American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

Gary Kloepfer
Assistant Director A
Maintenance Division
202-842-4213 (Office)
202-289-3746 (Fax)

Article 15 - 15 Day Statement of Issues and Facts

August 10, 2009

Mr. Doug Tulino
Vice President, Labor Relations
U.S. Postal Service, Room 9014
475 L'Enfant Plaza
Washington, D.C. 20260

Re: APWU No.HQTT20072, USPS No. Q06T4QC07147172
Certified No.: 7007 2560 0003 2182 1189

Dear Mr. Tulino:

The parties had numerous discussions regarding the issue in this grievance with the last one occurring on July 17, 2009. The parties agreed time limits had been extended for all purpose as well as achieving full discussion on the issue. Article 15, Section 2 (Step 4) provides that if the parties have not reached agreement within fifteen days of their meeting that each party shall provide the other with a statement in writing of its understanding of the issues involved, and the facts giving rise to the dispute. In addition to the parties' agreement to extend all time limits, an agreement was reached whereby each party's 15 Day Statement had to be submitted no later than September 2, 2009.

The following is the APWU's statement of issues and facts concerning this dispute. Whether the Postal Service violated Article 32 Section 1 of the National Agreement and Section 530 of the Administrative Support Manual when it made its decision to subcontract the installation of the implementation of PLANET code capability requiring software/firmware/and hardware modifications to FSM1000 ?

The Union alleges that contracting out of this work violated Article 32 Section 1 of the Collective Bargaining Agreement and Section 530 of the Administrative Support Manual (ASM). Article 32 requires the Postal Service provide its pre-subcontracting decision making documentation relied upon to demonstrate that it gave good faith consideration to the factors listed in Article 32 prior to making its decision to subcontract as well as meeting with the Union when subcontracting is being considered. In addition, Section 530 of the Administrative Support Manual restricts subcontracting this type of work unless there are no qualified maintenance employees or if the equipment is a prototype. The Postal Service

had not provided all relevant documents and/or evidence in response to the Union's request for all documents related to the subcontracting decision to include all "back-up" data and documents used to create its general/generic Article 32 Review. As such the Postal Service has failed to demonstrate that it gave good faith due consideration to the factors listed in Article 32 or Section 530 of the ASM.

It is the Union's position that the work performed by contract employees is bargaining unit work as contained in, but not limited to, the Standard Position Descriptions of the Electronics Technician and Electronic Technician (Electronic Technicians, MPE Mechanics and , Maintenance Mechanics are employed in every facility housing a FSM1000), etc. . In addition, bargaining unit employees have performed the same and/or similar work on prior occasions. There is no dispute between the parties that the PLANET Code Retrofit Plan is similar to the existing POSTNET code and required a relatively simple modification to read the new PLANET codes.

It is the Union's position that a contract for the performance of equipment modification for this equipment can only be made after the Postal Service complies with Article 32 of the Collective Bargaining Agreement and/or when one of the exceptions in Section 535 exists. Section 535 of the Administrative Support Manual contains specific contract language which prohibits the Postal Service from subcontracting this type of maintenance work. It is the Union's position that the Postal Service has failed to comply with these requirements and that it has failed to produce evidence that it gave good faith consideration to the factors listed in Article 32 of the CBA.

It is the position of the Union that this national in scope subcontracting decision had significant impact upon the bargaining unit due in part to the loss of this and future work. In addition the Postal Service failed to provide the Union with the requisite advance notice required by Article 32. Based on these facts it is the Union's position that it has been deprived of its rights as contained in Article 32 Section 1.B.[1] The harm to the Union and its members due to the

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[1]

Section 1. General Principles

A. The Employer will give due consideration to public interest, cost, efficiency, availability of equipment, and qualification of employees when evaluating the need to subcontract.

B. The Employer will give advance notification to the Union at the national level when subcontracting which will have a significant impact on bargaining unit work is being considered and will meet with the Union while developing the initial Comparative Analysis report. The Employer will consider the Union's views on costs and other factors, together with proposals to avoid subcontracting and proposals to minimize the impact of any subcontracting. A statement of the Union's views and proposals will be included in the initial Comparative Analysis and in any Decision Analysis Report relating

abridgement of these rights can not be remedied with a simple cease and desist instruction as the bargaining unit has been deprived of work and work opportunities and compensation due to the errors committed by the Postal Service. Rather, the remedy for the harm done due to this contract violation must be the subcontracted work being awarded to the bargaining unit and compensation to the bargaining unit for all hours worked by the contractor at the appropriate rate of pay, e.g. straight time and/or overtime rate.

It is the Union's position that the Postal Service further violates the National Agreement when it awards a contract without having first given the requisite notice to the Union. Clearly, a plain reading of the National Agreement establishes that prior notice to the Union is a condition precedent to any decision by the Postal Service to contract out bargaining unit work. By not doing so, the Postal Service compounded its violation of the National Agreement.

Thus, a cursory examination of Article 32 supports the APWU's position that proper notice to the APWU is a contractual requirement prior to any decision to contract out bargaining unit work. Clearly, the language of Article 32, Section 1.B requires advance notification to the Union at the national level with regard to subcontracting which will have a significant impact on bargaining unit work. In addition, Article 32, Section 1.B provides that "No final decision on whether or not such work will be contracted out will be made until the matter is discussed with the Union." It is the Union's position that the Postal Service made its subcontracting decision outside the parameters of Article 32.

An examination of a national level arbitration case by Arbitrator Gamser in Case No. AB-NAT-6291, in which he sustained the APWU's grievance regarding the Postal Service's obligation to provide advance notification to the Union before contracting out bargaining unit work, reveals that no decision to subcontract could be made unless, and until, such notification was given. Arbitrator Gamser stated, in relevant part, that:

> 3. ... Further, the employer is also obligated under Section 2 of Article XXXII not to make a final decision on this type of subcontracting of bargaining unit work until after engaging in a meaningful discussion with the union on this subject.

In the absence of any documented good faith consideration the Postal Service's inability to provide any information to the Union regarding its conduct of the necessary subcontracting analysis persuades is evidence that the Postal Service failed to discharge its obligations under Article 32 of the Agreement and requires the grievance to be sustained with regard to the entirety of the subcontracting actions. This is the only conclusion

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to the subcontracting under consideration. No final decision on whether or not such work will be contracted out will be made until the matter is discussed with the Union.

C. When a decision has been made at the Field level to subcontract bargaining unit work, the Union at the Local level will be given notification.

that can be drawn as the evidence and documents submitted by the Postal Service do not respond to the Union's information requests and show that subcontracting occurred without the benefit of "due consideration" of the factors established by either Article 32 or ASM 535.111.

Additionally, for example, Arbitrator James S. Odom, Jr., in Case No. H94T-1H-C 97121813, decided, consistent with the aforementioned Gamser Award, that the procedural requirement of Article 32 must be given "genuine respect" and not be "taken lightly." Indeed, according to Arbitrator Odom, "If they (the procedural requirements of Article 32) are not satisfied, 'no final decision on whether or not such work maybe contracted out may be made. " Article 32, in both Sections 1.A and 1.B clearly states that the Postal Service may not enter into contracts for bargaining unit work unless the pre-condition of prior notice to the Union is met. It is without doubt that the Parties agreed, in Article 32, Section 1.B to a strict process of prior notification to the Union before any contract with significant impact could be let. Specifically, Article 32 provides, in no uncertain terms, that the Union must receive prior notification, together with certain information and an opportunity for discussion prior to any subcontracting decision. In order for the notification and other procedural requirements of Article 32 to be effective, those provisions must be strictly adhered to, with no excuses.

The Postal Service's failure to observe the strict letter of the National Agreement and give the APWU prior notification of this contract deprived the Union of several opportunities it would otherwise have had to protect the job security of bargaining unit employees. When the Postal Service failed to give the APWU the notification and information required by Article 32, Section 1.B, it denied the APWU the opportunity to attempt to convince the Postal Service to assign the work to Maintenance bargaining unit employees and to suggest alternatives to subcontracting which would permit the work to be performed to be performed in-house by its career maintenance craft employees.

The Postal Service may claim that the scope of the contract did not have significant impact upon bargaining unit work and it is not required to give advance notification to the Union or to justify its subcontracting decision. Should it make this allegation then its position is a self-serving position and equates to an affirmative defense. In raising this affirmative defense it assumes the burden of providing the documents and evidence that it relied upon when it made its subcontracting decision. The necessity of providing this data is a requirement as the decision making process of Article 32, regardless of whether the decision making process results in a finding of significant impact or not, clearly requires good faith application on the part of the Postal Service. Not only did the Postal Service not provide evidence that it gave good faith consideration to the factors listed in Article 32 it also failed to supply any evidence in support of its claim of no significant impact. As such, the Postal Service is prohibited from submitting evidence and/or testimony beyond its limited input during our discussions. In this regard it is noteworthy to note the language of Arbitrator Das in case H0C-NA-C-21.

This grievance was initiated at Step 4 pursuant to Article 15.3.D. The National Agreement does not specifically provide a time limit for filing interpretive grievances at Step 4. Careful review of the Gamser decision in Case No. AB-NAT-2541 supports the Unions

contention that Arbitrator Gamser was not presented with and did not decide the issue of whether a Step 4 interpretive grievance must be filed within the 14-day time limit in Article 15.2 Step 1(a).

Arbitrator Gamser noted that in any event, the Postal Service's statement of issues, in effect its Step 4 response to this grievance which itself was untimely submitted under Article 15.2 Step 4(a) - does not raise the issue of timeliness. I am not persuaded by the Postal Service's argument that the issue of timeliness was implicit in or "all wrapped up" in the estoppel argument it did make in its Step 4 response. Under Article 15.3.B, as well as prior arbitration decisions holding that a party may not raise new issues at arbitration, the Postal Service is precluded from raising its timeliness argument in this case for the first time at arbitration.

It is also the position of the Union that when subcontracting decisions are made at the national level the first issue to be determined is whether the contract had significant impact on bargaining unit work. In case AB-NAT-6291, national arbitrator Howard Gamser refuted the Postal Service's argument that the Union was required to demonstrate an adverse impact upon the bargaining unit in order to prove the contacting action had a significant impact upon the bargaining unit. He reasoned that if there was a reasonable expectation that the subcontracted work could be expanded nation-wide then the subcontract could have significant impact upon bargaining unit work. In support of this reasoning he embraced a part of the Postal Service's position that the installation of more machines would result in more work for the bargaining unit employee that normally repairs the machine. He then conclude that an expanded contract would have a significant impact upon bargaining unit work available to be performed and that the Postal Service was required to give the Union advance notice of the contract, consider the Union's views on minimizing such impact upon bargaining unit work availability, and not make a final decision that such a program would be implemented until a good faith discussion of any issues raised by the Union had been concluded with due consideration of the Union's proposals.

Article 32 gives the Union the absolute right to advance notice and the opportunity to engage in discussions before the subcontracting commitment has been made. In case H4C-NA-C-39, national arbitrator Richard Bloch found that Article 32 sets forth certain procedural constraints concerning notification, meeting and discussion of the matter with the union as well as the employer's obligation to give "due consideration" to a variety of factors, including costs and efficiency, among other things. Assuming good faith compliance with the procedural requirements of Article 32, the Postal Service is otherwise unimpeded in the subcontracting process. Those requirements are not to be taken likely. If they are not satisfied, "no final decision on whether or not such work will be contracted out" may be made. ***The obligation to notify and to discuss with the union the aspects of the plan are not to be reduced to mere formalities or cursory briefings.***

He then defined the procedural requirements of Article 32 as:

Management must:

1. Give advance notification, when it is considering subcontracting that will have a "significant impact" on bargaining unit work.

2. Meet with the Union to consider its views on minimizing such impact.

3. Discuss the matter with the Unions prior to a final decision on the subcontracting program.

   Reasonably speaking, this means that, in the overall, the Union is to be consulted and the matter is to be discussed between the Company and the Union. This is not a new conclusion; Arbitrator Mittenthal has made the same observation:

   The purpose of the meeting is apparently is to give the union an opportunity to attempt to persuade the Postal Service to change its course... (Case A8-NA-0481, at page 8)

The 2000 Collective Bargaining Agreement expanded the criteria established by Arbitrator Bloch. The specific language is as follows:

> B. The Employer will give advance notification to the Union at the national level when subcontracting which will have a significant impact on bargaining unit work is being considered and will meet with the Union while developing the initial Comparative Analysis report. The Employer will consider the Union's views on costs and other factors, together with proposals to avoid subcontracting and proposals to minimize the impact of any subcontracting. A statement of the Union's views and proposals will be included in the initial Comparative Analysis and in any Decision Analysis Report relating to the subcontracting under consideration. No final decision on whether or not such work will be contracted out will be made until the matter is discussed with the Union.

It is also the position of the Union, assuming the Postal Service has met its contractual obligations under Article 32 Section 1.B, or in the case where management successfully demonstrates that there was no significant impact upon the bargaining unit, its subcontracting decision must then stand the scrutiny of Article 32 Section 1.A and Section 535 of the Administrative Support Manual. In case, H8C-NA-C-25, Arbitrator Richard Mittenthal ruled that management's obligations when making its subcontracting decision related more to the process by which it arrived at its decision than to the decision itself. He then defined the term "due consideration" as:

> "Unfortunately, the words 'due consideration are not defined in the National Agreement. Their significance, however, seems clear. They mean that the Postal Service must take into account the five factors mentioned in Paragraph A in determining whether or not to contract out surface transportation work. To ignore these factors or to examine them in a cursory fashion in making its decision

> would be improper. To consider other factors, not found in Paragraph A, would be equally improper. The Postal Service must, in short, make a good faith attempt to evaluate the need for contracting out in terms of the contractual factors. Anything less would fall short of 'due consideration.' "Thus, the Postal Service's obligation relates more to the process by which it arrives at a decision than to the decision itself. An incorrect decision does not necessarily mean a violation of Paragraph A. Incorrectness does suggest, to some extent at least, a lack of 'due consideration.' But this implication may be overcome by a Management showing that it did in fact give 'due consideration' to the several factors in reaching its decision. The greater the incorrectness, however, the stronger the implication that Management did not meet the 'due consideration' test. Suppose, for instance, that 'cost' is the only factor upon which Management relies in engaging a contractor, that its cost analysis is shown to be plainly in error, and that it would actually have been cheaper for the Postal Service to use its own vehicles and drivers. Under these circumstances, the conclusion would be almost irresistible that Management had not given 'due consideration' in arriving at its decision."

Based on Arbitrator Mittenthal's interpretation, the Postal Service carries the burden of proving it gave good faith consideration to all five factors prior to making its subcontracting decision whenever it claims a subcontracting decision was made in accordance with Article 32 and/or a Handbook, Manual or Instruction. This burden can only be achieved through the production of the documents, data, etc. that pre-date the decision to subcontract.

It is also well established through arbitral precedent that the Postal Service must give and provide more than simple lip service to the due consideration factors identified in Article 32 prior to making the decision to subcontract bargaining unit work. Thus the Postal Service must demonstrate, with evidence that exceeds the clear and convincing standard that it gave "good faith" consideration to the factors contained in Article 32 that predated the decision to subcontract. Therefore, an unsupported "Article 32 Review" document is insufficient to demonstrate good faith consideration to any of the listed factors in Article 32 of the National Agreement. In this case, the information supplied by the Postal Service failed to demonstrate that good faith consideration was achieved.

It is the position of the Union that there is no question that when management fails to respond to requests for information and otherwise presents vague or conclusionary answers during the grievance process; it is evident that "genuine" and good faith effort to duly consider the factors has not been made. There needs to be evidence that is detailed about the five factors and the weight afforded each one. Thus the failure to provide documentation used in the making of the decision to subcontract always establishes a lack of "due consideration.

Although the Postal Service did not provide the Union with the required advance notification that it was considering a subcontracting decision, the Union initiated discussions upon learning of the final subcontracting decision. Thus the record reveals that the Union took advantage of this opportunity to meet and discuss the Postal Service's subcontracting decision. The Union sought a detailed explanation of the Postal Service's assumptions, insisted upon the identification

and resolution of fact disagreements, suggested means to resolve the dispute, etc. It is the Union's position that all though meetings and discussions occurred, they were held after the decision to subcontract had been made. Therefore no negative inference can be attached to the Union for its participation in these meetings and discussions.

Arbitrator Das in case Q94V-4Q-C-96044758 (January 20, 2004) identified factors an arbitrator conceivably could properly consider in fashioning a remedy for a violation of Article 32. It is the Union's position that Arbitrator Das further defined the Postal Service's burdens when it conducts its subcontracting process. Also of note is the fact that he did not foreclose any remedial avenues for the Union. However, it's the Union's position that Bargaining Unit employees have been harmed and must be compensated as they would have performed the work had the Postal Service improperly subcontracted the work. It is the Union's position, in accordance with Arbitrator Das, in accordance with Arbitrator Mittenthal's decision in case H1C-NA-C-97, that he has the authority to grant a monetary remedy in order to restore the status quo.

Arbitrator Stallworth considered the issue of whether the Postal Service violated the National Agreement when it subcontracted work removing old paint and repainting the second floor vehicle maintenance facility without first giving the APWU notice under Article 32. Arbitrator Stallworth first concluded that the Postal Service violated the National Agreement when it failed to notify the APWU regarding its intent to subcontract the work in question. With regard to the remedy, Arbitrator Stallworth decided that:

> As a remedy, the Undersigned Arbitrator orders that the Service cease and desist subcontracting work as qualified journeymen in various occupational groups within the Minneapolis facility may be capable of doing such work, and that the Service provide the Union hereafter with cost information and advance notice as required-by the Collective Bargaining Agreement. The Undersigned Arbitrator further orders that the Service pay overtime to those employees qualified to do the disputed work at their respective overtime rates for the hours denied and all other benefits to which they would have been entitled to and to be made whole.

In a similar case, Case No.I94T-1I-C-97075046 (January 7, 2000), Arbitrator Stallworth again found that the Postal Service violated Article 32 of the National Agreement when it failed to give prior notice of its intent to subcontract disputed work. With regard to the Postal Service's failure to give the requisite prior notice, Arbitrator stated that:

> It is well-settled that to flatly ignore the subcontracting notice requirements of Article 32 is a clear violation of the National Agreement See, e.g., United States Postal Service and American Postal Workers Union, (Baton, Rouge, LA (Arb. Richard Mittenthal, November 9, 1981) Case No. H8C-NA-C 25 and United States Postal Service and American Postal Workers Union, (Minneapolis/St. Paul, MN BMC) (Arb. Lamont E. Stallworth, December 30, 1997) Case No. I90T-1G-C 94041650. Accordingly, the instant grievance must be sustained.

Arbitrator Stallworth went on to order, as a remedy in this case, that the Postal Service cease and desist from contracting out disputed work and that the Postal Service provide "monetary relief" to affected bargaining unit members in the amount "relative to the cost of the subcontracting, or a percentage thereof, in payment for the work that would have been performed by bargaining unit members." (In addition, see Arbitrator S. Earl Williams in Case No. S1V-3U-42697 (July 20, 1989), in which, after having found that the Postal Service committed a procedural violation of Article 32 by failing to give the APWU prior notice of its intent to subcontract, ordered, as a remedy, that the subcontract be cancelled, and the disputed work be reassigned to the bargaining unit.

Please contact me if you wish to discuss this matter.

Sincerely,

Gary Kloepfer
Case Officer

APWU #: HQTT20072
USPS #: Q06T4QC07147172

Dispute Date: 4/18/2007
Contract Articles: ;

cc: Industrial Relations

GK /RR