

REGULAR ARBITRATION PANEL

In the Matter of Arbitration)
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 between)
)
 UNITED STATES POSTAL SERVICE)
)
 and)
)
 AMERICAN POSTAL WORKERS UNION)

GRIEVANT: Michael Shediwy
POST OFFICE: East Des Moines, IA
Case No.: I90C-1I-C94039175

BEFORE: Lamont E. Stallworth

APPEARANCES:

For the U.S. Postal Service: Paul A. Lyons
Labor Relations Specialist
Midwest Area Operations

For the Union: Carl Casillas
National Business Agent

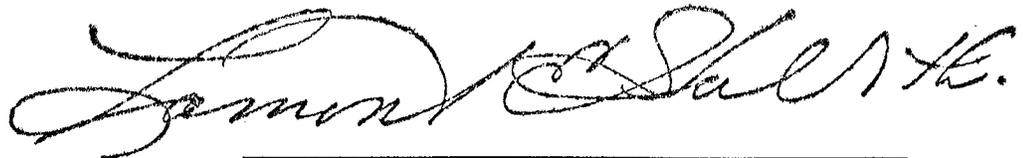
Place of Hearing: Des Moines, Iowa

Date of Hearing: June 27, 1996

Date of Award: August 2, 1996

AWARD:

The instant grievance is denied. The Service did not violate the Contract when it issued the Grievant a Letter of Demand on April 13, 1993 in the amount of \$3,134.75.



Lamont E. Stallworth
Labor Arbitrator

THE ISSUE

The Parties submitted the following issue(s) to the Arbitrator:

Did the Service violate the Contract when it issued the Grievant a Letter of Demand?

If so, what shall the remedy be?

APPLICABLE PROVISIONS OF THE NATIONAL AGREEMENT

ARTICLE 15
GRIEVANCE-ARBITRATION PROCEDURE

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Section 2. Grievance Procedure-Steps

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Step 2:

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(d) At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statement from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents, in accordance with Article 31.

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ARTICLE 28
EMPLOYER CLAIMS

The parties agree that continued public confidence in the Postal Service requires the proper care and handling of the USPS property, postal funds and the mails. In advance of any money demand upon an employee for any reason, the employee must be informed in writing and the demand must include the reasons therefor.

1. Shortages in Fixed Credits

Employees who are assigned fixed credits or vending credits shall be strictly accountable for the amount of the credit. If any shortage occurs, the employee shall be financially liable unless

the employee exercises reasonable care in the performance of his duties. In this regard, the Employer agrees to:

A. Continue to provide adequate security for all employees responsible for postal funds;

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ARTICLE 31
UNION-MANAGEMENT COOPERATION

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Section 3. Information

The Employer will make available for inspection by the Unions all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information.

Requests for information relating to purely local matters should be submitted by the local Union representative to the installation head or his designee.

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BACKGROUND

The instant grievance involves the April 13, 1993 Letter of Demand issued to the Grievant, Michael Shediwy. As of the hearing date, the Grievant had been employed by the Service for 30 years, and had worked as a window clerk for 23 years.

The Letter of Demand was based on a February 25, 1993 audit of the Grievant's stamp credit at the East Des Moines finance station, at which the Grievant held a bid position as a Window Clerk. The audit identified a shortage of \$3,134.75. (Joint Exhibit Nos. 3, 7).

Supervisor Jeannie McReynolds conducted the audit, at which the Grievant was present. By signing the count sheet, the Grievant indicated that he agreed with the count. (Joint Exhibit Nos. 3, 7).

The Parties stipulated that no issues of procedural or substantive arbitrability were presented to the Arbitrator. The Union presented the testimony of the Grievant, Union Steward Douglas Hudson and APWU Clerk Director Eugene VerSteegh. The Service did not present any witnesses.

The East Des Moines finance station is a small facility. At the time the instant dispute arose, the Grievant was the only full-time employee assigned to that station. Part-time clerk Dianna Wadle worked with the Grievant in the mornings. The Grievant held the station's main stock of approximately \$60,000. His personal stamp stock contained approximately \$10,000.

The working area of this finance station was contained in an area of approximately 15 feet by 25 feet. It is not disputed that the Grievant would have been aware of any other individual who was behind the counterline while he was working. The safe and the counterline were at opposite ends of the facility. A Window Clerk who was waiting on customers at the counterline would therefore be facing away from the safe.

The safe had a combination lock. The Grievant had a locked drawer in the safe in which to store his accountability. According to the Grievant, the outer door of the safe was not locked during working hours. The Grievant stated that this was "normal practice", and there is no contrary evidence in the record.

The custodian who cleaned the East Des Moines station had a key allowing him access to the area in which the safe was kept. However, the safe was locked when the custodian was cleaning, and the custodian did not know the combination to the safe. As a result, it is not disputed that the custodian did not have access to the Grievant's credit when it was locked in the safe after working hours.

The Grievant began working at East Des Moines on or about January 1, 1993. He took the bid position of employee Robert Brown, who retired on December 31, 1992. (Union Exhibit No. 6). It is undisputed that the Grievant had the correct amount of stock when he took over Brown's position.

The Grievant and Brown worked together for approximately two (2) weeks before Brown retired. Brown did not give the Grievant or Steward Douglas Hudson any information about any security problems at East Des Moines. In addition, Hudson did not file any grievances to that effect on Brown's behalf. There is no evidence that any such grievances were filed by any other APWU Steward responsible for this facility. Further, the Grievant testified that when he took over Brown's position, he did not feel that the station's security was a problem.

Supervisor McReynolds performed a key check on January 8, 1993 and determined that the safe compartment doors were operating properly. (Joint Exhibit No. 2). On or about January 19, 1993, McReynolds requested maintenance to change the locks on the cash drawer, safe compartment and envelope drawer because of the "clerk

change." New locks were installed on January 19, 1993. (Union Exhibit No. 3).

On February 16, 1993, the Grievant went home sick. Before leaving, the Grievant placed his stamp stock in his compartment in the safe, and locked the drawer. Former-employee Brown came into the station after the Grievant left. Brown volunteered to help Wadle, who was working by herself in the Grievant's absence. The Grievant testified that he returned to work on the following day, and that none of his personal stock appeared to be missing. He also testified that because he did not count his stock, he might not have noticed if coils were missing. In addition, the Grievant testified that it was not until after the February 25, 1993 audit that he learned that Brown had worked in the station on February 16, 1993.

The Grievant was audited by McReynolds on February 25, 1993. The Grievant testified that when he opened his drawer at the beginning of his February 25 shift, the drawer was empty. According to the Grievant, the drawer should have contained a box of 50 coils of \$.29 stamps, totalling \$1,450.

There is no evidence that the Grievant reported this loss to McReynolds or any supervisor on the day of the audit or at any time prior to the arbitration hearing. No such loss is mentioned in the count sheet of the February 25, 1993 audit (Joint Exhibit No. 7), or in the Step 2 grievance or Step 3 appeal (Joint Exhibit No. 2).

The Grievant credibly testified that he was very upset when the audit showed a shortage of \$3,134.75, since he had never had a shortage of this magnitude in his years as a Window Clerk.

According to the Grievant, he started to "think out loud" of possible explanations for the shortage, including anything that he might have done. He testified that he asked himself if he could have, by mistake, charged a customer \$290 when selling that customer stamps worth \$2,900.

The Grievant also testified that he asked himself if he might have mistakenly thrown away a check that had been tendered for a purchase. In this regard, the Grievant testified that he had once discarded a business check and kept the check stub, but had retrieved the check when he realized his mistake.

In addition, the Grievant testified that after he reviewed all of the possibilities, he determined that none of them had occurred and that he did not know what he could have done that would have caused this large shortage. The Grievant also testified that he checked throughout the facility for his missing stock before he signed the count. (Joint Exhibit No. 7).

The Grievant testified that he did not recall whether his stock was recounted during the audit, but that he assumed that it was recounted.

The Grievant also testified that on March 10, 1993, he discovered that the lock on his drawer in the safe was defective. According to the Grievant, he learned this by chance, when he put his key in the lock but did not turn it fully. When he pulled on the key, the drawer opened, even though the lock was still in its "locked" position.

The Grievant testified that he placed "hardly any force" on the key when he pulled the locked drawer open. In addition, the

Grievant testified that after he discovered the defective lock, he did not place his stamp stock in that compartment.

The Grievant immediately reported this security problem to his supervisor. The relevant maintenance document shows the following report on March 10, 1993: "Safe compartment will not lock. New lock was recently installed. See Mike Shediwy for details." (Union Exhibit No. 3). The lock was repaired on the next day, March 11. The problem was diagnosed as follows: "[l]ock cam will not completely catch stop plate - needs to be adjusted, or door lock assembly needs [to be] replaced." (Union Exhibit No. 3)

The Grievant also contacted Union Steward Douglas Hudson. On March 10, 1993, Hudson took several photographs of the defective safe drawer. Hudson's photographs corroborate the Grievant's testimony that the door could be opened even though it was still in its "locked" position. (Union Exhibit No. 4). In addition, Hudson testified that he was able to open the Grievant's drawer when he inserted his own key and pulled the drawer open.

The Grievant testified that he had used reasonable care with respect to his accountability at East Des Moines. He testified that before going to lunch, he placed his stock in the safe and locked the safe. He also testified that he stored his unbroken coils and books of stamps in his drawer in the safe. As noted, when he learned that the lock on that drawer was defective, he did not use that drawer again until it was fixed.

In addition, the Grievant testified that he had never been short by the amount of the shortage at issue from the February 25, 1993 audit; e.g. \$3,134.75. The Grievant also testified that he

has handled large amounts of bag money while working as a Register Clerk in the two and one-half (2-1/2) years before the hearing, and that no money has been missing in that period of time.

The Grievant testified that during his 23 years as a Window Clerk, as many as ninety per-cent (90%) of his audits were within tolerance. The Service did not introduce the Grievant's audit records for his entire employment. However, the report from a May 18, 1993 audit of the Grievant contained the following information:

DATE OF AUDIT	OVERAGE OR SHORTAGE	ADJUSTMENT
<u>Audits prior to Grievant's assignment to East Des Moines Station</u>		
January 17, 1992	-\$ 253.05	Letter of Demand
May 13, 1992	-\$ 224.84	Letter of Demand
December 10, 1992	-\$ 212.31	Step 2 decision
<u>Audits while the Grievant was assigned to East Des Moines Station</u>		
February 25, 1993	-\$3,134.75	Letter of Demand
March 11, 1993	-\$ 99.32	Suspense
April 7, 1993	+\$ 102.25	Trust

(Management Exhibit No. 2)

The May 18, 1993 audit showed a shortage of \$241.45. (Management Exhibit No. 2). The Grievant testified that with respect to the December 10, 1992 shortage, he paid approximately \$100 as a result of the Step 2 settlement.

Management Exhibit No. 2 notes that as of May 23, 1993, one or more of the pre-May 18, 1993 audits listed on that document were "unresolved." (Management Exhibit No. 2). The instant grievance challenging the February 25, 1993 audit was filed at Step 1 on May 10, 1993. (Joint Exhibit No. 2). There is no evidence that any of the other audits listed in Management Exhibit No. 2 were in dispute as of May 21, 1993 or as of the hearing in this matter.

The Grievant voluntarily left his bid position at East Des Moines at some point after the May 18, 1993 audit.

Union Steward Hudson had filed two (2) information requests under Article 31 before filing the Step 1 grievance on May 10, 1993. On May 5, 1993, Hudson requested six (6) items from Station Manager James Zimmerman. (Union Exhibit No. 2). While the Service provided four (4) of the requested items before Hudson filed the Step 2 grievance, the information on two (2) of the items was provided after that point.

On May 7, 1993, Hudson filed a second request specifying four items. (Union Exhibit No. 1). None of this information was provided before Hudson filed the instant grievance at Step 2. The Service partially responded to one (1) item. See Joint Exhibit No. 7 (count sheet for February 25, 1993 audit; this was one of two count sheets requested in the fourth item in that request). There is no evidence that the Service responded, at any point since May 7, 1993, with respect to the other items requested in Union Exhibit No. 1.

Among the items requested on May 7 was a "Copy of Postal Inspectors memorandum on M. Shediwy shortage at E.D.M. Station on audit of 2-25-93 and audit [of] 3-11-93." (Union Exhibit No. 1). Hudson testified that he requested these documents because a supervisor had told him that she was asking the Inspectors to audit the Grievant. At the hearing, the Service's Advocate stated that the Service had no knowledge that any such Investigative Memoranda existed. Hudson acknowledged that he had no independent knowledge of their existence.

Hudson appended a "Steward's Statement" to the Step 2 grievance in order to detail his efforts to secure compliance with his information requests. The statement asserted that supervision promised on several occasions that the missing information would be supplied. (Joint Exhibit No. 2). The Service presented no evidence to rebut or in any way dispute Hudson's testimony or his statement attached to the Joint 2 instant grievance. (Joint Exhibit No. 2).

Hudson acknowledged that he did not file a grievance on these information requests.

The Service issued the Step 2 denial on April 4, 1994. Clerk Craft Director Eugene VerSteegh was the Union's Step 2 designee. Labor Relations Specialist Steve Thalken was the author of the Step 2 decision. (Joint Exhibit No. 2). However, two (2) other Step 2 designees had worked on this grievance for the Service before Thalken.

The Step 2 denial addressed, and rejected, four (4) security contentions presented by the Union: (1) access to the counterline by "unauthorized personnel"; e.g. when former-employee Bob Brown worked behind the counterline on February 16, 1993; (2) lack of security in the Grievant's safe drawer; (3) security alarm problems at the station; and (4) access to the facility by the janitor. (Joint Exhibit No. 2).

It is not disputed that all of these issues were discussed at the Step 2 meeting. However, VerSteegh testified that when Thalken discussed the first item, Thalken relied on a statement from part-time Clerk Dianna Wadle. The Step 2 denial states that "[t]he

statement given by Ms. Wadle refutes" the Union's argument on Brown's February 16 access to the counterline. (Joint Exhibit No. 2).

VerSteegh testified that Thalken told him that Wadle's statement demonstrated that Brown did not approach the safe on the day on which he assisted Wadle at East Des Moines. VerSteegh further testified that he requested a copy of Wadle's statement during the Step 2 meeting, but that the Service never complied with that request.

At the hearing, the Service tendered Wadle's statement as Management Exhibit No. 1. Because this was the document that had not been disclosed during the grievance steps, it was admitted as evidence that such a statement existed. However, it was not admitted to prove the truth of Wadle's statement.

The Step 2 denial also relied on detailed statements from McReynolds about the Grievant's purported conduct and statements during the February 25, 1993 audit. (Joint Exhibit No. 2). Among the information which Thalken attributed to McReynolds was the following:

...The grievant prepared to go to lunch and in doing so, put his drawer in the counter line. Supervisor McReynolds immediately asked him why he did not put his stock in the safe rather than the counter line when he went to lunch for security purposes. She also asked him if he locked his stock up in the counter line during lunch. His response to all this was that he did not always lock up his stock at the counter line and he also would occasionally leave the Dutch door unlocked...

When the grievant returned from lunch Supervisor McReynolds suggested that they recount his stock again. The grievant stated,

"No, I'm sure it's right, the more I think about it, I sold a hundred coils to a company one day and only charged them \$290 instead of \$2,900. Supervisor McReynolds stated that even if that were so, the grievant was still short another \$524.75. To this the grievant responded, "I don't know, maybe I threw away a check. I've done that before at West Suburban. They found one of my checks in the garbage...."

(Joint Exhibit No. 2).

VerSteegh testified that Thalken relied on McReynolds' statement at the Step 2 meeting. He also testified that he requested a copy of that statement, and that it was not provided during the grievance process.

The Grievant denied that he made the statements attributed to him by McReynolds in the Step 2 denial. McReynolds was listed as a witness for the Service in this proceeding, but did not testify.

VerSteegh also testified that during the Step 2 meeting, he requested a copy of the final audit conducted when the Grievant left East Des Moines. The Grievant testified that he did not receive a copy of that final audit. VerSteegh also testified that he requested a copy of the Inspection Service's Investigative Memorandum on that audit, but that the Union has received neither document.

According to VerSteegh, he was told by one of the Service's Step 2 designees that the Investigative Memorandum showed a \$500 overage on the Grievant's final audit. VerSteegh further testified that Management's Step 2 designees told him that they were waiting to receive the Investigative Memorandum, and that they promised to provide that document to the Union.

The Service did not dispute any of VerSteegh's testimony about the Step 2 proceedings.

The Grievant testified that "if" some of his stock was overlooked or miscounted in the February 25, 1993 audit, it "might" have been discovered during his final audit. In support of this contention, the Union submitted a Form 2130 concerning stock that the Grievant had redeemed on March 9, 1993, and which was stored at East Des Moines. (Union Exhibit No. 5; "3-9-93 redeemed stock of M. Shediwy was miscounted. When opened 1-9-96, \$176.52 was not there").

VerSteegh filed the Step 3 appeal for the Union. That appeal stressed that the Step 2 denial relied on the Wadle and McReynolds statements, which had not been supplied to the Union at Step 2. It also stated that the Service had not provided a copy of the Grievant's final audit or the Investigative Memorandum on that audit. VerSteegh noted, as well, that the Service had not provided the Investigative Memorandum on the February 25, 1993 audit that Hudson had requested at Step 1.

VerSteegh acknowledged that he did not file a grievance on the Service's failure to provide the documents he requested at Step 2. In addition, he acknowledged that he did not file Additions and Corrections to the Step 2 denial, but chose to address them in his Step 3 appeal.

The Parties were not able to resolve the instant dispute. Accordingly, the matter was properly submitted to arbitration. It is within this factual context that the instant grievance arises.

POSITION OF THE UNION

The Union contends that the April 13, 1993 letter of demand violated Article 28 of the Contract. It is the position of the Union that the evidence demonstrates that the Grievant exercised reasonable care with his accountability at East Des Moines, as he has throughout his postal career. In this regard, the Union emphasizes the Grievant's testimony about his overall audit history, as well as his testimony that he always locked his stock in his safe compartment or counterline. In addition, the Union stresses that Management provided no evidence that the Grievant did not comply with regulations or that he failed to exercise reasonable care.

According to the Union, the plain language of the Contract provides that, since the Grievant has demonstrated that he used reasonable care, he cannot be held liable for the shortage at issue. The Union urges the Arbitrator to reject arbitral decisions that also require the Grievant to establish that the Postal Service failed to provide adequate security. It is the position of the Union that these cases have misapplied the Contract.

In the alternative, the Union maintains that it proved that security was inadequate at the East Des Moines station. The Union emphasizes that former-employee Bob Brown was allowed access to the area in which the counterline and safe were located. The Union stresses that the lock for the Grievant's safe drawer was defective, and that, as a result, his drawer could be opened by keys used for other drawers. The Union contends that the Service violated postal regulations by allowing Brown access and by

providing defective equipment. The Union also asserts that part of the Grievant's redeemed stock was discovered to be missing after it was stored at East Des Moines.

According to the Union, the record supports several explanations for the shortage discovered in the disputed audit. The Union asserts that Brown and the part-time clerk at this facility had access to the Grievant's defective safe drawer. In addition, the Union emphasizes the Grievant's testimony that on the morning of the audit, coils valued at \$1,450 were missing from the Grievant's safe drawer, and that books may have been missing as well. The Union further asserts that the Form 2130 for the Grievant's redeemed March 3, 1993 stock is evidence of lax security at East Des Moines. It is the Union's position that this document shows that \$176.52 of that redeemed stock "was not there" when the stock was opened on January 9, 1996 (Union Exhibit No. 5).

The Union also contends that Management informed the Union's Step 2 designee that the Grievant's final audit showed an overage in his accountability. According to the Union, it is possible that this audit uncovered stock that was not counted in the February 25, 1993 audit or that was missing at that time. The Union stresses that during Step 2, VerSteegh requested both the final audit and the Inspector's Memorandum from that audit. It is the position of the Union that because the Service failed to provide those documents, the Union is entitled to a negative inference that those documents would have supported the Union's argument.

In addition, the Union argues that these and other refusals to provide requested information on this grievance provide an

independent reason to sustain the instant grievance. The Union, therefore, requests the Arbitrator to rescind the disputed letter of demand.

POSITION OF THE SERVICE

The Service contends that the letter of demand was appropriately issued under Article 28. According to the Service, the Union has failed to demonstrate that the alleged breaches of security were causally related to the shortage at issue.

The Service argues that the defective safe drawer could only be opened when a drawer key was inserted into the lock, and that there is no evidence that Brown had such a key. The Service also stresses that the Grievant did not notice that any stock was missing when he returned to work the day after Brown was in the facility. The Service further contends that the Grievant did not assert that the part-time clerk at the facility, who had a key, took his stock from the defective drawer. The Service also emphasizes that Management repaired the defective lock as soon as it was reported by the Grievant.

In addition, the Service maintains that the Union cannot rely on the Grievant's testimony that a box of coils worth \$1,450 was missing from his compartment on the day of the audit. It is the position of the Service that this argument is precluded because it was not advanced at any prior step in the grievance process. In addition, the Service argues that Union Exhibit No. 5 establishes that the Grievant miscounted his redeemed stock on March 9, 1993,

and not, as the Union asserts, that part of this stock was taken while it was stored at the East Des Moines facility.

The Service also contends that the Union failed to demonstrate a causal relationship between the other asserted safety breaches and the shortage at issue. In this regard, the Service notes that no evidence was presented on the Union's Step 2 contention that the security alarm was defective. It is also the position of the Service that inadequate security is not demonstrated by the fact that the custodian had a key to this facility. The Service emphasizes the Grievant's testimony that the safe was always closed at night and that the custodian did not know the combination to the safe.

In addition, the Service asserts that Management complied with the applicable regulations. It is the position of the Service that the employees did in fact use the safe and counterline were used to protect their stock, as the regulations require. The Service also stresses that there is no evidence that Brown complained about the security of the facility when he was the window clerk at East Des Moines.

The Service further contends that the Grievant did not prove that he exercised reasonable care. The Service stresses that the Grievant was out of tolerance in five (5) of the seven (7) audits performed on his stock between January 1992 and May 1993. It emphasizes that while four (4) of those audits took place at East Des Moines, three (3) were taken before the Grievant was assigned to that facility. According to the Service, this pattern is evidence that the Grievant's shortage on February 25, 1993 was

attributable to his lack of reasonable care, and not to any security problems at East Des Moines.

In addition, the Service contends that during the February 25, 1993 audit at issue, the Grievant told McReynolds that the shortage was probably caused by his own mistakes. In addition, the Service argues that when the Grievant started to work at East Des Moines, he did not fulfill his responsibility to determine that the safe was properly working.

With respect to the Union's information requests, the Service argues that the Union failed to file grievances on these questions when they arose. In addition, the Service argues that by failing to file Additions and Corrections at Step 2, the Union waived its right to challenge the parts of the Step 2 denial that were based on the statements by McReynolds and Wadle.

The Service, therefore, requests the Arbitrator to deny the grievance and enforce the letter of demand.

OPINION

The instant grievance challenges the April 13, 1993 Letter of Demand issued to the Grievant. The Parties submitted the following issue(s) to the Arbitrator:

Did the Service violate the Contract when it issued the Grievant a Letter of Demand?

If so, what shall the remedy be?

The Arbitrator has carefully considered the facts, evidence and arguments related to the issue(s) presented. The Arbitrator concludes that the instant grievance must be denied. The

Arbitrator's reasoning, findings and conclusions are set forth below.

Window clerks are required to handle a substantial amount of stock and money. As a result, they are regularly audited. The Parties have also negotiated the following standards for shortages resulting from these audits:

Employees who are assigned fixed credits or vending credits shall be strictly accountable for the amount of the credit. If any shortage occurs, the employee shall be financially liable unless the employee exercises reasonable care in the performance of his duties.

(Joint Exhibit No. 1, Article 28.1; emphasis added)

This strict standard is balanced by the Service's obligations to "continue to provide adequate security for all employees responsible for postal funds." (Joint Exhibit No. 1, Article 18.1(A)). However, the Service is not contractually required to provide "perfect" or "foolproof" security. Rather, Article 28.1(A) requires security to be "adequate." Case No. C7C-4JC-15899 (L.E. Stallworth, July 10, 1991), page 17; Case No. C8C-4B-C 11300 (N.N. Bernstein, July 7, 1981), pages 6-7; Case No. S4C-3Q-C 46614 (R.W. Foster, April 4, 1989), page 6.

The weight of arbitral authority indicates that a shortage in an employee's accountability creates a "rebuttable presumption" that the employee did not exercise "reasonable care" in their duties with respect to that stock. Once the Service establishes that a shortage existed, the burden of proof then shifts to the Union to prove that "the shortage can be reasonably attributed to

some other cause than employee negligence." Case No. W7C-5S-C 17442 (G.L. Axon, July 31, 1990), pages 6, 7.

At that point, the Union must prove that the employee exercised reasonable care "in protecting his or her stock" and that the Service failed to provide the employee with "adequate security" to maintain their stock. Axon, pages 6-7. See also, Case No. E7C-2N-C 16616 (C.F. Stoltenberg, August 31, 1991), page 11; Case No. S7C-3W-18328 (R.W. Foster, June 18, 1990), pages 5-6; Case No. S4C-3F-C 16103 (R.B. Moberly, May 21, 1987), page 3; Case No. S1C-3A-C 39630 (J.F. Scearce, March 28, 1986), page 5; Case No. W1C-5K-C 24413 (T.F. Levak, December 14, 1985), page 10; Case No. N1C-1A-C 3561 (N. Zumas, January 23, 1984), page 4.

In addition, the Union must present sufficient evidence that the inadequate security was causally related to the shortage. As Arbitrator Axon has stated, "...since the central issue is the actual cause of the shortage, there must be some logically induced showing of a causal connection between the shortage and the breach of security being asserted as the alternative to the employee's negligence." Axon, page 7 (quoting Case No. S4C-3SC-516 (R.W. Foster)).

This causal nexus must be established by a "sufficient quantum of clear and convincing evidence ... [S]upposition and unsupported allegation" are not sufficient. Case No. C4C-4B-C 14067 (J.J. Mikrut, Jr. November 30, 1988), pages 12, 13. The Union's evidence must be "substantive and probative." Foster, page 6. As Arbitrator Zumas has stated, "speculation, guessing and 'possibilities' are insufficient to shift the burden to the Service to show that the

security at the facility did not result in the loss." Zumas, page 6.

The Union argues that the above-stated "rebuttable presumption" ignores the literal language of Article 28.1. According to the Union, an employee cannot be held responsible for a shortage if the employee proves they have "exercise[d] reasonable care in the performance of his duties." (Joint Exhibit No. 1, Article 28.1). However, it is the conclusion of the Undersigned Arbitrator that the rebuttable presumption appropriately allocates the burdens of proof under Article 28.1. See Case No. C0C-4J-C 1199 (L.E. Stallworth, September 17, 1994), page 16; Case No. C7C-4JC-15899 (L.E. Stallworth, July 10, 1991), page 11.

Shortage cases turn on the specific facts at issue. For the reasons stated below, it is the conclusion of the Arbitrator that in the instant case, the Union did not present "substantive and probative" evidence that the shortage was caused by inadequate security.

The Union emphasizes that on February 16, 1993, former employee Bob Brown was allowed to go behind the counterline at the East Des Moines facility after he had retired from the Service. The Union argues that this incident demonstrates a lack of adequate security at this facility, and stresses that Section 143.12 of the ELM provides that "[p]ostal funds must be inaccessible to the public and concealed from view." (Joint Exhibit No. 4).

As the Service stresses, the Grievant's testimony establishes that Section 143.12 was otherwise followed in all respects at East Des Moines. Further, the Union provided no other evidence to

support this argument. The record thus shows that Brown's presence behind the counterline on February 16th was a one-time event that occurred under highly unusual circumstances. As a result, the Union's contention with respect to Section 143.12 is not persuasive.

Moreover, the Union provided no evidence to link this incident with the shortage discovered on February 25, 1993. Indeed, the Grievant testified that when he returned to work on February 17th, none of his personal stock appeared to be missing. The Grievant's testimony that he might not have noticed if coils were missing is simply speculation. As a result, Brown's presence behind the counterline on February 16th is not probative evidence of inadequate security. See Case No. S7C-3W-C 18328 (R.W. Foster, June 18, 1990), page 6.¹

The Union also asserts that the April 11, 1996 Form 2130 concerning the Grievant's redeemed stock is evidence that security was not adequate at East Des Moines. That document states that "3-9-93 redeemed stock of M. Shediwy was miscounted. When opened 1-9-96 \$176.52 was not there." (Union Exhibit No. 5). However, it does not establish the reason that the final count differed from that on March 3, 1993. While it states that "\$176.52 was not

¹ In reaching this conclusion, no reliance has been placed on the statement of part-time clerk Wadle (Management Exhibit No. 1), since management failed to provide that document to the Union as VerSteegh requested. Step 2 requires the Parties "to cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents, in accordance with Article 31." (Joint Exhibit No. 1, Article 15, Section 2, Step 2). The Service's failure to comply with this provision precludes Wadle's statement from being used by the Service at the hearing.

there," it also states that the stock "was miscounted." No other evidence was provided on this point by the Union. As a result, the Union has not demonstrated that \$176.52 was taken from this stock while it was stored at East Des Moines.

At Step 2, the Union contended that the East Des Moines facility had a faulty security alarm system. (Joint Exhibit No. 2). This assertion was not renewed at the hearing.

Moreover, the record evidence established that Management responded promptly when the Grievant informed supervision that his drawer had a defective lock. That lock was repaired on March 11, 1993, the day after the Grievant reported the defect. See also Union Exhibit No. 3).

However, there is no evidence that the lock was broken as of February 25, 1993, when the audit at issue was conducted. Even assuming that this was the case, the Union has still not provided the required causal nexus between the defective lock and the Grievant's \$3,134.75 shortage. The Union identified three (3) individuals, aside from the Grievant, who had access to the safe between January 19, 1993 and February 25, 1993. Former-employee Brown was behind the counter-line on February 16, 1993. However, none of the Grievant's stock appeared to be missing from the Grievant's drawer on February 17, 1993, the day after Brown worked at East Des Moines. As a result, there is no evidence linking Brown to the shortage.

A similar conclusion must be drawn with respect to the custodian who cleaned the East Des Moines finance station. While the custodian had a key to the area behind the counterline, he did

not know the combination to the safe. As a result, he could not open the door to the safe. Moreover, there is no evidence that he had a key that could be inserted into the defective lock on the Grievant's drawer. As such, there is no evidence that the custodian had access to the Grievant's credit when the drawer lock was defective.

Part-time clerk Wadle had access to the safe during working hours, when the door to the safe was left open. She also had a key to her own drawer. However, there is no evidence that Wadle took the Grievant's credit when it was stored in the drawer with the defective lock. Any inferences to that effect are "speculation, guessing and 'possibilities.'" Zumas, page 6.

The Grievant testified that on the morning of February 25, 1993, his drawer was empty when he took it from the safe, and that coils valued at \$1,450.00 should have been in that drawer. However, the Union did not raise this contention during the grievance process. (Joint Exhibit No. 2). As a result, this part of the Grievant's testimony is barred by Article 15, Section 2, Step 2 of the Contract, which requires the Union's Step 2 representative to "make a full and detailed statement of facts relied upon...." (Joint Exhibit No. 1).

In addition, there is no evidence that the Grievant reported such a loss to McReynolds when she conducted the disputed audit on February 25, or to any supervisor at any time after that date. Similarly, the count sheet for the disputed audit, which the Grievant signed, does not mention that \$1,450 in stamps were missing from the Grievant's drawer prior to the audit. (Joint

Exhibit No. 7). For these reasons, even if the Arbitrator could consider this part of the Grievant's testimony, it could not be credited.

Moreover, the record contains no evidence of any security problems at East Des Moines other than those alleged in this grievance. Both the Grievant and Steward Hudson acknowledged that Brown had not raised any security complaints while he was at this facility. There is no evidence that Wadle raised any such concerns, either.

The record also fails to support the Union's contention that Management failed to ensure that "equipment on hand is used to provide the best security and that the priorities of protection are observed." (Joint Exhibit No. 5; Section 141.2 of the ELM). As the Service stresses, the Grievant's testimony shows that the counterlines and safe were used as they should have been.

Nor did the Union demonstrate that Management failed to follow Section 141.2 of the ELM, which provides that equipment used to protect stock "must be examined by the supervisor and employee to determine that it provides proper safekeeping." (Joint Exhibit No. 5). The defective lock on the Grievant's drawer was installed on January 19, 1993, when the Grievant had already started working at East Des Moines. (Union Exhibit No. 3). There is no evidence that maintenance failed to inspect the new lock after it was installed. In addition, Section 141.2 obligated the Grievant to inspect that new equipment, as well. Moreover, when the Grievant brought the defective lock to Management's attention, "immediate action" was

taken to correct that security deficiency, as Section 141.2 requires. (Joint Exhibit No. 5).

As previously discussed, the Service did not provide the Union with a copy of the Grievant's final audit or the Investigative Memorandum from that audit, both of which VerSteegh requested at Step 2. VerSteegh testified without rebuttal that one of Management's Step 2 designees told him that these documents showed a \$500.00 overage on the Grievant's final audit. The Grievant testified that "if" some of his stock were miscounted or overlooked in the February 25, 1993 audit, it "might" have been discovered during the final audit.

However, the Grievant's testimony is purely speculative. Moreover, even if that were not the case, the \$500.00 overage would only account for a small portion of the \$3,134.75 shortage at issue. It is, therefore, the conclusion of the Arbitrator that the Union has not presented an appropriate evidentiary basis for its requested negative inference; e.g. that the final audit and the Investigatory Memorandum contained information adverse to the Service's case in this grievance.

The arbitral awards on which the Union relies turn on facts that are not present in the instant case. Thus, several arbitral awards involve installations at which the security breaches were serious and widespread. See Case No. S4C-3S-C 32243 (J.F. Caraway, March 7, 1989), pages 6-9 (drawers of the grievant and other clerks did not properly lock and grievant's calculator consistently made errors); Case No. W1C-5K-C 24413 (T.F. Levak, December 14, 1985), page 10 (grievant's duplicate key was missing; drawers of grievant

and other employees would not properly and could be opened when locked); Case No. C7C-4B-C 1454 (L.E. Stallworth, July 10, 1991), pages 15-17 (Service violated its own regulations by failing to change safe combination when supervisors and other employees left the facility; combination was written on back of calendar in supervisor's office and could be seen by many employees); Case No. W7C-5L-C 6381 (E.F.J. Francis, January 31, 1990), pages 16-18 (Management had "casual attitude" toward security; numerous deviations from security regulations were sanctioned by Management in areas such as keys, transfer of stock, security of combination to safe).

Moreover, these arbitral awards do not dispense with the required causal nexus. Rather, they allow the Union to establish that nexus by demonstrating that the alleged security breach was of the type which certainly could have caused the loss at issue. See also Case No. C7C-4JC-15899 (L.E. Stallworth, July 10, 1991), page 16.

Further, in three (3) of the arbitral awards cited by the Union, Management either ignored or failed to repair successfully the security problems reported by employees. Caraway, pages 7, 8; Levak, page 10; Case No. E4C-2D-C 3275 (B. Cushman, June 27, 1986), pages 7-8. In the instant case, Management successfully repaired the broken drawer lock the day after the Grievant reported that problem.

For the reasons stated above, the Undersigned Arbitrator therefore concludes that the Union did not present sufficient

evidence that the shortage at issue was caused by inadequate security at the East Des Moines facility.

The Grievant testified without rebuttal to the care with which he protected his accountabilities, both at East Des Moines and in his other assignments in 23 years as a window clerk. Moreover, the Arbitrator places no reliance on those parts of the Step 2 denial that are based on McReynolds' statement about the February 25, 1993 audit. (Joint Exhibit No. 2 [Step 2 denial, pages 2, 3]). That document was not provided to the Union after VerSteegh requested it at the Step 2 meeting, despite the Service's obligations under Article 15, Section 2, Step 2.

Nonetheless, the evidence establishes that the Grievant had shortages in five (5) of his seven (7) audits between January 17, 1992 and May 18, 1993, excluding the disputed audit of February 25, 1993 (Management Exhibit No. 2). While the December 10, 1992 shortage was settled in a Step 2 grievance, there is no evidence that the Grievant challenged any of the other four (4) shortages. Moreover, three (3) of these shortages preceded the Grievant's assignment to East Des Moines.

The record, therefore, demonstrates that despite his earlier favorable audit history, the Grievant had accountability problems for more than one (1) year before the February 25, 1993 audit, and for several months after that audit. On balance, then, the Arbitrator must therefore conclude that the Union did not prove that the Grievant exercised reasonable care, as required under Article 28, over his stock that was audited on February 25, 1993. Stoltenberg, page 6.

The Arbitrator wishes to make clear that careful consideration has been given to the unrebutted evidence that Management "stonewalled" several Union information requests during the grievance procedure. The Service's conduct is a serious matter.

The Undersigned Arbitrator also recognizes that the Grievant will be required to repay a \$3,134.75 shortage. However, this result is required by the Parties' negotiated Contract. The record before the Arbitrator reflects security breaches that are "relatively minor." In addition, the Union has not demonstrated "a direct connection between the security breaches and the loss." As such, "it is not unreasonable for the Service to hold the employee accountable for the loss." Case No. C7C-4J-C 15899 (L.E. Stallworth, July 10, 1991) (shortage of \$2,170.66).

In enforcing a Letter of Demand of similar dimensions, Arbitrator Foster stated as follows:

In sum, the arbitrator has no choice but to enforce what may seem to be a harsh contract provision negotiated by the parties to hold employees "strictly accountable for the amount of the credit" where there is no factual basis for finding the Employer violated its duty to provide adequate security that caused the loss or that reasonable care was exercised by the grievant.

Case No. S7C-3W-C 18328 (R.W. Foster, June 18, 1990), page 7 (shortage of \$3,491.58).

Lastly, the Arbitrator hastens to point out that neither has the Service asserted nor has the Arbitrator concluded that the Grievant stole the missing stock.

AWARD

The instant grievance is denied. The Service did not violate the Contract when it issued the Grievant a Letter of Demand on April 13, 1993 in the amount of \$3,134.75.



Lamont E. Stallworth
Labor Arbitrator

Signed this 2nd day of August, 1996

City of Chicago
County of Cook
State of Illinois

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MIDWEST EXPEDITED ARBITRATION PANEL

In the Matter of Arbitration
Between

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION,

Post Office: Des Moines, IA

Case No: 198C-11-C 99259520

Grievant: P. Schulte

BEFORE: Sharon K. Imes

APPEARANCES:

For the Service: Marcia G. Grant, Labor Relations Specialist, Hawkeye District, United States Postal Service, Des Moines, IA.

For the Union: Robert D. Kessler, National Business Agent, St. Louis Region, Clerk Division, American Postal Workers Union, Kansas City, MO 64131.

PLACE OF HEARING: Des Moines, IA

DATE OF HEARING: June 15, 2000

DATE OF AWARD: June 19, 2000

RELEVANT CONTRACT PROVISIONS: Articles 3, 9, 15, 19, 28; ELM 437

CONTRACT YEAR: November 21, 1998 - November 20, 2000

TYPE OF GRIEVANCE: Contract Violation

AWARD SUMMARY:

While it is clear the Grievant received monies that she did not earn and that, generally, this act would constitute unjust enrichment, it is also clear the Grievant was disadvantaged financially since not only did she pay taxes on the overpayments over a period of four years, a fact not considered by the Service in its Letter of Demand, and, further, since the Service failed to take into account the length of time during which this error occurred and to make adjustments for the manner in which any collection of the claim would take place. When these factors are

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considered it is concluded that the claim for collection goes "against equity" and "the best interest" of the Postal Service.

By: Sharon K. Imes
Sharon K. Imes, Arbitrator

THE ISSUE:

Did the Service violate the National Agreement when it issued the July 7, 1999 letter of demand for \$919.83 to the Grievant? If so, what is the remedy?

STATEMENT OF THE CASE:

The Grievant, a Flat Sorter Clerk, has been employed by the Postal Service since October 1985. In 1993, the Grievant was promoted from a Level 5 to a Level 6; returned to a Level 5 and was repromoted to a Level 6. When she was repromoted an administrative error was made and she was moved from a Level 5, Step H to a Level 6, Step H. The error was discovered by management in late 1997.

On June 7, 1999, the Grievant received a Letter of Demand stating that due to this error, the Grievant had been overpaid \$919.83. In that letter the Grievant was advised that if she did not pay it back in a lump sum she could opt to have 15% of her disposable pay deducted (and interest on all debt greater than 30 days old) until the amount was paid. She was also advised that she could grieve the Letter of Demand.

This matter was grieved on June 18. In the grievance, the Union and the Grievant asked that the grievance be held in abeyance until the Grievant's Request for Waiver of Claim for Erroneous Payment had been fully adjudicated. The Grievant filed a Request for Waiver of Claim for Erroneous Payment on July 8. When the waiver, referencing the filing of a grievance, was filed the Lead Plant Manager who received the request for wavier notified the Grievant that he had no record of a grievance being filed and that nothing on the issue could be done until that time. Consequently, on July 15, the Union Steward sent the Lead Plant Manager a memo indicating that the grievance had been filed on June 18 and that it had been denied at Step 1 that same date; that he had personally made copies of the grievance and placed them in the Manager's designed holdout and to Accounting and Finance. The Steward also advised the Manager that he



had also sent correspondence to the Manager's office to advise the Manager that a grievance would be filed. There is no record that this waiver request was ever considered. In the meantime, however, the grievance continued through the grievance process and was also denied at Steps 2 and 3. At both Steps 2 and 3, management denied the grievance stating that the Grievant should have been aware of the overpayment and that she had the responsibility to report it to management.

POSITIONS OF THE PARTIES:

The Union argues that the Grievant should not have to reimburse the Service for the overpayment since the three criteria cited under Section 437.6 of the ELM have been met. Continuing, it states that there is no dispute over whether the overpayment was the result of an administrative error and that while the Step 3 management response stated the Grievant had not acted in good faith, the Service does not now assert that the Grievant did not act in good faith and, in fact, agrees it would have been difficult for the Grievant to have discovered the overpayment. Further, it maintains that requiring the Grievant to reimburse the Service for the overpayment would be a collection against equity particularly since more than four years passed before the error was discovered. The Union also maintains that since the Grievant's Request for Waiver of Claim for Erroneous Payment was never adjudicated, the Grievant was denied due process and that fact alone should be cause to rescind the Letter of Demand.

The Service argues, however, that since the Grievant was paid for time she did not work she is obligated to return the overpayment, therefore the Service did not violate the National Agreement when it issued the Letter of Demand. Further, it rejects the Union's argument that all three conditions in Section 437.6 of the ELM have been met declaring that the Grievant has been unjustly enriched and, therefore, failure to be reimbursed would go against equity and the best interest of the Service. It also states that it believes the Union's argument that the Grievant was denied due process is a new argument and should not be considered not only because it is new but also because it is not at issue in this dispute.

DISCUSSION:

Although the Union argues that the Service's failure to adjudicate the Request for Waiver of Claim for Erroneous Payment of Pay denies the Grievant due process, that argument is not

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considered in this dispute since such failure on the Service's part should be the subject of a grievance separate from one that challenges whether a Letter of Demand should be rescinded. Consequently, the outcome of this dispute will rest solely upon a finding as to whether the Union has shown that the error was an administrative error; that the Grievant acted reasonably under the circumstances, without any indication of fraud, misrepresentation, fault, or lack of good faith, and that the collection of the claim would be "against equity and good conscience" and would not be in the "best interest" of the Postal Service.¹

In support of their respect positions and to give guidance to the Arbitrator, the Union submitted nine arbitration decisions and the Service submitted fifteen decisions all concerning similar incidents. In almost all of these cases, the decision was based upon the arbitrator's view of whether or not collection of the overpayment would be against equity as defined in paragraph (c) of Section 437.6 of the ELM. The same is true in this dispute since the parties do not dispute that the overpayment resulted from an administrative error and since there is no indication of fraud, misrepresentation, fault or lack of faith on the part of the Grievant.

In those cases where the grievance was denied the arbitrators generally applied the principle that a person cannot retain monies that do not belong to them and concluded that returning the money would simply put the grievant in the same financial position he or she would have been absent the Postal Service's error.² In those cases where the grievance was sustained, it was usually concluded that collecting the claim went against equity and good conscience when the error was difficult to discern by either management or the employee or when the error occurred over a number of years. In two cases, those decided by Arbitrator Snow, it was concluded based upon insight he had gained from an earlier version of the Employee and Labor Relations Manual that the collection of a claim would be "against equity and good conscience" or would not be "in the best interest" of the Postal Service when it has been determined that not only was the error an administrative one but when there is no indication of fraud, misrepresentation, fault or lack of good faith on the employee's part.

¹ These three criteria are set forth in Section 437.6 of the ELM and are intended for use by the Minneapolis Accounting Center in determining whether to waive a claim for erroneous overpayment. Nonetheless, these three criteria also set the standard of review for determining whether there is merit in a Letter of Demand seeking reimbursement of the same claim.

² In certain cases, the arbitrator also found that the employee's failure to notify the Service of overpayment or the short duration of time between the error and its discovery also affected a finding against the grievant.



This Arbitrator is of the opinion that although an earlier provision of the Employee an Labor Relations Manual did indicate that "generally" meeting the first two criteria in Section 437.6 is cause to find "against equity and good conscience", an automatic finding to that effect upon evidence that the first two criteria were met ignores the fact that there are three criteria in this provision and that each deserves consideration. There is merit, however, in the conclusion by some arbitrators that a lengthy delay of time between when the administrative error occurred and when it was discovered, provided that the employee acted reasonably, is a factor to be considered in determining whether the collection of a claim goes against equity.

In this dispute, the fact that an administrative error caused the Grievant to be overpaid for four years and the fact that the parties agree the Grievant was not likely to have found the error just as it was difficult for management to find the error are relevant factors in determining whether the collection of this claim would go against equity. While other arbitrators have concluded that an approximate two-year delay in finding the error did not cause that employee any financial harm, there is no evidence that they or the Service took into account the fact that employees subjected to such errors were required to pay taxes on that overpayment. To this extent, even if amended returns are filed, employees subject to such errors do suffer some financial harm. In this instance, the Grievant was overpaid for four years and paid taxes on this overpayment for the same period of time.

Also relevant to this dispute is that it the Letter of Demand now seeks repayment of the overage in increments of nearly \$138 per pay period when the Grievant received the overpayment in increments of approximately \$9 per pay period and that the Grievant, if she elects payroll deduction, will be charged interest on any part of the debt that has not been repaid within 30 days of a finding that she must repay the overpayment.³ This puts the Grievant at a distinct financial disadvantage since the evidence establishes that she knew nothing of the overpayment. It is, in essence, the same as granting her a loan she did not ask for and then expecting her to not only repay it but to repay it quickly and to pay interest on it as well.

While it is clear the Grievant received monies that she did not earn and that, generally, this act would constitute unjust enrichment, it is also clear the Grievant was disadvantaged

³ The Service stated that it was not requiring the Grievant to pay interest, however, Joint Exhibit 3 indicates that interest will be charged on all debts greater than 30 days old and no evidence was introduced into the record that indicated no interest would be charged.

financially since not only did she pay taxes on the overpayments over a period of four years, a fact not considered by the Service in its Letter of Demand, and since the Service failed to take into account the length of time during which this error occurred and to make adjustments for the manner in which any collection of the claim would take place. When these factors are considered it is concluded that the claim for collection goes "against equity" and "the best interest" of the Postal Service.

Based upon the above findings, the award is as follows:

AWARD:

The grievance is sustained. The Service is ordered to rescind the Letter of Demand.

June 19, 2000
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