NATIONAL ARBITRATION

BEFORE IMPARTIAL ARBITRATOR STEPHEN B. GOLDBERG

In the Matter of Arbitration	)		
	)		
between	)		
	)		
UNITED STATES POSTAL SERVICE	)		
	)		
and	)		
	)		
AMERICAN POSTAL WORKERS	)		
UNION, AFL-CIO	)	Q10V-4Q-C	12324573
	)		

BEFORE: Stephen B. Goldberg, Arbitrator

APPEARANCES:

United States Postal Service: John Oldenberg, Attorney; James P. Verdi, Attorney

American Postal Workers Union, AFL-CIO: Melinda K. Holmes, Attorney; Darryl J. Anderson, Attorney; Sarah T. Kanter, Attorney (O'Donnell, Schwartz & Anderson, P.C)

Place of Hearing:	USPS Headquarters, 475 L'Enfant Plaza, S.W., Washington, D.C.; American Postal Workers Union, AFL-CIO, 1300 L Street, N.W. Washington, D.C.
Dates of Hearing:	November 27-28, 2012; December 3-4, 2012; January 15-17, 2013
Date of Award:	March 4, 2013
Relevant Contract Provisions:	Article 32.1; Article 32.2; Memorandum of Understanding re Contracting or Insourcing of Contracted Services; Memorandum of Understanding re Workplace Benefits, Employment Opportunities, Training and Education Fund; Memorandum of Understanding Re Consideration of National Outsourcing Initiatives; Memorandum of Understanding re Motor Vehicle Craft Jobs
Contract Year:	2010-2015
Type of Grievance:	Contract Interpretation

Award Summary

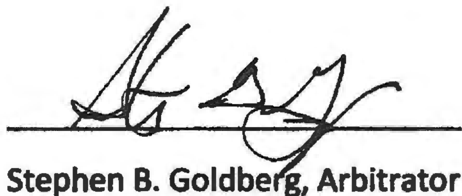
1. Article 32.1.B applies to the proposed California mode conversion. Accordingly, the Postal Service must comply with Article 32.1.B before making a final decision on whether or not California PVS work will be contracted out.

2. Article 32.2 does not apply to the California mode conversion.

3. The Memorandum of Understanding Regarding Contracting or Insourcing of Contracted Services applies to all contracting out of highway transportation work, including that controlled by Article 32.2.

4. The "fair comparison of all reasonable costs" called for by the Memorandum of Understanding Regarding Contracting or Insourcing of Contracted Services is to be made at the times called for by Article 32 – in an Article 32.1.B proceeding at the time the Comparative Analysis report is being developed; in an Article 32.2 proceeding within 45 days of the Postal Service furnishing the Union with the information called for by Article 32.2.C.

The Arbitrator shall retain jurisdiction of this matter to resolve such additional issues arising out of the proposed California mode conversion as the parties may bring before him.



Stephen B. Goldberg, Arbitrator

I. SUMMARY OF EVENTS LEADING TO THE FILING OF THE GRIEVANCE

On June 7, 2012[1], Patrick Devine, USPS Manager of Contract Administration, sent a letter to APWU President Cliff Guffey, advising Mr. Guffey that because of 2008 California emission regulations requiring the replacement or retrofitting of all Postal Service trucks in California, "the Postal Service has made the decision to subcontract Postal Vehicle Services in all Pacific Area mail processing and network distribution facilities in the state of California". The letter also stated that "No significant impact to the bargaining unit is anticipated."

On August 10, Mr. Devine sent Mr. Guffey another letter, said by Mr. Devine to replace the June 7 letter, stating that because of the California regulations, "the Postal Service is proposing to subcontract Postal Vehicle Services in all Pacific Area mail processing and network distribution facilities in the state of California".

On August 13, Mr. Devine wrote to Bob Pritchard, the Union's Director, Motor Vehicle Services Division. The August 13 letter stated, in relevant part, that the proposed subcontracting was based in part on compliance with California emission regulations and also on an estimated savings of $86,945,176.76, resulting from contracting out.

In a letter dated October 5, Mr. Pritchard challenged the accuracy of the Postal Service's calculation of the savings to be accomplished by contracting out. On October 26, Mr. Devine responded, advising Mr. Pritchard that the Postal Service had revised its calculations. The revised cost savings resulting from contracting out, according to Mr. Devine, were $25 million, rather than $86 million.

[1] All dates herein are 2012 unless otherwise stated.

On November 23, Mr. Devine notified Mr. Pritchard that pursuant to Article 32.2, the Postal Service had made the final decision to convert Postal Vehicle Service to Highway Contract Routes in California. That letter stated, in relevant part:

> . . . [I]n accordance with Article 32.2.A, the Postal Service has considered factors such as public interest, cost, efficiency, availability of equipment, and qualification of employees. In this final analysis, the Postal Service concluded that HCR service presents a better value for the Postal Service than PVS with an estimated cost savings of $24,041,528.

Meanwhile, on September 21, the Union had initiated a Step 4 dispute, alleging that in deciding to contract out all California Postal Vehicle service, the Postal Service had violated Article 32.1.B, Article 32.2, the Memorandum of Understanding Concerning Contracting or Insourcing of Contracted Services, and the Memorandum of Understanding Concerning Workforce Benefits, Employment Opportunities, Training and Education Fund.

II. DOES ARTICLE 32.1.B APPLY TO THE PROPOSED CALIFORNIA MODE CONVERSION OR ARE MODE CONVERSIONS GOVERNED EXCLUSIVELY BY ARTICLE 32.2?

A. Background

The Postal Vehicle Service (PVS) is the Postal Service's in-house trucking operation. PVS moves mail and equipment by truck between postal facilities within a city. It is staffed by truck drivers, all of whom are in the APWU bargaining unit and are represented by the APWU's Motor Vehicle Service (MVS). MVS represents approximately 8,000 truck drivers nationally, of whom approximately 800 are employed in California PVS operations.

In 2011, the Postal Service let over 17,000 contracts, 7,500 of which were Highway Contract Routes (HCR). HCRs are postal contracts to perform the same short-haul trucking services as PVS, using private sector drivers and either vehicles owned by the private sector contractor or those supplied by the Postal Service.

According to Mr. Devine, a "mode conversion" involves the contracting out (or "outsourcing") of an entire PVS operation and the conversion of all PVS services to HCR service. When a mode conversion occurs, employees are excessed or detailed and trucks are sold or transferred to other cities. Some managers may remain to supervise the performance of the HCR contracts.

The initial mode conversions took place in 2007, and stopped entirely between 2009 and 2012 as a result of an agreement between the parties (the PVS Amended Work Rules Pilot MOU). The Work Rules Pilot MOU was "suspended" in August 2011.[2] Approximately one year afterwards, the Postal Service notified APWU that it intended to mode convert all 13 PVS sites in California, as well as several other PVS operations around the country. It is the proposed California mode conversion that is the subject of the instant grievance.

B. Bargaining History of Article 32[3]

Article 32 originated in the1973 Agreement. In the negotiations leading to that Agreement, the Union proposed prohibiting all subcontracting of highway contracts. The Union's proposal did not become part of the Agreement. Instead the parties adopted the following as Article 32 of the 1973 Agreement:

> The Employer will give due consideration to public interest, cost, efficiency, availability of equipment, and qualifications of employees when evaluating the need to subcontract.
>
> The Employer will give advance notification to Unions at the national level when subcontracting which will have a significant impact on bargaining unit work is being considered and will meet to consider the Unions' views on minimizing such impact. No final decision on whether or not such work will be contracted out will be made until the matter is discussed with the Unions.

The foregoing language remained unchanged in the 1975 Agreement. Added to that Agreement, however, were separate Memoranda of Understanding

[2] Whether or not the Work Rules Pilot MOU was terminated in August 2011 is one of the issues raised by this grievance that, pursuant to agreement of the parties, is not here decided.

[3] The following recitation of bargaining history from 1973-1987 is drawn primarily from the decision of Arbitrator Carlton Snow in Case Nos. H4V-NA-C 84 etc. (1992).

between the Postal Service and each of the unions which, at the time, bargained jointly with the Postal Service.[4] The APWU Memorandum of Understanding provided that the Postal Service, prior to contracting out a highway contract, would furnish APWU, 60 days prior to the scheduled installation of the service to be provided under that contract, with certain information covering each route to be contracted out. The Memorandum also set out a list of factors that the parties would use in any cost comparison of the transportation mode to be selected.

The 1975 Memorandum of Understanding was incorporated into the 1978 Agreement as Article 32.4. The same Article 32.4 exists today as Article 32.2 of the 2010 Agreement without change in its basic structure, albeit with changes in the information to be furnished and the factors to be considered in a cost comparison.

The original Article 32 in the 1973 Agreement, set out above, was modified by the Interest Arbitration Panel that decided the terms of the 2000 Agreement. The modifications sought by APWU at that time were as follows (proposed changes in bold):

> B. The Employer will give advance notification to the Union at **both** the national **and local** level when subcontracting which will have an 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**. No final decision on whether or not such work will be contracted out will be made until the matter is discussed with the Union **and all cost comparisons are completed**.

[4] These were, in addition to APWU, the National Association of Letter Carriers, the Mail Handlers, and the National Rural Letter Carriers' Association.

C. **<u>The Employer will not contract work if the cost comparison does not favor contracting by a minimum cost differential of 10% of in-house costs.</u>**

<u>D. In selecting the means to perform work being considered for subcontracting, the Employer will provide any and all private sector bidders only one opportunity to submit a bid for the work in question, and will not allow any private sector contractor to submit a second bid after an assessment of in-house costs to perform the work has been made</u>.

The Interest Arbitration Panel rejected the proposed new paragraphs C and D, as well as the proposed provision in paragraph B for notice to the Union at the local level and that barring the Postal Service from contracting out "until . . .all cost comparisons are completed". The Panel did, however, award the other proposed changes, so that Article 32.1.B, which has not been modified since the 2000 Interest Award, today provides:

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.

C. <u>DISCUSSION</u>

It is undisputed that Article 32.1 was originally drafted to deal with contracting out of the highway transport of mail and that its application was limited to those contracts which would have a significant effect on bargaining unit

work. It is similarly undisputed that at the time Article 32.2 was agreed to, first as an MOU and subsequently incorporated into the Agreement, it did not contain language excluding from the pre-existing Article 32.1 those proposed contracts for the highway transport of mail which would have a significant impact on bargaining unit work. Nor has such language subsequently been added to Articles 32.1 or 32.2.

The Postal Service argues, however, that the similarity in some of the provisions of Article 32.1 to those in Article 32.2, negotiated subsequent to Article 32.1, suggests that Article 32.2 was intended as the sole contract clause dealing with the highway transport of mail to the exclusion of Article 32.1.B, even when the proposed contract would have a significant impact on bargaining unit work.

The Postal Service's argument rests to a considerable extent on the 1992 decision of Arbitrator Carlton Snow, previously cited in note 3. According to Arbitrator Snow:

> . . . [I]t is reasonable to conclude that [what is now] Article 32.2 was intended to particularize, without substantive change, the general content of Article 32 itself.
>
> The structure of Article 32.2 supports this conclusion. Article 32.2(A) merely restates, as it affects the Motor Vehicle Craft alone, the general 'due consideration' obligation found in Article 32.1. Indeed, the language is identical. Article 32.2 accomplishes the same particularization with respect to requirements of procedural notification and the obligation to meet which was set forth in Article 32.1. . .

Because none of the contracts before Arbitrator Snow would have had a significant effect on bargaining unit work, Arbitrator Snow was not faced with the question of whether Article 32.2 displaces Article 32.1.B when the proposed contract would have a significant impact on bargaining unit work. Perhaps because that question was not before him, Arbitrator Snow's discussion of the similarities between Article 32.1.B and Article 32.2 ignores the fundamental difference between them – Article 32.1.B deals with subcontracting which will

have a significant impact on bargaining unit work, while Article 32.2 deals with subcontracting which will have a lesser effect on bargaining unit work..

Arbitrator Snow's decision also does not – because the issue was not before him - address the very practical question of why, in order to obtain the protections of Article 32.2 when dealing with non-significant contracts for the highway transport of mail, APWU would have surrendered the protections of Article 32.1.B when dealing with contracts which did have a significant impact on bargaining unit work. One must also ask, if USPS had obtained such a concession from APWU – excluding highway contracts from the ambit of Article 32.1.B – that exclusion was not set out in the text of 32.1.B. The answer to both questions would appear to be that no such exclusion was intended. While Article 32.2 imposed procedural requirements on non-significant contracts, which APWU did not have under Article 32.1, Article 32.2 did not deprive APWU of the protections it already enjoyed under Article 32.1 in dealing with those proposed contracts that would have a significant impact on bargaining unit work.

Any doubt concerning the separate functions served by Articles 32.2 and 32.1.B as they currently exist under the 2010 Agreement is put to rest by the Decision of the 2000 Interest Arbitration Panel and the changes that Panel's Award effectuated in Article 32.B.1. While the Union had always possessed the Article 32.1.B right to advance notice when subcontracting which would have a significant impact on bargaining unit work was being considered, and to a guarantee that no such work would be contracted out until the matter had been discussed with it, the 2000 Award provided the Union with a considerably greater role than it previously had in the discussions leading to a decision whether or not to subcontract. The Postal Service is now obliged to:

> 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.

This, as the Postal Service recognizes, is likely to be a lengthy process. Indeed, APWU Manager of Negotiation Support and Special Projects Phil Tabbita testified before the 2000 Interest Arbitration Panel that a Section 32.1.B analysis of a proposed contract that would have a significant effect on bargaining unit work could take as long as a year to complete. The extensive analysis and lengthy time period required in Article 32.1. B proceedings, far removed from the 60 days allotted under Article 32.2 for the exchange of information and discussion, further supports the conclusion that it is Article 32.1.B, not Article 32.2, which applies to proposed HCR contracts which would have a significant impact upon bargaining unit work.

In sum, there is nothing in the text of Article 32.1.B or Article 32.2, in the bargaining history that led to the adoption of those Articles, or in the Decision and Award of the 2000 Interest Arbitration Panel warranting a conclusion that a proposed subcontract that would have a significant effect on bargaining unit work is excluded from Article 32.1.B because it deals with the highway transportation of mail.[5]

The remaining issue to be considered in determining whether Article 32.1.B applies to the proposed contracting out of California PVS services is whether that contracting out would have the significant impact on bargaining unit work that is necessary for the application of Article 32.1.B.

The Postal Service asserts that contracting out limited to California cannot have a significant impact on bargaining unit work because the parties have jointly come to understand that the threshold for an Article 32.1.B "significant impact" is that the contract in question is not merely large, but national in scope. In support of this assertion, the Postal Service relies on the Union's effort in the 2000 Interest Arbitration to persuade the Interest Arbitration Panel to alter the

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[5]The Postal Service points to Article 32.2.C.5, which sets out the information that the Postal Service is required to provide to the Union in an Article 32.2 proceeding in which the "new contract solicitation replaces in part or in whole existing Postal Vehicle Service (PVS) service". Based on that language, the Postal Service argues that even a complete replacement of PVS service by HCR service falls within Section 32.2, not 32.1. Accepting that there are some circumstances in which a complete replacement of PVS service by HCR service may fall under Section 32.2, that does not mean that a replacement of PVS service by HCR service which has a substantial impact on bargaining unit work falls under Article 32.2. Hence, the argument that Article 32.C.5 demonstrates that contracting out which has a significant impact on bargaining unit work does not fall under Article 32.1 is without merit.

language in Article 32.B.1 from "when subcontracting which will have a significant impact on bargaining unit work is being considered" to "when a national contract/subcontract on bargaining unit work is being considered". The argument that this shows the Union to understand "significant impact" and "national in scope" to be the same is unpersuasive. The Union may have been attempting to substitute "national in scope" for "significant impact" because the former more accurately represented what the parties intended, but it equally may have sought this change in wording because it sought a substantive change in the coverage of Article 32.B.1. In any event, the Union's proposed change was rejected by the Interest Arbitration Panel.

The Postal Service next relies on the 2010 Memorandum of Understanding Re Consideration of National Outsourcing Initiatives in support of its position that only contracts which are national in scope can be deemed to have a significant impact under Article 32.B.1. [6] That Memorandum, in relevant part, provides:

> The parties agree that it is in their best interest to meet and discuss national outsourcing initiatives at an early stage of the process.
>
> Once the Strategic Initiatives Action Group (SIAG) has determined that a proposed concept will involve significant impact on bargaining unit work and preparation begins on a memo detailing consideration of the five Article 32 factors, the Union will be provided notification. Union involvement at this early stage of the process is without prejudice to either party's position regarding the determination as to whether there is a potential significant impact on bargaining unit work. . .
>
> The above process also will be utilized when an existing contract for a national outsourcing initiative is expiring and consideration is being given to rebid the outsourcing of the work.

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[6] The Union asserts in its Supplemental Brief that the Postal Service may not rely upon the National Outsourcing Initiatives because it has not previously done so in these proceedings. That assertion is unpersuasive. The Postal Service is not relying on the National Outsourcing MOU as an independent basis for contesting the Union's argument that the California mode conversion would have a significant effect on bargaining unit work, but as an aid in interpreting Article 32.B.I. It may do so consistent with Article 15, regardless of its having failed to do so earlier in the proceedings. (See Case No. QO6C-4Q-C-092507 (Goldberg, 2012).

Far from supporting the Postal Service's position that only contracts which are national in scope can be deemed to have a significant impact under Article 32.1.B, this Memorandum suggests that some national initiatives will have a significant impact on bargaining unit work and others will not. Thus, while the Memorandum provides that the parties will discuss all national outsourcing initiatives, it goes on to provide that the national outsourcing initiative may or may not be determined to have a significant impact on bargaining unit work. Finally, even if all national outsourcing initiatives were determined to have a significant impact on bargaining unit work, that would not prove the converse – that only national outsourcing initiatives can be deemed to have a significant impact on bargaining unit work.

The Postal Service's arguments in support of restricting a determination of substantial impact on bargaining unit work to national outsourcing initiatives having been rejected, the question remains whether the proposed contracting out of California PVS services would have a significant impact on bargaining unit work. Initially, the proposed contracting out, though regional in scope rather than national, would displace a substantial number of bargaining unit employees – in excess of 800. Furthermore, there appears a strong likelihood that the PVS operation, once fully contracted out, would not return. According to Mr. Pritchard, once a trucking operation is contracted out, it does not return:

> Whenever you lose a facility, you lose the opportunity to capture any work in that facility. . . It becomes impossible to capture any work in that facility . . . because there's nobody there to do the work . . . [O]nce Humpty Dumpty is broken, it really, for all practical purposes, cannot be put back together.

The Postal Service takes issue with Mr. Pritchard's views. It states (Brief, p. 18):

> Under the processes of 32.2.B and C, the Union will always be in a position to examine route economies when HCR contracts are up for renewal. Former PVS drivers will enjoy retreat rights to reinstituted PVS service under Article 12.5.C.4.c backstopped by the possibility of new PVS hires if no former PVS drivers remain who would or could exercise that right. And the

> Workforce Benefits MOU was expressly drafted to supply a possible capital source for the purchase of new trucks if such were needed to bring outsourced work back in house.

To be sure, as the Postal Service points out, a return of this work in house is not impossible, but is rendered unlikely by the many barriers to reinstating a PVS operation that has been shuttered for three or more years (the length of the proposed HCR contracts in the instant case). Not only must employees be recruited, which may be the least of the barriers, but maintenance facilities must be reactivated and a supervisory staff assigned. Some supervision of the HCR operation will have been necessary, but additional supervision would likely be required to directly supervise a PVS operation. Finally, in light of the California emission control regulations which triggered the instant contracting out, trucking work could not be returned in house in California until a fleet of emission control compliant trucks has been acquired – either be retrofitting the existing fleet (which may in the interim have been sold or sent to Postal facilities outside California), leasing trucks, or purchasing new trucks.

The Postal Service points out that the Workplace Benefits, Employment Opportunities, Training and Education Fund may be used to purchase trucks for the purpose of returning contracted out work into the bargaining unit, but there is no guarantee that it would agree to such a purchase. The Workplace Benefits Fund provides that it shall be used "to insure that . . . work presently contracted out can be brought back into the bargaining unit *economically*" (emphasis added), and the Postal Service might well decline to authorize the acquisition, leasing, or retrofitting of trucks on the ground that it would be economically unwise to use Workplace Benefit Fund resources to acquire trucks when, on balance, contracting out would be financially more beneficial. Indeed, that is the position which the Postal Service took in this case when the Union made a similar proposition in an effort to dissuade the Postal Service from pursuing a California mode conversion.[7]

In sum, it is my judgment that the proposed California mode conversion, if implemented, would have a significant impact on bargaining unit work. As a

[7] The contractual propriety of the Postal Service's response to the Union's proposal to use Workplace Benefit Fund resources to retrofit PVS vehicles is another of the issues that may come before the Arbitrator for decision in subsequent proceedings. Accordingly, I here express no opinion regarding that issue.

result, the Postal Service must comply with Article 32.1.B prior to making a final decision on whether or not California PVS work will be contracted out.

III. IF ARTICLE 32.1.B APPLIES TO THE CALIFORNIA MODE CONVERSION, DOES ARTICLE 32.2 ALSO APPLY?

As discussed above (pp. 6-7), the bargaining history of Article 32.1, the initial procedural limitation achieved by the Union on the Postal Service's unfettered freedom to contract out, applied solely to those proposed contracts which would have a significant impact on bargaining unit work. Subsequently, in what is now Article 32.2, the Union negotiated similar, but more particularized, procedural limitations on the Postal Service's freedom to engage in contracting out which would not have a significant impact on bargaining unit work. The Union now suggests that when the Postal Service proposes to contract out work which would have a significant impact on bargaining unit work, it is obliged to comply with the procedural requirements of Section 32.1.B, which applies to significant impact contracts, and Section 32.2, which applies to contracts which would not have a significant impact on bargaining unit work.

It is difficult to find support for the Union's position in the text or bargaining history of Articles 32.1.B or Article 32.2. It is equally difficult to discern why the Postal Service would have agreed to follow the procedural requirements of both Articles in dealing with the same proposed contract. If the two Articles were to function simultaneously, Article 32.2.B contains time limits which would be entirely at odds with the intensive and time-consuming analysis which goes into developing the Comparative Analysis report of Section 32.1.B. It is equally difficult to envision the parties proceeding first under Section 32.1.B, then under Section 32.2 (or vice versa). The goal of Article 32.1.B is to insure that the Postal Service, in deciding whether or not to contract out, has given due consideration to the five factors set out in Article 32.1 – public interest, cost, efficiency, availability of equipment, and qualification of employees – which are identical to the five factors set out in Article 32.2.A. Once the Postal Service has complied with its obligation under Section 32.1.B to consider these five factors, and has decided to engage in contracting out, there would appear little to be gained in requiring the Postal Service to consider the same factors a second time in an Article 32.2 proceeding.

Accordingly, I conclude that since Article 32.1.B applies to the California mode conversion, Article 32.2 does not apply.

IV. DOES THE CONTRACTING OR INSOURCING OF CONTRACTED SERVICE MEMORANDUM OF UNDERSTANDING APPLY TO ARTICLE 32.2?[8]

A. Bargaining History

According to APWU President Cliff Guffey, who testified that he negotiated the Contracting MOU directly with USPS Vice President Labor Relations Doug Tulino, this MOU "started from the motor vehicle craft . . . talking about the decisions we've had in the past that even if we were cheaper, we didn't get the work".[9] In an effort to nullify those decisions, as well as to require the Postal Service to accurately compute the costs of having work done in house as compared to contracting it out:

> [W]e said, 'If we could provide that service cheaper, we'd get that work', and . . . the motor vehicle craft insisted on having that language in there, that as long as it's a fair comparison. And we were very delighted when . . . Mr. Rachel came back with that language in there.

[8] The Postal Service, in its brief, points out that it has conceded that the Contracting MOU applies to Article 32.B.1, and requests that if the Arbitrator finds that Article 32.1.B applies to the California mode conversion ,which I have done, he should not address the question of whether the Contracting MOU applies to Article 32.2, since doing so is unnecessary to a resolution of the grievance. It states (Brief, p. 21), "In [this] situation, the question of the MOU's operation upon non-significant Article 32.2 matters should be left for resolution by the parties." (The Union has not joined in the Postal Service's request that the Arbitrator not decide the applicability of the MOU to Article 32.2.)

The Postal Service's request is denied. The parties have attempted to resolve the question of the applicability of the MOU to Article 32.2, and have failed to do so. That issue was the subject of extensive testimony and attorney presentations over seven days of hearing, and has been fully briefed. Under these circumstances, it would represent a waste of the parties' time, energy, and funds were I to decline to rule on the issue.

[9] Among the decisions to which Mr. Guffey was referring were that of Arbitrator Carlton Snow, discussed at pp. 9-10, and that of Arbitrator Richard Mittenthal (Case No. A8-NA-0481 (1981)).

Mr. Guffey also testified that in the discussions concerning the Contracting MOU, the Postal Service never sought to limit its applicability to those HCR contracts that fell under Article 32.1.B.

Mr. Tabbita also testified that at no time during the negotiations did the Postal Service propose limiting the Contracting MOU to those HCR contracts which would have a significant effect on the bargaining unit.

Kevin Rachel, who was the Postal Service Manager of Collective Bargaining and Arbitration at the time of the 2010 negotiations, testified that he became involved in the drafting of the Contracting MOU at the request of Mr. Tulino:

> Doug Tulino, vice president of labor relations, came to me and he had an earlier iteration of [the MOU]. Basically, if not exactly, it had the same language except it didn't have 'when a fair comparison is made of all reasonable costs.' And Doug said this is something that the Union wanted to include in the new agreement, that as a general matter he was thinking that it was conceptually an acceptable thing to do, but asked me to look at it from a language perspective and – and suggest whether or not there was anything else that ought to be done with the language.

Mr. Rachel testified that in response to Mr. Tulino's request, he drafted the phrase, "when a fair comparison is made of all reasonable costs", which subsequently made its way into the MOU. Mr. Rachel was not asked whether he understood the MOU to be limited to contracting out that fell within Article 32.1.B.

B. Discussion

There is nothing in the text or the bargaining history of the Contracting MOU suggesting that its applicability is limited to those HCR contracts which would have a significant effect on bargaining unit work, hence fall under Article 32.1. The number of Article 32.1 "significant impact" contracts is miniscule

compared to the number of routine HCR contracts[10], and it would have been extraordinary for the APWU President and the Postal Service Vice President Labor Relations to personally negotiate an MOU that would apply to such a small number of cases. It would be even more extraordinary if the Postal Service, having succeeded in limiting the Contracting MOU to significant impact cases falling under Article 32.1, did not insist that such a limitation be placed in the text of the MOU. Furthermore, the testimony of Mr. Guffey and Mr. Tabbita that the Postal Service at no time in the negotiations proposed limiting the MOU to Article 32.B.1 is uncontradicted. Finally, Mr. Guffey testified that the Contracting MOU "started from the motor vehicle craft . . . talking about the decisions we've had in the past that even if we were cheaper, we didn't get the work". None of those decisions arose under Article 32.1; they all involved Article 32.2 challenges to routine HCR contracts.

The Postal Service argument that the MOU applies solely to proceedings under Article 32.1.B "rests squarely upon the fact that the MOU was replicated in full and specifically placed in the parties' 2012 Joint Contract Interpretation Manual (JCIM) under the header of Article 32.1.B. . . . The placement of the MOU under the 32.1.B header clearly denotes the joint understanding of the parties that the MOU had a specific and restricted application to this section. As was stated about the JCIM in the prefatory statement signed by both the APWU President and the Postal Service Vice President Labor Relations:

> 'Jointly prepared by the American Postal Workers' Union, AFL-CIO, and the United States Postal Service, this manual provides a mutually agreed upon explanation on how to apply the contract to the issues addressed.
>
> When a dispute arises, the parties should first go to the JCIM to determine if the issue in dispute is addressed. If

[10] According to Mr. Pritchard, in the 18 years he has served as Motor Vehicle Director, he has received approximately 1,000 notices of contracting out of motor vehicle services per year. Mr. Rachel testified before the 2000 Interest Arbitration Panel that he was aware of only four national level contracts having been let in the preceding ten years. To be sure, the number of contracts that have a significant impact on bargaining unit work may be greater than that, but the most likely contracts to be challenged by the Union as having a significant impact are mode conversions, and there have been few of those compared to the number of routine, non-significant HCR contracts.

> it is, the parties are required to resolve the dispute in accordance with this manual.'[11]

While the issue here in dispute – whether the Contracting MOU is limited to Article 32.1.B – is not specifically addressed by the placement of the Contracting MOU under the Article 32.1.B heading in the JCIM, the Postal Service argument that that placement strongly suggests that the MOU applies in Article 32.1.B proceedings is not without force. To be sure, that placement does not of itself reject the application of the MOU to Article 32.2 proceedings as well, but it is nonetheless a valid argument and might well prevail were it not for even more powerful countervailing considerations.

First among these considerations is that the only witness who was asked about the placement of the MOU in the JCIM was Mr. Tabbita, who stated that "the MOU could have been placed anywhere", suggesting that there was no significance to its having been placed under Article 32.1.B. None of the Postal Service witnesses who participated in the negotiations – not Mr. Devine, not Mr. Rachel – was asked if Mr. Tabbita's statement was accurate. Hence, Mr. Tabbita's testimony that the placement of the MOU under Article 32.1.B was meaningless stands uncontradicted. Similarly uncontradicted was the testimony of Mr. Guffey and Mr. Tabbita that at no time in the negotiations did the Postal Service propose limiting the MOU to Article 32.B.1.

Finally, the Postal Service's position that the Contracting MOU applies solely to that contracting which would have a significant effect upon bargaining unit work, and does not apply to the vastly more common contracts of lesser effect, is inconsistent with the text of the MOU, which contains no such limitation. The Postal Service's position is also inconsistent with the bargaining history, which shows the genesis of the MOU to have been an effort to overrule arbitral decisions in Article 32.2 cases.

In sum, the Postal Service's reliance on the placement of the MOU in the JCIM is outweighed by a host of other factors supporting the conclusion that the contracting MOU is not limited to proceedings under Article 32.1.B, but applies equally to proceedings under Article 32.2.

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[11] Postal Service brief, pp. 21-22.

V. IF THE CONTRACTING OR INSOURCING OF CONTRACTED SERVICE MEMORANDUM OF UNDERSTANDING APPLIES TO THE CALIFORNIA MODE CONVERSION, WHEN IN THE CONTRACTING OR INSOURCING PROCESS IS THE "FAIR COMPARISON OF ALL REASONABLE COSTS" TO BE MADE?

It is the Union's position that the "fair comparison" is to be made when the Postal Service has completed the contract solicitation process and has negotiated the best price it can with the preferred contractor. It states (Brief, pp. 31-33):

> At a minimum, the final analysis of the Contracting MOU's fair cost comparison should be made with actual costs. Typically, the Postal Service does not have actual subcontractor pricing until it has concluded the contract solicitation and negotiation process, so the final determinative fair cost comparison cannot happen until at least that point. The subcontractor pricing is only one component, and while important, is not determinative on its own. To do the full cost comparison required by the Contracting MOU, the Postal Service must also have a final actual cost for its in- house operation, which should also include costing of any proposal from the Union to lower costs to or below the cost of the subcontractor. . .
>
> Using estimates for the final in-house cost or subcontractor cost is inconsistent with the purpose and value of the Contracting MOU. . . There is no justification for using estimates in the final calculation when the Postal Service. . can get the actual cost data and where its goal is to determine if it can actually, not probably, beat the subcontractor's price. . .
>
> Interpreting the Contracting MOU to be true to its intent means that the cost comparison it requires must be made using actual costs . . .

The position of the Postal Service is that the fair cost comparison called for by the Contracting MOU is to be made on the basis of estimated costs at the times called for by the Agreement – for Article 32.1.B at the time the Comparative Analysis report is developed; for Article 32.2 within 45 days of the Postal Service having furnished the Union with the information called for in Article 32.2.C.

In support of its position, the Postal Service initially points out that the term "cost" as it appears in Article 32.1 and Article 32.2 has been consistently understood and applied by the parties to mean estimated costs. These cost estimates or cost "analyses" (used as a synonym for estimated costs) are typically made on Postal Form 5505; even when they are not, the parties' determination of the costs of contracting out compared to the costs of retaining work in house has always been predicated on estimates of those costs, not on a comparison of the price quoted by the Postal Service's preferred contractor (who may or may not be the lowest bidder) and the Union's statement of the cost of keeping the work in house. As the Postal Service states (Brief, pp. 28-29):

> The unbroken history and unchallenged practice of cost comparisons between the parties regarding potential HCR subcontracting for the well-nigh 40 years of their bargaining relationship has determined the issue of cost under Article 32.2 by the utilization of cost estimates. Even if [this] did not rise to the level of a binding past practice that cost comparisons are made on estimated costs, . . . as the Postal Service asserts here, it is certainly at a minimum an ongoing and fixed course of dealing which informs the meaning of the term as used by the parties in the Article 32 context.

Turning next to Article 32 itself, the Postal Service asserts (Brief, p. 39):

> [T]he Fair Cost Comparison MOU does not exist in a vacuum independent of Article 32 and does not repeal any portion of that Article. Rather, the MOU only modifies the Article to require where work must be assigned (in house) when the remaining Article 32 due consideration factors are satisfied and the work can be performed by postal employees at the same or lesser cost than by a subcontractor. Accordingly, the MOU, an

> extension of Article 32 which contains within itself no explicit timeline, is subject to the timelines found within the body of Article 32, as modified or clarified by other associated MOUs.

As the Postal Service points out, the relevant portions of Article 32 set out the time at which cost comparisons are to be made -- for Article 32.1.B at the time the Comparative Analysis report is developed; for Article 32.2 within 45 days of the Postal Service having furnished the Union with the information called for in Article 32.2.C. There is no language in the MOU which modifies those timelines. The parties did not provide in the MOU that there was to be a fair comparison of actual costs, and there is no evidence that "reasonable" costs was intended as a synonym for "actual" costs.[12]

Furthermore, the Consideration of National Outsourcing Initiatives MOU, which was a product of the same negotiations which led to the Contracting MOU, and which provides for the parties to develop costing models at the time the Comparative Analysis report is being developed, serves to confirm the parties' contemporaneous understanding that cost comparisons under Article 32.1.B of the 2010 Agreement were to be made at a time when only estimated costs were available. To be sure, the National Outsourcing Initiatives MOU applies only to Article 32.1.B, but there is no reason to suppose that having confirmed existing practice regarding the time for comparing costs under Article 32.1.B, the parties, without saying so, contemplated a revised time for comparing costs under Article 32.2.[13]

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[12] The Union asserts that the evidence adduced in the hearing demonstrates the inaccuracy of Form 5505 cost estimates for both HCR and PVS, and so argues strongly against using those estimates in making the cost comparison called for by the Contracting MOU. Assuming, *arguendo*, the validity of the Union's assertions regarding the inaccuracy of Form 5505 estimates, the Arbitrator could hardly rely on evidence from a 2012-2013 hearing, not known to the parties at the time they drafted the Contracting MOU, to interpret that MOU.

[13] The Union also relies on the Motor Vehicle Craft Jobs MOU in support of its position that that the cost comparison envisioned by the Contracting MOU is to the actual costs of contracting out compared to the actual costs of keeping work in house. The Motor Vehicle Crafts MOU provides, among other matters, that the parties will review approximately 8,000 existing HCRs. Section 2.c. of that MOU states:

> The APWU may initiate and obtain a cost comparison on segments (trips) of an HCR route: that is, some, but not all the routes covered by the contract. If the APWU fair comparison of a contract or a segment of a route shows that it would cost less to have the work performed by MVS employees, it will be assigned to MVS employees.

Since this comparison is to take place between an existing contract and the APWU's showing of the cost of performing the contracted work in house, not between the estimated cost of each, it supports, on the one hand, the APWU assertion that the appropriate comparison is between actual contractor costs and actual in house costs.

In sum, the Union makes a powerful argument that even though the MOU is silent on the issue of what costs are to be compared –estimated or actual - the purpose and logic of the MOU are best furthered by interpreting "cost" to mean "actual cost", available only when the Postal Service has negotiated a final price with its preferred contractor.[14] That argument is, however, insufficient to overcome the parties' 40 year history of interpreting "cost" to mean "estimated cost", and the explicit time lines of Article 32.1.B and Article 32.2, which require the use of estimated costs. The Union's argument also runs afoul of the National Outsourcing Initiatives MOU, a product of the same negotiations which produced the Contracting MOU, and which is inconsistent with the proposition that the 2010 negotiations broadly transformed the comparison of costs from estimated to actual and the time for comparing those costs to that point at which actual costs can be known. Accordingly, I hold that the "fair comparison of all reasonable costs" called for by the Memorandum of Understanding Regarding Contracting or Insourcing of Contracted Services is to be made at the times called for by Article 32 – in an Article 32.1.B proceeding at the time the Comparative Analysis report is being developed; in an Article 32.2 proceeding within 45 days of the Postal Service furnishing the Union with the information called for by Article 32.2.C. If the Union is to attain a change in the Article 32.1.B and 32.2 time lines, it will need a contract provision (or MOU) that more clearly makes that change than does the Contracting MOU.

Two final points remain to be made. First, since the Union, pursuant to this Decision, does not have the contractual right to have its cost proposal compared to that of the preferred contractor after the Postal Service has negotiated the lowest price it can with that contractor, it follows that the Union does not have the right to the "last bid" to which it asserts it is entitled under the Contracting MOU. In the event that there exists any doubt on that score, it should be clear

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On the other hand, it also demonstrates that the parties knew how to provide for the comparison the Union seeks to have applied to all proposed contracting out, and did not do so in the Contracting MOU. Thus, on balance, I cannot conclude that the Motor Vehicle Crafts MOU supports the Union's position that the comparison provided in the Motor Vehicle Crafts MOU applies equally to comparisons made under Article 32.

[14] The Postal Service asserts that even when it has negotiated a final price with the proposed contractor, the costs to the Postal Service of administering that contract can only be estimated and that even PVS costs may be a matter of dispute. Assuming those assertions to be accurate, which the Union vigorously contests, it is nonetheless the case that a comparison of the costs of contracting out compared to the costs of retaining work in house are likely to be more accurate if the comparison is made after the proposed contractor has made its final bid that if it is made earlier in the contracting out process, at a time that may precede the Postal Service having received any bids on the proposed contract.

that I here conclude that the Union does not possess that right. Arbitrator Snow, in the case cited in note 3, so held, and, whatever may be the contrary implications of the Contracting MOU, I cannot find Arbitrator Snow's holding overturned by an MOU which is silent on the issue.

Conversely, I reject the argument which I understand the Postal Service to be making, that the Contracting MOU leaves untouched the decisions of Arbitrators Snow and Mittenthal cited in note 7 to the extent those decisions held that the sole contractual obligation of the Postal Service, when deciding whether or not to contract out highway transport work, is to give due consideration to the five factors set out in Articles 32.1 or 32.2 (depending on whether the contract would have a significant impact on bargaining unit work), and that if the Postal Service has done so it may contract out even if the cost of doing so is greater than the cost of keeping the work in house. While those decisions may have been contractually sound at the time they were rendered, they do not survive the Contracting MOU.

It is undisputed, as Mr. Tabbita testified, that a central goal of the Union in proposing the Contracting MOU was to overrule "... the decisions we've had in the past that even if we were cheaper, we didn't get the work", an unquestioned reference to the Snow and Mittenthal decisions to that effect. To be sure, the Contracting Out MOU is not clear on when the cost comparison is to be made, but what is clear from both the bargaining history and the text of the Contracting MOU is that if all other Article 32.1 or 32.2 factors are equal, and it is less costly to keep work in house, the Postal Service must do so. Indeed, the Contracting MOU states:

> It is understood that if the service can be performed at a cost equal to or less than that of contract service, when a fair comparison is made of all reasonable costs, the work will be performed in-house.

Hence, the Postal Service can no longer justify contracting out work that would be less expensive to keep in house on the ground that it has given due consideration to cost as well as the other Article 32.1 or 32.2 factors. To be sure, each of those factors must be considered, but if factors other than cost do not rule out keeping work in house, and the cost of keeping work in house would be less than contracting out, both the text and the bargaining history of the Contracting MOU require that the work be kept in house.