

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF HOMELAND SECURITY  
BUREAU OF CUSTOMS AND BORDER  
PROTECTION  
COBURN GORE PORT OF ENTRY  
COBURN GORE, MAINE

and

CHAPTER 141, NATIONAL TREASURY  
EMPLOYEES UNION

Case No. 15 FSIP 79

DECISION AND ORDER

Chapter 141, National Treasury Employees Union (NTEU or Union) filed a request for assistance with the Federal Service Impasses Panel (Panel) under the Federal Employees Flexible and Compressed Work Schedules Act of 1982 (Act), 5 U.S.C. § 6120, et seq., to resolve an impasse arising from negotiations with The Department of Homeland Security (DHS), Bureau of Customs and Border Protection, Coburn Gore, Maine (CBP or Employer) over the implementation of a 12-6/8 compressed work schedule (CWS) for Customs and Border Protection Officers (CBPOs) at the Coburn Gore Port of Entry (POE).<sup>1/</sup>

During the investigation of the request for assistance the Employer stated that it was not alleging that implementation of the Union's proposed CWS would cause an "adverse agency impact" under the Act. Consequently, the Panel asserted jurisdiction over the Union's request for assistance under the Federal Service Labor-Management Relations Statute (Statute), and determined that the dispute should be resolved through mediation-arbitration with Panel Member David E. Walker. The parties were informed that if a

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<sup>1/</sup> Under the Union's proposal, nine CBPOs would work 12-hour shifts 6 days per pay period, from 4 a.m. to 4 p.m. or 4 p.m. to 4 a.m., and 1 8-hour day. The schedule would begin the first full pay period of calendar year 2016 - January 10, 2016.

settlement was not reached during mediation, Member Walker would issue a binding decision to resolve the dispute. The proceeding was scheduled to occur on September 30, 2015, at the Jackman POE in Jackman, Maine. On September 29, 2015, the Employer informed the Panel that it had changed its position and was now alleging that implementation of the Union's proposed CWS would cause an adverse agency impact pursuant to the requirements of the Act.<sup>2/</sup> Nevertheless, by mutual agreement of the parties and Member Walker, the mediation portion of the mediation-arbitration proceeding occurred as scheduled on September 30, 2015, in Jackman. Mediation efforts continued in October, both by telephone and face-to-face in Portland, Maine, on October 27, 2015, where the discussion included the Union's proposed CWS and the Memorandum of Understanding (MOU) that would accompany the CWS were it to be implemented.

Prior to a teleconference that was scheduled to occur between the parties and Member Walker on October 30, 2015, the Employer indicated it was unwilling to continue with mediation and reasserted its adverse agency impact claim. On November 4, 2015, in accordance with the requirements of the Act, the Jackman Port Director issued his finding that implementation of the Union's proposed CWS schedule would cause an adverse agency impact. Because the Panel had initially asserted jurisdiction over the Union's request for assistance under the Statute, on November 9, 2015, the Panel determined to assert jurisdiction under the Act and directed the Employer to submit a written statement of position (SOP), with evidence and argument, to support the Jackman Port Director's finding, and provided the Union with an opportunity to submit a rebuttal SOP. The parties' SOPs were submitted pursuant to the Panel's direction. In accordance with 5 U.S.C. § 6131 and 5 C.F.R. §2472.11 of its regulations, the Panel has now considered the entire record in

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<sup>2/</sup> To bring the parties' dispute under the Act, the Employer submitted DHS Management Directive 3081, "Alternative Work Schedules," issued on September 6, 2005; CBP Delegation Order Number 07-005, "Delegation of Authority to Schedule Work," issued August 2, 2007; and CBP Delegation Order Number 08-001, "Delegation of Authority to Schedule Work," issued February 27, 2008. In essence, the first document delegates authority to make adverse agency impact findings under the Act from DHS to the CBP Commissioner; the second document re-delegates the authority to make such findings from the CBP Commissioner to CBP Assistant Commissioners; and the third document re-delegates such authority from CBP Assistant Commissioners to all Port Directors.

rendering its decision.

### BACKGROUND

CBP's mission is to prevent terrorists and terrorist weapons from entering the U.S. It is also charged with the interdiction of drugs and other contraband and the prevention of illegal entry of individuals. The vast majority of the NTEU's approximately 25,000 bargaining unit employees are CBPOs who are primarily responsible, on a 24/7 basis, for "screening passengers and cargo at CBP's more than 300 [POEs]." Chapter 141 represents 360 employees in New England and Canada, approximately 51 of whom are CBPOs at the Jackman POE or the five smaller POEs it manages: St. Aurlélie, St. Juste, St. Pamphile, St. Zacharie and Coburn Gore. The parties have negotiated CWS agreements for every POE except Coburn Gore.<sup>3/</sup> The parties' National Collective Bargaining Agreement (NCBA) was due to expire on May 11, 2014, but they have agreed that it will remain in effect until a successor is executed. The parties have agreed on ground rules at the level of exclusive recognition and are engaged in renegotiating their NCBA.

### ISSUE AT IMPASSE

The issue in dispute is as follows:

Whether the finding upon which the Port Director bases his determination not to implement the Union's proposed 12-6/8 CWS for unit employees at the Coburn Gore POE because it is likely to have an adverse agency impact is supported by evidence as defined under the Act.<sup>4/</sup>

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<sup>3/</sup> CBPOs at Jackman are permitted to work a 12-6/8 CWS.

<sup>4/</sup> Under 5 U.S.C. § 6131(b), "adverse agency impact" is defined as:

- (1) a reduction of the productivity of the agency;
- (2) a diminished level of the services furnished to the public by the agency; or
- (3) an increase in the cost of agency operations (other than a reasonable administrative cost relating to the process of establishing a flexible or compressed work schedule).

## 1. The Employer's Position

Implementation of the 12-6/8 CWS proposed by the Union "would increase the cost for Agency operations, create a loss in the productivity for the Agency and diminish the level of service to the public." By way of background, the 10 CPBOs currently stationed at the Coburn Gore POE have never had an alternative work schedule.<sup>5/</sup> They work a "[5 U.S.C. §] 6101 compliant schedule," i.e., 8-hours-a-day, 5-days-a-week, with fixed starting and stopping times. There are three 8-hour shifts per day (24/7), with two or three officers on duty each shift "dependent on whether it's peak or non-peak season." To meet mission requirements, the Port Director has discretion temporarily to detail a CBPO to another port, for example, from the Jackman POE to the Coburn Gore POE; if the distance is greater than 50 miles, however, *per diem* and a housing allowance must be paid. At each CBP POE, staffing "is accomplished at the Headquarters level, not locally." The Coburn Gore POE is "considered an undesirable location,"<sup>6/</sup> and "is not staffed to meet work requirements."

The Union's proposed CWS would reduce scheduling flexibility, resulting in increased overtime usage "in terms of both anticipated and unanticipated leave and for that matter any other reasons that require backfilling."<sup>7/</sup> Unlike the current

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The burden of demonstrating that the implementation of a proposed CWS is likely to cause an adverse agency impact falls on the employer under the Act. See 128 CONG. REC. H3999 (daily ed. July 12, 1982) (statement of Rep. Ferraro); and 128 CONG. REC. S7641 (daily ed. June 30, 1982) (statement of Sen. Stevens).

<sup>5/</sup> The number of CPBOs at the Coburn Gore POE will be reduced to nine effective January 10, 2016. The Union revised its proposed 12-6/8 CWS on November 4, 2015, to cover 9 CBPOs, rather than 10, after learning this.

<sup>6/</sup> In October 2015, during the mediation with Member Walker, the Assistant Port Director and the Union solicited volunteers from the Jackman POE for a temporary detail to the Coburn Gore POE and received no responses.

<sup>7/</sup> "Anticipated leave" includes any annual leave, sick leave, Temporary Duty (TDY) training assignments or military leave that management has been made aware of prior to the posting of any individual schedule. Schedules are posted 4 weeks in

schedule, which "provides six 8-hour shifts of overlap," the Union's proposal only provides "six 4 hours of overlap." In this regard, the Employer's latest "feasibility study," issued on November 18, 2015, uses "factual data" from six previous feasibility reviews of the Union's 12-6/8 proposal going back to February 7, 2012. During the 6-month period from March 1 to August 31, 2015, when there were 8 CBPOs at Coburn Gore, there were 247 8-hour anticipated shifts of relief provided by Jackman CBPOs to Coburn Gore. Coverage for these anticipated shifts "were at a zero cost" because management was able to use the 12-hour CWS of the Jackman CBPOs to cover the 8-hour shifts at Coburn Gore "within a regular 12-hour schedule." This option would be unavailable under the Union's proposed CWS. While the parties agree that a 9<sup>th</sup> CBPO at Coburn Gore would have reduced the number of anticipated relief shifts from 247 to 133, and the 12-hour shifts proposed by the Union would reduce the number still further to 88 anticipated relief shifts, the cost to fill them would be \$39,072 annually.<sup>8/</sup>

During the September 30, 2015, mediation session, the parties agreed that there are three options that management could use to address the number of anticipated relief shifts generated by the Union's 12-6/8 CWS proposal. Option 1, which would involve sending a Jackman CBPO to cover the 12-hour shift in Coburn Gore, would result in \$39,072 annually in overtime and \$6,732 annually in *per diem* costs, "for a grand total of \$45,804." Under Option 2, where a Jackman CBPO on a 12-hour shift would cover 9 hours of a 12-hour shift in Coburn Gore, and two Coburn Gore CBPOs would get 1½ hours overtime on each end of the 12-hour shift, the *per diem* costs would be eliminated but overtime expenditures would still increase by \$39,072 annually. Finally, under Option 3, where two Jackman CBPOs would split one 12-hour shift at Coburn Gore, although both the overtime and *per diem* costs under Options 1 and 2 would be eliminated, an additional 176 trips for a total of 24,640 extra miles, or 528 hours of unproductive travel time, would be created annually. Option 3 would also require overtime coverage "for all types of leave" the second CBPO would take, result in unnecessary wear and tear on vehicles, and add \$2,772

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advance. "Unanticipated leave," among other things, includes emergency annual leave, sick leave for personal or family reasons, light duty assignments, maternal/paternal leave, administrative duty assignments, and official time for Union activities.

<sup>8/</sup> The cost assumes a \$37 hourly rate, a figure used by both parties in prior studies.

in fuel costs.

In addition to the cost increases and reduction in productivity that covering for anticipated relief shifts would cause under the three Union options, another major factor supporting the Agency's adverse agency impact finding involves the expense of unanticipated leave. Between March and August 2015 there were 58 unanticipated 8-hour shifts at the Coburn Gore POE; from August 2014 to February 2015 there were 54 unanticipated shifts plus 70 TDY days; and from February 2014 to July 2014 there were 23 unanticipated shifts plus 19 TDY training days. Based on the Union's latest CWS proposal, "these unanticipated shifts will require overtime to backfill the shift to a minimum staffing number [of 2 CBPOs] in most circumstances." In this connection, 22 12-hour shifts per pay period would not exceed 2 CBPOs. Thus, every instance of unanticipated leave would require management to backfill the position for 12 hours. Currently, management is only required to backfill 8-hour shifts when unanticipated leave occurs. Using the data on unanticipated leave for the period from August 2014 to August 2015, the Coburn Gore POE would have to backfill approximately 182 12-hour shifts. This amounts to an increase in cost for that period of \$53,842 under the Union's proposal, or \$296 more to cover unanticipated leave for a 12-hour shift than for an 8-hour shift.

In summary, when the cost of anticipated and unanticipated leave is calculated, if management implements Option 1 the agency will incur "an increased total of \$99,647"; Option 2 would involve a total of \$92,915 in additional costs; and, under Option 3, "the agency will incur \$53,842 covering unanticipated leave plus 24,640 in extra miles on agency vehicles plus \$2,772 [in] extra fuel costs." Moreover, implementation of Option 3, which would reduce overtime costs the most under the Union's proposed nine CBPO 12-6/8 CWS, would result in "528 hours of extra unproductive travel time (equal to 66 days of an average 8-hour shift work schedule)." Furthermore, while the Union claims that its proposal would save the Agency approximately \$19,000 annually in shift differential, "shift differential is not part of the annual budgetary allocation that the [POE] receives." It only becomes a factor when a CBPO "reaches half of the overtime cap of \$35,000," or \$17,500 of overtime. Once a CBPO reaches that amount in overtime "all premium and differential pay is included for the total overtime earnings." The Jackman area of responsibility "has never gone over the \$35,000 cap" established under the Customs Officer Pay Reform Act "and has not requested a cap waiver."

Given the fact that Jackman CBPOs would have to travel to

Coburn Gore to backfill for anticipated and unanticipated leave, "management's ability to staff the [POEs] to process passenger and commercial vehicles" would be reduced, resulting in a diminished level of service to the public at the Jackman POE. In this regard, wait times during peak passenger traffic seasons would increase and the inspection of private aircraft and train arrivals also would be delayed. During the period from May 1 through October 31, 2015, for instance, the Jackman POE inspected 68 inbound trains and 30 private aircraft. As indicated above, however, under the Union's proposal Option 3 would require management to use two Jackman CBPOs to cover the one 12-hour shift at Coburn Gore "that used to be 8 hours." Further, in addition to the inspection of private aircraft and inbound trains, the Jackman POE also provides staffing, as needed, at four POEs other than Coburn Gore. It also should be noted that "the Agency's staffing crisis is not limited to the Coburn Gore [POE]." According to the July 2014 final "Report on U.S. Customs and Border Protection's Workload Staffing Model," issued by DHS's Office of the Inspector General, "CBP estimates that CBPOs are available for [inspection] duties 1,182 out of 2,080 hours, or 57 percent of the time; CBPO leave, training, and assorted administrative duties account for the remaining hours."

In conclusion, the Union's CWS proposal "primarily made up of [4 a.m. - 4 p.m. and 4 p.m. - 4 a.m.] shifts does not work from a financial, operational or production standpoint." While there are ongoing efforts to bring more staff to the Coburn Gore POE, no one knows if it will ever reach a level of staffing "to become a self-sufficient port." CBPOs assigned to Jackman already travel significant distances to report for their shifts, and increasing the hours at Coburn Gore from 8 to 12 would make their day even longer, adversely affecting the safety of CBPOs who "could be working and driving home up to a 21-hour period." Any "further degradation" of the staffing at the Coburn Gore POE "will increase the severity of the adverse situation" it already faces, as well as cause "adverse effects [at] the Jackman [POE]." For the reasons enumerated above, the Panel should find that the implementation of the Union's CWS proposal is likely to create an adverse agency impact.

## 2. The Union's Position

The Panel should conclude that the Employer has not met its burden under the Act of demonstrating that the Union's proposed 12-6/8 CWS is likely to cause an adverse agency impact. Contrary to the requirements of the Act, and the Panel's previous

decisions,<sup>9/</sup> the Employer's finding is based on "speculation and conjecture." There is "no dispute" that when staffing at the Coburn Gore POE drops below nine CBPOs on a temporary basis "there may be a need to backfill using either overtime or an officer from Coburn Gore." The Employer's claim that relief from the Jackman POE "would balloon" when the staffing level falls below nine, however, "is based on last year's data, when there were only seven officers working at Coburn Gore, and at times as few as five."<sup>10/</sup> In fact, the Union's proposed 12-6/8 CWS "requires less backfilling than the 6101 schedule," essentially because it "provides for coverage above minimum staffing more often than the 6101 schedule." In this regard, with the 6101 schedule, each CBPO covers 10 days in a pay period and has 4 days off. Under the 12-6/8 CWS, each CBPO covers six 12-hour days in a pay period, one 8-hour day, and has 7 days off. Therefore, Coburn Gore CBPOs on the Union's proposed CWS would cover 30 percent fewer shifts.

The validity of the Union's position, and the defects in the Employer's adverse agency impact finding, are demonstrable. Using annual leave requests that management has already approved for Coburn Gore CBPOs in FY 2016, "reducing staff to either seven or eight for a week or 2 weeks," the Union "directly compared" the current schedule with its proposed 12-6/8 CWS by randomly selecting several "yet to be worked FY 2016 pay periods," i.e., Pay Periods 16, 19, 21 and 24. In Pay Period 16, for example, one CBPO already has been approved to take annual leave during the

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9/ The Union cites the Panel's decisions in Department of Defense, Defense Logistics Agency, Tinker AFB, Oklahoma and Local 916, AFGE, AFL-CIO, Case No. 10 FSIP 84 (April 27, 2011) and Department of the Air Force, Air Force Reserve Command, March Air Reserve Base, California and Local 3854, AFGE, AFL-CIO, Case No. 07 FSIP 31 (February 23, 2007) to support its position.

10/ For example, the Employer relies on data from March 1 through August 31, 2015, to support its assertion that a 9 or 10 CBPO CWS would result in a reduction in service to the public in Jackman. According to the Union, during that period there were only seven CBPOs working at Coburn Gore performing full duties, and six or five when CBPOs were out due to leave or training, requiring substantial backfilling from both Jackman and with overtime. The data "is not relevant now because there are currently 10 officers assigned and there will be 9 officers as of the start of 2016."



first week and another CBPO has been approved to take annual leave during the second week. Under the 6101 schedule, management would be required to backfill eight 8-hour shifts (64 hours total), while under the Union's proposal only four 8-hour and three 4-hour shifts would have to be backfilled (44 hours total). In each of the four pay periods for which it provided sample schedules, the 12-6/8 CWS required significantly fewer hours to backfill. To backfill the necessary hours, management has the options of using the Coburn Gore supervisor (if no overtime is involved), a Jackman CBPO on straight time, or a Coburn Gore CBPO on overtime. Significantly, "there will be almost no occasion when it will be necessary for the Agency to backfill from Jackman for an entire 12-hour tour" under the Union's proposal. The four real-life examples substantiate that "even though the officer or officers on leave are off for 12 hours, the typical amount of backfilling needed is 8 hours or 4 hours with the CWS." If such a situation should arise, however, "the Agency can split the shift between 3 hours of overtime for Coburn Gore officers and 9 hours of relief from Jackman, much as it does at present."<sup>11/</sup>

Although, at a minimum, there are likely to be 30 percent fewer days requiring backfilling either with overtime or from Jackman, "given triple coverage for many hours with the CWS, actually far fewer would have to be backfilled." Even assuming that management would have to cover for a Coburn Gore CBPO every time a shift is missed, "30 percent fewer shifts means at least 30 percent fewer trips from Jackman," saving on lost productivity, mileage and wear and tear on Government vehicles. If, on occasion, two Jackman CBPOs were sent to Coburn Gore to cover a 12-hour shift, "the productivity savings at other times would more than make up the difference." In addition, there would be other benefits to the Agency if the Union's proposal is implemented. With shifts starting at 4 p.m. and 4 a.m., shift differential costs would be reduced by approximately \$19,000 per year. The Employer's claim that such savings are irrelevant "is mistaken. Savings are savings regardless of how the budget is parceled out, and must be offset against increased costs elsewhere." While "only experience can quantify this," it is also reasonable to assume that unanticipated "day-at-a-time" annual and sick leave would be reduced if Coburn Gore CBPOs are off 7

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<sup>11/</sup> In the Union's view, the Employer's assertion that it would have to send CBPOs for 12 hours, and pay for 3 or 4 hours of travel overtime and per diem "is not worthy of serious discussion. Given the alternatives, that scenario would only take place if the Agency made it happen in order to intentionally increase the costs of the Coburn Gore CWS."

days per pay period rather than 4.

If staffing at Coburn Gore falls below the nine CBPOs that the Union's proposed 12-6/8 CWS is based upon the Employer has a number of options for dealing with the "ballooning relief costs" it has projected. In this regard, the parties' NCBA gives it the right to temporarily suspend the CWS for three pay periods in such circumstances. Management can assign additional CBPOs to Coburn Gore either as new hires or through temporary or permanent reassignments. Moreover, even though the Union's proposed CWS "is workable without relief shifts, as the sample schedules demonstrate," had the Employer not brought this dispute under the Act, the parties' could have completed their negotiations over an accompanying MOU to provide "relief shifts or other flexibilities that would mitigate unusual decreases in staffing." Finally, the Employer also can exercise its rights under the Act and the NCBA by issuing a finding of adverse agency impact due to a permanent staffing decrease after the Union's proposed CWS is implemented. What the Employer should not be permitted to do, however, is "deny CWS to Coburn Gore employees, who have as much right to CWS as Jackman employees." For the reasons presented above, the Panel should reject the Employer's assertion of adverse agency impact "and order the acceptance of the Union's proposed CWS."<sup>12/</sup>

#### CONCLUSION

Under § 6131(c)(2)(B) of the Act, the Panel is required to rule in favor of an agency head's determination not to establish a CWS if the findings on which it is based are supported by evidence that the schedule is likely to cause an "adverse agency impact." Panel determinations under the Act are concerned solely with whether an employer has met its statutory burden. The Panel is not to apply "an overly rigorous evidentiary standard," but must determine whether an employer has met its statutory burden

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<sup>12/</sup> The Panel notes that its options under the Act are limited in cases where an employer fails to meet its statutory burden. In such circumstances, it is clear from the Act's legislative history that:

The Panel will direct the parties to return to the bargaining table and to continue negotiations on an alternative work schedule (128 Cong. Rec. H3999, daily ed. July 12, 1982) (statement of Rep. Ferraro). See also S. Rep. No. 97-365, 97<sup>th</sup> Cong., 2d Sess. 15-16 (1982).

on the basis of "the totality of the evidence presented."<sup>13/</sup>

After careful consideration of the arguments and evidence presented, the Panel concludes that the Employer has not met its statutory burden. In this regard, both parties during bargaining and the mediation phase before Member Walker agreed that the key to a CWS schedule at Coburn Gore POE was the level of regularly assigned officers working 24/7 at that outlying location. The Employer was and is properly concerned with the prospect of ballooning overtime costs should the Coburn Gore workforce prove to be too small to independently cover scheduled and unscheduled absences without help from the larger POE at Jackman. At one point in the proceeding the Port Director opined that a staffing level of 10 CBPOs at Coburn Gore could "work," but anything less would cause large cost overruns, a related diminished level of service to the public and a reduction in production by the Agency. Over the last quarter of 2015 the staffing of CBPOs at Coburn Gore rose to 10, with the prospect of dropping to 9 in January 2016.

Most, if not all, of the Employer's prediction of unacceptable results was based on a 6-month survey it performed covering the pay periods between March 1 and August 31, 2015, which showed there was a total of 247 8-hour relief shifts which Jackman CBPOs were required to cover traveling the approximate 70 miles to Coburn Gore.<sup>14/</sup> Factual evidence such as the 247 relief shifts would not only be relevant, but possibly dispositive of the tests set forth in 5 U.S.C. §6131(b). Unfortunately, the underlying premise of that survey is faulty

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<sup>13/</sup> See the Senate report, which states:

The agency will bear the burden in showing that such a schedule is likely to have an adverse impact. This burden is not to be construed to require the application of an overly rigorous evidentiary standard since the issues will often involve imprecise matters of productivity and the level of service to the public. It is expected the Panel will hear both sides of the issue and make its determination on the totality of the evidence presented. S. REP. NO. 97-365, 97<sup>th</sup> Cong., 2d Sess. at 15-16 (1982).

<sup>14/</sup> This is in addition to 91 overtime shifts covered in-house by Coburn Gore CBPOs in the same time period.

because it occurred at a time, or times, in which Coburn Gore was manned at much lower levels than in the last quarter of this year. Those levels caused a non-representative increase in absences that needed coverage, making a conclusion based thereon a *non sequitur*.

The Employer did not explain or remedy the discrepancy in the statistics that it offered and relied upon in predicting drastic impacts from the proposed CWS. Accordingly, in view of that and the absence of similar factual proofs, the Employer failed to carry its burden of showing through reliable facts that costs, or related reduction in public services and/or agency production, would increase under a 12-6/8 CWS schedule as last proposed by the Union.

In addition, the Employer did not credibly rebut various proposals by the Union that would have mitigated any possible adverse consequence of the proposed CWS schedule. It is this observation, along with the overriding authority vested in the Employer by 5 U.S.C. § 6131(a)(2) and (c)(2)(A), to seek termination of an existing CWS if there is an adverse agency impact based on actual evidence, that makes detailed bargaining in advance of agreement on this variable subject compelling and beneficial to both parties.

#### ORDER

Pursuant to the authority vested in it by the Federal Employees Flexible and Compressed Work Schedules Act, 5 U.S.C. § 6131(c), the Federal Service Impasses Panel under § 2472.11(b) of its regulations hereby orders the Employer to negotiate over the Union's proposed 12-6/8 compressed work schedule.

By direction of the Panel.



H. Joseph Schimansky  
Executive Director

December 15, 2015  
Washington, D.C.