the staffing element remains as part of the budgeting process, in which the total number of annual workhours is determined. Scheduling of custodial personnel is now completed through the automated E-mars system.

The Union points to several key changes in the 2001 MS-47, in addition to the deletion of all cleaning frequencies and the staffing guarantee which were replaced with the budget process. Higher levels of authority are given the power, not just to review, but to approve and revise local management's workhour requests. The Handbook now includes new principles such as: "adopt[] a private sector business perspective"; manage custodial services and employees based on "economic reality and operative needs"; and decide the level and amount of cleaning to be done using "the most cost effective methods". The 2001 MS-47 now states that revisions of a custodial program may arise as a result of "changing economic conditions". Scheduling paperwork is optional, and quarterly inspections now are critical to determining day-to-day custodial needs. Section 1.2.2 states that management must "hold employees accountable for the tasks they are assigned". The Union notes that many custodial employees are disabled veterans, and that the Postal Service has removed the protection included in Section 163 of the 1983 MS-47, which emphasized that the performance standards are not to be used for disciplinary purposes.

The Union also asserts that between January 2, 2002 and December 2, 2004 the total number of bargaining unit custodial employees -- as shown on Postal Service documents listing the maintenance craft count by job titles -- decreased from 18,864 to 17,063. The Union's Maintenance Craft Director testified that he knows that there are many offices which have reverted and eliminated positions, citing the new MS-47 as justification, and he cannot otherwise account for this drop of 1,800 employees. He also noted that these reductions occurred notwithstanding headquarters instructions to the field that:

> It was not intended that the revised MS-47 would cause any radical changes in existing custodial workload. Major budget reductions locally based on Area level MS-47 mandates is not acceptable and may very well have a negative impact on the ruling when the revised MS-47 appeal is heard at the national level.

The Postal Service points to other (ORPES) data -- also presented by the Union -- showing that the number of custodial employees decreased from 18,322 in late September/ early October 2001 to 18,012 at the end of February 2003. This data, the Postal Service says, shows a much smaller drop (310) in the number of custodial employees. Moreover, the Postal Service presented data and testimony which it asserts establishes that it had subcontracted the work of at least 531 custodial positions during the period from January 2002 to about October 2005 pursuant to the Subcontracting MOU, which the Postal Service has taken greater advantage of since the 2001 MS-

47 highlighted the need to consider its applicability in smaller offices.

UNION POSITION

The Union contends that the revised 2001 MS-47 Handbook violates Article 19 of the National Agreement. In the Union's view, it is a complete nullification of the parties' contractual agreement to the terms of the 1983 MS-47 and undoes the very compromise and consideration that agreement embodied. Changing the MS-47 as the Postal Service has done eliminates the consideration the Union gave in order to agree with the Postal Service on the principles, terms and language of the 1983 MS-47. The Union agreed to a range of cleaning frequencies in the 1983 MS-47 that certainly was less than the absolute standard the 1974 MS-47 required. The parties knowingly predicted that replacing the fixed standard with a range would decrease the amount of cleaning and derivatively the number of custodial employees, but the Union accepted this loss in return for the consideration of a staffing guarantee set forth in Section 116 of the 1983 Handbook. A balance was struck between the parties' competing demands, demands that went to fundamental concerns of job protection and cost effective management.

The revision and implementation of a new MS-47 that eliminates cleaning frequency ranges, eliminates the staffing guarantee, and substantively changes other terms of the MS-47 about which the parties negotiated and agreed, the Union argues, not only is a change to the parties' agreement on the terms of the Handbook itself, but also their concurrent settlement

adopting that agreement as a key and operative term. Without frequency ranges, the Union asserts, the ongoing term of the settlement concerning deviations from the ranges is obviously rendered meaningless. Indeed, the parties[1] entire history developed since at least 1983 for operating under and understanding the MS-47 is suddenly without import as the result of the Postal Service taking back the bargain it struck without due consideration to the Union. As the author of the 2001 MS-47 readily admitted, there are no cleaning frequencies whatsoever, no staffing guarantees, no scheduling requirements, and no discipline protection, in addition to the other changes to the MS-47.

The Union insists that the Postal Service cannot justify its revisions to the MS-47. Not until arbitration did the Postal Service give a reason for its revisions, and that late-stated reason is, by the Postal Service's own admission, unsupportable. When the parties met about the Postal Service's changes to the MS-47, the Union repeatedly asked for the basic explanation of why the Postal Service was making this revision, but the Postal Service refused to answer. At arbitration, for the first time, the Postal Service claimed it needed more flexibility than the 1983 MS-47 permits, but this claim was inadequate, if not unconvincing.

The Union points out that the 1983 MS-47 described how many employees were needed to staff a year's worth of custodial work, and the Postal Service always had taken the position that nothing in the MS-47, particularly Form 4852, required the Postal Service to perform the work detailed there every week of

the year. In an earlier arbitration case involving that issue, Postal Service witness Cox had testified that the exceptions which he referred to in the present case -- holidays, weather-related closings, local events, etc. -- were to be managed by local maintenance managers work-wise, and were immaterial to staffing issues about which the MS-47 is principally concerned. Case No. I94T-4I-C 98116745 (Das 2004), commonly referred to as the "Line J case". The decision in that case, which was pending arbitration at the time the 2001 MS-47 was drafted, affirmed the flexibility the Postal Service already claimed it had by holding that the average weekly hours total figure on Line J of Form 4852 "is an approximate yardstick against which to measure management's compliance, but does not constitute a rigid obligation which cannot be deviated from."

Moreover, Cox admitted that the 2001 MS-47 still requires managers to project their custodial needs into the future to determine how many workhours they would need annually.

The Union cites the decision in Case No. HOC-NA-C-19007 (Das 2002) for the proposition that if the Postal Service "seeks to change long-standing provisions that on their face afford considerable protection to the bargaining unit it needs at least to provide a convincing explanation of why it determined such a change to be necessary, if it is to satisfy Article 19's requirements that the change be fair, reasonable, and equitable."

The Union further argues that the 2001 MS-47 was poorly developed and poorly designed. It puts form over

substance in that it requires an entire inventory and various budget factor calculations to reach an end that, if local managers want it to be different, can be struck out and replaced with numbers devised from no better guidance than unarticulated speculation, which then can be changed at the whim of "higher level authorities". The Union points out that the method by which the budget factor aspects of the 2001 MS-47 were developed was based on samples that: the Postal Service cannot demonstrate with any level of statistical support are actually representative; were untested; were based on gross lack of relevant research; and lacked any comparison to actual postal conditions. More importantly, the Union stresses, the budget factor component actually is immaterial to the request for workhours. What is material is what was removed -- objective staffing instructions, the prior MS-47's staffing guarantee, the cleaning frequency ranges, written scheduling documents -- and what they were replaced with -- a "private sector business perspective"; managed based only on "economic reality and operative needs"; and using "the most cost effective methods" and "the minimum resources necessary".

Finally the Union argues that the new MS-47 has had a deleterious effect on the size of the bargaining unit. It removes all employment protections at the same time it requires local management to constantly look for additional reductions in cleaning and staffing. Although not required to do so under Article 19, the Union has shown that the revision of MS-47 has resulted in substantial job loss. Regardless of the specific number of bargaining unit positions that were lost, this job

loss is another demonstration that the revised MS-47 violates Article 19.

The Union requests, as a remedy, that the arbitrator direct that the revised MS-47 be rescinded and the 1983 MS-47 be retroactively reinstated in its place, and that the bargaining unit be made whole for any harm from the Postal Service's application of the 2001 MS-47. The Union argues that the retroactive reinstatement of the 1983 MS-47 is the only sensible remedy because the terms of the MS-47 work in tandem and cannot be rationally separated. Nor is it the role of the Arbitrator to rewrite the handbook for the parties from the parts of the MS-47, new and old, that the Arbitrator thinks are less objectionable.

EMPLOYER POSITION

The Postal Service insists that the changes to the MS-47, where they exist, fully satisfy Article 19. The standard of review is whether the changes are "fair, reasonable, and equitable". In addition, the changes must not be inconsistent with the National Agreement. Application of the fairness standard begins with a presumption in favor of management's actions. Article 3, Management's Rights, is the starting point for Article 19 challenges. The Postal Service maintains that it revised the MS-47 to be consistent with the direction of the enterprise: achieving efficiencies in postal operations by assigning the appropriate human resources to the appropriate work areas to be serviced. Therefore, the revisions directly result from the Postal Service's exercise of its most basic

management rights under Article 3. Deference should be accorded to management's operational judgment about how the work should be performed, and the Union should be required to make an especially compelling case for unfairness or inequity before management's operational judgment is overturned.

The Postal Service maintains that during the discussion periods prior to issuance of the 2001 MS-47, management fully complied with its procedural obligations as set forth in Article 19 of the National Agreement in effect at the time.

The Postal Service asserts that at the arbitration hearing the Union identified two ways in which it claims the changes made to the MS-47 are not fair, reasonable, and equitable: the elimination of cleaning frequencies; and the reduction of bargaining unit custodial employees, which the Union alleges occurred as a direct result of the changes made to the MS-47.

The Postal Service argues that the Union's contentions that the elimination of cleaning frequencies is not fair, reasonable, and equitable and/or is in violation of the National Agreement are without merit. The Union claims that the revisions violate the National Agreement by "undoing" the 1983 Settlement Agreement regarding cleaning frequencies. The Postal Service maintains, however, that there is no legal basis to demand that an employer be bound forever from asserting its management rights because of a prior agreement to maintain the status quo ante. See: American Postal Workers Union, AFL-CIO

v. USPS, 99 LRRM 3465 (E.D.N.Y. 1978). In addition, there is no contractual basis for the Union's assertion. The Settlement Agreement by its terms provides that in 1983 the MS-47 would contain certain provisions concerning a range of cleaning frequencies. There is no question that was complied with. The Settlement Agreement does not provide that the 1983 MS-47 Handbook provisions shall never change, nor would it be reasonable to presume that the Settlement Agreement somehow implicitly waived management's future rights to make changes under Article 19 when such changes could be supported as fair, reasonable, and equitable. Moreover, the Postal Service insists, there is no arbitral support for precluding the Postal Service from revising its handbooks, in compliance with Article 19, because of a prior settlement on what its handbooks would contain at an earlier time. In the 1981 Gamser Award, in which the arbitrator found that the Postal Service was required to maintain the fixed frequencies in the 1974 MS-47 that it had imposed upon itself, he also found that the Postal Service could amend the Handbook, subject to the requirements of Article 19.

The Postal Service further contends that, contrary to the Union's assertions that a staffing level is required to be maintained, Arbitrator Gamser made it clear he was not imposing "a manning floor or any manning commitment upon the Service in carrying out its maintenance responsibilities." Arbitrator Gamser's focus was not on staffing levels, but on the "the number of man hours which will be required to perform the tasks at hand." The bottom line in the new 2001 MS-47 is the total number of workhours needed annually to clean the facility. This total is the same as the calculation on Line H of Form 4852 of

the old MS-47. The only difference between the old MS-47 and the new MS-47 on this point is that the total of annual workhours is not divided to determine the staffing level of full-time equivalent postal custodians. However, these workhours, although not expressly, are at least impliedly divided by local managers to determine the number of full-time equivalents, particularly in light of the no-layoff protection afforded many of these custodians. As Postal Service witness Cox testified, a local manager is unlikely to request an annual number of workhours that is less than the equivalent of 1760 for each custodian on staff. As such, the Postal Service asserts, the staffing levels remain constant.

The Postal Service also cites the finding in the Line J case that "Line H is what is critical". The Postal Service states that the critical importance of the total annual workhours is carried over from the old MS-47 to the new MS-47. In light of the arbitral precedent and the critical importance granted solely to the total workhours (and not staffing levels) there does not appear to be any obstacle to elimination of the requirement of dividing the total number of workhours to determine staffing levels.

The Postal Service further stresses that the range of cleaning frequencies was not eliminated. Rather, applying information from the old MS-47, the author of the new MS-47 simply developed a midrange of cleaning frequencies which is now incorporated into the budget factors utilized in filling out the Budget Worksheet.

To the extent the Union has indicated minor objections to other changes in the text of the MS-47, the Postal Service claims the overwhelming majority of those changes clearly demonstrate a rewording of principles carried over or simply updated from the old MS-47. The basic tenets and principles of the old MS-47 have been carried over, including: the maintenance of a clean, safe (and now healthful) condition; the calculation of the number of workhours each year; the concept of cleaning versus policing and the local manager's determination of when to clean and when to police; the assessment of the size of the facility in determining cleaning needs; the procedure for measuring the physical space; the reliance upon quarterly inspections, now to a greater degree, to monitor cleanliness; the importance of local conditions, including the number of employees in the facility; and the exact same performance time standards allotted for cleaning and policing areas. Any other changes that are more than de minimis and directly relate to wages, hours and working conditions, the Postal Service claims, are fair, equitable, and reasonable.

The Postal Service disputes the Union's allegation that the bargaining unit was reduced by 1,800 custodians, approximately 10% of the total custodial work force, as a result of the new MS-47. Initially, the Postal Service argues, the Union's own exhibits suggest that the bargaining unit was reduced only by 310 positions. Moreover, the Postal Service presented evidence that demonstrates that at least 531 custodial positions have been contracted out since publication of the new MS-47.

Finally, the Postal Service requests that if the Arbitrator finds a contract violation, the parties should be afforded the opportunity to meet and discuss an appropriate response. The determination of remedy by the Arbitrator, if any, should await the conclusion of the parties' discussions and further briefing.

FINDINGS

Cleanliness of postal facilities is critically important to the working environment, health and safety of postal employees, as well as to the public. As of 2001, the MS-47 Handbook, in its 1974 and 1983 versions, had been a -- if not the -- cornerstone of the Postal Service's regulations governing the performance of custodial services for over a quarter century. A key component of both the 1974 and 1983 MS-47 is a determination of the number of workhours required to regularly maintain a facility at the appropriate level of cleanliness. This is calculated in a systematic fashion using a building inventory, performance standards and designated frequencies.

The 1974 MS-47 imposed a uniform set of minimum frequencies for performance of various area and component cleaning tasks. Although it did not contain a staffing guarantee, as such, it was a staffing document in that it established the number of custodial workhours required to perform the mandated cleaning tasks. In the Gamser Award, the arbitrator stressed that he was not imposing "a manning floor or any manning commitment upon the Service," but he clearly also held that the workhours required under the 1974 MS-47 had to be

performed. The Postal Service could not unilaterally determine to depart from the standards in the MS-47, in particular, the minimum frequencies.

Not too long after issuance of the 1981 Gamser Award, the Postal Service tried a different tack to obtain greater flexibility. It prepared a revision of the MS-47 which eliminated any set frequencies, leaving that to be determined at each facility. The Union strongly objected to the proposed elimination of cleaning frequencies when it received notice of the proposed changes under Article 19. Following discussions, the parties were able to reach a compromise, and the 1983 MS-47 was implemented pursuant to the parties' 1983 Settlement Agreement. This compromise gave the Postal Service flexibility to vary frequencies based on the individual circumstances at each facility, and to modify frequencies based on experience or changed conditions, but only within a nationally agreed-to range of frequencies for each task. Frequencies were to be determined -- within the established ranges -- by local management, subject to review by higher levels of authority. See Case No. HOC-NA-C 16 (Das 2002). Another key part of the parties' compromise was that a custodial staffing level would be determined for each facility based on the total annual workhours, as reflected on Form 4852. Any combination of full-time and part-time employees could be scheduled to perform that custodial work, but Section 116 of the 1983 MS-47 provided that:

> Once a custodial staffing level is determined using the procedures in this handbook, that staffing level must be maintained. If conditions arise that

> warrant a change in staffing, the entire staffing procedure must be redone, i.e., new forms must be completed.

As the Union notes, the parties in entering into the 1983 Settlement Agreement knew that the MS-47 revisions they had agreed to would result in a reduction in the custodial workforce, because the previously mandated uniform frequencies were the top of the agreed-to frequency ranges. The 1983 Settlement Agreement provided incumbent custodial employees with certain protections, but there was no question that over time the changes in the 1983 MS-47 would result in a reduction in the custodial workforce.

Following implementation of the 1983 MS-47 there were occasional disputes and grievances. In particular, a number of grievances evidently were filed at the local level in which the Union claimed the Postal Service was required each and every week to schedule the number of hours shown on Line J of Form 4852 -- which was the total annual workhours for the facility shown on Line H divided by 52. As the Union points out, however, the Postal Service never agreed that it was obliged to schedule that number of hours each and every week, regardless of circumstances. In a National arbitration decision in the Line J case -- which had been appealed to arbitration before the 2001 MS-47 was drafted, but was not heard or decided until after the 2001 MS-47 was implemented -- this arbitrator found that:

> The average weekly hours total shown on Line J of PS 4852 is an approximate yardstick against which to measure management's compliance, but does not constitute a rigid

> obligation which cannot be deviated from. As noted above there are a variety of circumstances in which management may schedule and/or work fewer hours than the Line J average in a particular week without violating its obligation to conform to MS-47 standards consistent with the Gamser Award.

Part of the Postal Service's argument in the Line J case was that there were holiday and other weeks when the facility -- or parts of the facility -- were closed due to holidays, etc., and that this justified departure from Line J in certain weeks.

What is striking in the present case is the lack of empirical evidence showing that continued application of the 1983 MS-47 was causing cleaning to be done unnecessarily, or that staffing pursuant to the 1983 MS-47 was leading to custodial employees twiddling their thumbs, so to speak, or that local management was unable to appropriately respond to changed conditions or was having significant difficulty scheduling custodial employees because of constraints imposed by the 1983 MS-47. The Postal Service has not even alleged this was the case, beyond the limited testimony of its witness Ray Cox.

At arbitration, Cox, a former postal maintenance specialist now serving as an outside consultant, stated that upper level management instructed him in 2001 to revise the MS-47 Handbook to provide more day-to-day flexibility to local managers. The Postal Service has not convincingly shown, however, that it had insufficient flexibility under the 1983 MS-47 to deal with the types of situations Cox referred to, such as weeks when a holiday or other local event resulted in the

facility -- or parts of it -- being used less frequently than in other weeks, or those weeks when there were fewer custodial employees at work than usual. But even if Form 4852 of the 1983 MS-47 did not sufficiently take into account that there are a number of weeks each year when area cleaning needs are reduced, due, e.g., to holidays, an appropriate change could have been made to the 1983 MS-47, including Form 4852, to take care of that situation, without dismantling key structural components of that Handbook. Moreover, as pointed out in the decision in the Line J case, management has flexibility, under the 1983 MS-47, in how it schedules component work, which allows it to take into account prime vacation weeks or other circumstances that cause a fluctuation in available custodial staff.

Significantly, in developing the 2001 MS-47 the Postal Service retained the existing building inventory (Form 4869) and did not change the performance standards contained in the 1983 MS-47.[4] There has been no claim by the Postal Service that the frequency ranges established in the 1983 MS-47 were outmoded or needed adjustment. On the contrary, the Postal Service seems to have embraced the overall past application of those frequencies in creating its new budget factors. The key difference is that the Postal Service eliminated the use of frequencies as part of the basis for determining how often certain cleaning had to be performed at a facility, and substituted "average" factors to be used for budget purposes. The Postal Service apparently decided

[4] While Cox combined areas on the Form 4869 into a limited number of space types -- a budgeting approach to custodial work he had seen on a college website -- it is not clear how this enhanced workplace efficiency or even managerial flexibility.

that it needed to retain some semblance of the prior frequency ranges in establishing the new budget factors, yet the computation it came up with basically serves only as a yardstick to measure how a particular facility is doing (per 1000 sq. ft.) compared to the pre-2001 average.[5]

In any event, there appears to be only a tenuous connection between the Budget Worksheet calculations and how custodial work is to be performed. There no longer are requirements with respect to the work to be scheduled or staffing. Local management, after performing the budget calculations, is not required to use them to determine the number of workhours to request.[6] The only constraints are that management cannot lay off custodial staff and, as was true under the 1983 MS-47, is required to perform quarterly inspections to ensure an adequate level of cleanliness. Higher level

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[5] This assumes that the 400 facilities that responded to Cox's request for staffing surveys -- about 10% of total facilities over 15,000 sq. ft. -- truly were a representative sample, which is difficult to determine on the present record.

[6] As Cox testified, a manager has to request at least the number of workhours needed to cover the number of custodial employees at that facility. An area maintenance management specialist testified that in his area they calculate the average, using the budget factors, but then add additional time for training, breaks and wash-up (as was previously done on Form 4852). If a facility wants to request "a deviation" due to local conditions they note that on their worksheet. This witness and another area manager testified that facilities in their areas do not complete the Budget Worksheets annually, as the 2001 MS-47 provides for, but only where there is a change in the physical inventory or a custodial position is vacated.

authorities also have been given considerably broader authority to substitute their own determination of the number of workhours to be budgeted for.[7]

The 2001 MS-47 may provide some greater flexibility to management and may result in the Union filing fewer grievances with respect to scheduled workhours, but it removed critical components of the previously agreed to structure for ensuring a satisfactory level of cleanliness is maintained within set parameters and that custodial jobs are not unduly eliminated. The Postal Service places considerable stress on the required quarterly inspections as a guarantee of cleanliness. But the Gamser Award and the parties' subsequent negotiation of the 1983 MS-47 reflect an historical recognition that inspections by themselves are not sufficient.[8]

Use of the new Budget Worksheet also is likely to put pressure on those facilities -- theoretically about one-half the total number -- whose actual custodial workhours exceed the average to reduce their hours, at least over time, so as not to deviate from the total calculated using the fixed budget factors. In this way, what was an average before 2001, might become a sort of ceiling, which all facilities should strive not

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[7] Cox indicated this was not really a change, because higher level authorities de facto had exercised equivalent authority despite the language of the 1983 MS-47. (See: Case No. HOC-NA-C 16.)

[8] If, as was stated by Cox, inspections previously were often not performed as required by the 1983 MS-47, that would not appear to be a good reason to change the Handbook to put greater reliance on inspections.

to exceed, with reduced consideration for variations in local conditions.

As the Union stresses, the 1983 MS-47 was the result of negotiation and compromise, reflected in the 1983 Settlement Agreement. The latter does not provide that the Postal Service can never change the 1983 MS-47, or that it can only do so with Union approval. The Postal Service did not give up its right to make changes that are fair, reasonable, and equitable. But, the fact that the structure of the 1983 MS-47 was a negotiated compromise is important in applying Article 19, particularly as it seems unlikely, in light of the findings in the Gamser Award, that the Postal Service would have been successful in convincing an arbitrator that elimination of mandated frequencies -- which is what it proposed in 1982 -- was fair, reasonable, and equitable, Also, as I stated in Case No. HOC-NA-C 19007:

> The Postal Service is entitled to change its policies, subject to its contractual obligations. But if it seeks to change long-standing provisions that on their face afford considerable protection to the bargaining unit, it needs at least to provide a convincing explanation of why it determined such a change to be necessary, if it is to satisfy Article 19's requirement that the change be fair, reasonable, and equitable.

Improving efficiency and application of sound custodial management techniques, including a number of the factors spelled out in certain portions of the 2001 MS-47, do not appear to be inconsistent with the basic structure of the

1983 MS-47. It also is not clear to me that use of E-mars to schedule custodial work is not compatible with the 1983 MS-47, But if any changes need to be made to accomplish that, or to better enable management to take into account variations that occur in holiday or other weeks, that can be accomplished under Article 19, without throwing out the baby with the bath water.

For all of these reasons, I am not able to conclude that the 2001 MS-47 is fair, reasonable, and equitable, for purposes of Article 19. This is not a matter of a few portions of the revised MS-47 not meeting that standard, but is based on the major changes made to key parts of the basic structure of the Handbook.

Under the circumstances, it is appropriate that the Postal Service be directed to rescind the 2001 MS-47, to reinstate the 1983 MS-47, and to reinstate or prepare staffing packages as soon as practicable. As the Postal Service has stressed, the building inventories still are in use and the performance standards have not been changed. Prior staffing documents based on the frequencies determined by the appropriate level of management under the 1983 MS-47 presumably still exist, and can be revised under that Handbook where needed. Whether any remedy is appropriate for the intervening period since implementation of the 2001 MS-47, and, if so, what it should be, is a matter remanded to the parties for further discussion. The arbitrator retains jurisdiction over that aspect of the remedy. In addition, it appears that the Union does not have any significant objection to a number of the more minor changes that were designed to streamline or update the 1983 Handbook, without

imposing substantive change, and the parties should address incorporation of those changes.

AWARD

The Union's challenge to the revised MS-47 issued by the Postal Service in 2001 is sustained on the basis set forth in the above Findings.

Shyam Das, Arbitrator