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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO/OAKLAND DIVISION

AMERICAN POSTAL WORKERS UNION,
AFL-CIO and SAN FRANCISCO LOCAL 2,
AMERICAN POSTAL WORKERS UNION,
AFL-CIO,

Plaintiffs,

v.

UNITED STATES POSTAL SERVICE,
Defendant.

CASE NO. 12-cv-5327

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR A PRELIMINARY
INJUNCTION; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT**

Date: TBD
Time: TBD
Courtroom: TBD

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NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

Please take notice that at a date and time to be set by the Court, in a courtroom and at a location of this Court to be announced when a new Judge is assigned to his case by the Court,¹ Plaintiffs will move the Court for entry of a preliminary injunction ordering the Postal Service to refrain from making, implementing or carrying out any part of its decision to contract out California Postal Vehicle Service jobs, including but not limited to terminating, excessing or reassigning employees because their employment would be affected by that contracting out; disposing of postal trucks by sale or by reassignment to other areas; entering into contracts with any entity or person to perform any California truck driver work currently performed by USPS employees; or in any other manner implementing or preparing to implement the disputed decision to contract out, until the arbitrator, who will hear the Union's grievance on November 27 and 28, 2012 has issued his decision on the merits. Because the Postal Service has indicated that it will begin implementing its decision to contract out California Postal Vehicle Service jobs before the arbitration hearing, a motion to shorten the time in which to hear this motion is being filed under separate cover.

This motion is made pursuant to 39 U.S.C. §1208(b) and Federal Rule of Civil Procedure 65 on the grounds that the Plaintiffs meet all equitable requirements for a preliminary injunction. Plaintiffs further meet all the requirements that entitle them to a preliminary injunction under the exception to the Norris-LaGuardia Act's ban on the issuance of injunctions in labor disputes because an injunction in this case is required to preserve the arbitration process. *See* 29 U.S.C. § 104; *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970); *Newspaper & Periodical Drivers' & Helpers' Union, Local 921 v. San Francisco Newspaper Agency*, 89 F.3d 629 (9th Cir.1996).

¹ This case was originally assigned to Magistrate Judge Ryu, but defendant filed a declination to proceed before the Magistrate Judge, Docket No. 4, and a reassignment is pending, Docket No. 8. The parties have stipulated to shortening time to hear the instant motion, since the motion must be heard by November 9, 2012, and they will file that stipulation as soon as they receive notice from the Court of the assignment of a new Judge. For that reason, we have indicated above that the time, date and place of the hearing on the instant motion will be determined by the Court.

1 This motion is based on this Notice of Motion and Motion, the accompanying
2 Memorandum of Points and Authorities in Support of Preliminary Injunction, the Declarations in
3 Support of Motion for Preliminary Injunction, the Complaint for Injunctive and Declaratory Relief,
4 the [Proposed] Order Granting Plaintiffs' Motion for Preliminary Injunction, the Court's complete
5 file and record in this action, any evidence and/or argument that Plaintiffs submit in reply to any
6 opposition submitted by Defendant, any evidence and/or argument that Plaintiffs present at the
7 hearing in this matter and such other and further matters as the Court may properly consider.

8 Dated: October 22, 2012.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This is a “reverse *Boys Markets* case” in which plaintiffs American Postal Workers Union, AFL-CIO (“APWU”), and Local 2 of the American Postal Workers Union, AFL-CIO (“the San Francisco Local”), collectively the “Union,” seek a preliminary injunction to prevent the defendant employer in this case, the United States Postal Service (“USPS,” “Postal Service” or “the Employer”) from contracting out all postal union truck driver jobs in California before the scheduled November 27-28, 2012 arbitration of the grievance challenging that action. *See Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 248, (1970); *Newspaper & Periodical Drivers’ & Helpers’ Union, Local 921 v. San Francisco Newspaper Agency*, 89 F.3d 629, 632 (9th Cir. 1996).

At stake in this case is the fate of more than 800 postal workers represented by the Union throughout California. All of these employees have been notified by the Postal Service that their driving jobs will be eliminated in the near future. Employees in the Francisco, Anaheim, Santa Ana, and the City of Industry have been notified that their jobs will be eliminated on November 17, 2012. The jobs of all remaining affected employees in California will be eliminated on or about February 14, 2013. Pineres Declaration, ¶ 4. The Postal Service intends to implement its job-elimination plan notwithstanding the fact that the Union and the Postal Service are set to arbitrate its legal authority to do so in a matter of weeks.

The Court should grant the requested injunction because (a) the Employer agreed in the parties’ collective bargaining agreement (“CBA”) not to contract out bargaining unit work until certain specified conditions are met; (b) the Employer agreed in the CBA to arbitrate any grievance that alleges that it failed to meet those conditions; and (c) absent preliminary injunctive relief, those collectively-bargained obligations will be nullified. Moreover, the Union can satisfy the other requirements for preliminary injunctive relief, in that (a) the Union and the employees it represents will be irreparably injured if an injunction is not issued to preserve the status quo pending arbitration; (b) the Postal Service will not be injured by the issuance of the injunction; (c) the balance of equities favors issuance of the requested injunction, and (d) the public interest requires

an injunction pending arbitration in this case.

JURISDICTION

This case is before the Court on the Union's suit to enforce its CBA with the Postal Service. This Court has jurisdiction to enforce the parties' labor agreement under 39 U.S.C. 1208(b), which is the substantive equivalent of Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a).

STATEMENT OF UNDERLYING FACTS

I. The 2010 National Agreement Includes Both Very Large Cost Savings For The Postal Service And Important Job Security Protections For PVS Employees

Among the employees represented by the Union for the purpose of collective bargaining are approximately 6,800 career truck drivers employed of the Postal Service division known as the Postal Vehicle Service ("PVS"). The present dispute concerns the employment of approximately 840 PVS employees, most of whom are truck drivers, in California. The dispute affects all postal drivers in California, representing about 12 percent of all PVS drivers in the nation, and a smaller number of non-driving PVS employees in California.

At all material times, the Union and the Postal Service have been party to CBAs, known as "National Agreements," setting the terms and conditions of employment for these employees. The current National Agreement is the "2010 National Agreement," which is effective from November 21, 2010 through May 20, 2015. See Morris Declaration & Exh. A, Article 1.¹

The 2010 National Agreement between the Union and the Postal Service included major compromises on behalf of postal workers precisely in order to obtain protections against the type of contracting out the Postal Service has undertaken in this case. These compromises provide very large financial savings for the Postal Service, including the creation of a new category of temporary employees, called Postal Support Employees ("PSEs"), who earn reduced wages and do not receive retirement benefits or protection from layoff. Guffey Declaration ¶ 4. As Postmaster General Patrick Donahoe testified before the House Committee on Oversight and Government Reform, the

¹ In addition to PVS employees, the APWU represents maintenance, clerk, and other employees. *Id.*

2010 National Agreement will save the Postal Service \$3.7 billion. *Id.* & Exh. A.²

In exchange for these major cost-saving measures, the Postal Service agreed to preserve and protect bargaining unit work that could and should be done by rank and file workers represented by the Union. An important part of that agreement is embodied in a Memorandum of Understanding on “Contracting or Insourcing of Contracted Services” that protects Union-represented workers from the unwarranted assignment of their work to contractors’ employees, and which provides, “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.” Guffey Declaration, ¶ 5 & Exh. B.

These agreements to protect bargaining unit work reached in negotiations for the 2010 National Agreement were in addition to provisions already in the National Agreement, which we next discuss, that set limits on the Postal Service’s right to contract out bargaining unit work.

II. The National Agreement Requires The Employer To Maintain The Status Quo Pending Arbitration Of The Contracting Out Grievance In This Case

A. The National Agreement Establishes Mandatory Procedures That Must Be Followed When The Postal Service Is Considering Contracting Out, and Requires That a Fair Comparison be Made of All Reasonable Costs

When the Postal Service is considering whether to enter into a subcontract that will have a significant impact on bargaining unit work, Article 32, Section 1.B of the National Agreement

² APWU President Guffey explains these compromises in his declaration in this case:

The 2010 National Agreement was a watershed in the history of negotiations between the APWU and the Postal Service. The Agreement will reduce costs and increase flexibility for the Postal Service. Under the Agreement, career postal workers agreed to a two year wage freeze. This meant that they received no wage increase for three years, from the last negotiated wage increase in 2009 until the end of the two year freeze under the 2010 Agreement in 2012. We negotiated new lower starting wages for career workers, and we agreed that a larger percentage of the workforce can be made up of a new type of temporary workers, called Postal Support Employees (“PSEs”), who are paid lower wages than career employees and who receive no retirement benefits. In addition, a new category of work assignment was created, called non-traditional full-time, which can be non-traditional schedules of from 30 hours per week up to 48 hours per week on a regular basis. These schedules, together with traditional 40-hour per week schedules, permit the Postal Service to schedule efficiently to meet its varying workload.

Guffey Declaration, ¶¶ 3-5.

1 imposes certain requirements the Postal Service must meet before it can subcontract. Pritchard
 2 Declaration, ¶ 8; Morris Declaration, ¶ 4 & Exh. A. That provision states as follows:

3
 4 The Employer **will give advance notification** to the Union at the national level
 5 when subcontracting which will have a significant impact on bargaining unit work is
 6 being considered and **will meet with the Union while developing the initial**
 7 **Comparative Analysis report.** The Employer **will consider the Union's views on**
 8 **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.**

9 Morris Declaration, Exh. A at Article 32, Section 1.B (emphasis added).

10 The mandatory process required by the foregoing provision is a form of negotiations
 11 requiring the Union and the Postal Service to exchange views and information so that the Postal
 12 Service can undertake a fair consideration of all reasonable factors. The Union is entitled to have
 13 these factors, and the Union's "views and proposals," considered as part of the Postal Service's
 14 deliberations before any final decision is made to contract out, if that contracting out will have a
 15 significant impact on bargaining unit work. *Id.*

16 Article 32, Sections 2.B and C, of the National Agreement establish additional procedures
 17 that must be followed when the Postal Service is considering contracting out PVS work. The
 18 Postal Service must, among other things, provide to the Union, in a concise summary form, "[a]
 19 statement of service" detailing the work that is to be contracted out. This must inform the Union
 20 of the "frequency, time of departure and arrival, annual mileage, and proposed effective date of
 21 contract." The Postal Service is also required to inform the Union "how the impacted employees
 22 will otherwise be utilized." Pritchard Declaration ¶ 16; Morris Declaration, Exh. A at Article 32,
 23 Sections 2.B & C.

24 **B. The Postal Service Separately Agreed Not to Unilaterally Change Negotiated** 25 **Terms Of The National Agreement**

26 In Article 5 of the National Agreement, the Postal Service agreed to maintain the status
 27 quo established by the National Agreement: "The Employer will not take any actions affecting
 28 wages, hours and other terms and conditions of employment as defined in Section 8(d) of the

1 National Labor Relations Act which violate the terms of this Agreement or are otherwise
2 inconsistent with its obligations under law.” Pineres Declaration, ¶ 3 & Exh. B at Article 5.³

3 **III. The Employer Violated the National Agreement And Did Not Maintain The Status**
4 **Quo**

5 **A. Without Notifying Or Conferring With The Union, The Postal Service**
6 **Announced That It Had Decided To Contract Out All Postal Vehicle Service**
7 **Jobs In California**

8 On June 7, 2012, the manager of contract administration for the Union’s bargaining units,
9 Patrick M. Devine, wrote to APWU President Cliff Guffey informing him that the Postal Service
10 had decided to contract out all Postal Vehicle Services in the state of California. Guffey
11 Declaration, Exh. C. Mr. Devine’s letter stated that, based on certain 2008 regulations, “the
12 California Air Resources Board (CARB) requires significant reduction in vehicle emissions to meet
13 federally imposed clean air standards The most important justification for subcontracting is
14 the availability of equipment. The Postal Service does not currently have the equipment necessary
15 to comply with the legislation; nor the capital available to purchase vehicles at the rate required for
16 compliance with the law.” *Id.* The Postal Service’s decision to contract out all PVS work in
17 California violated the National Agreement, as we discuss in detail below.

18 In response to Mr. Devine’s June 7 letter, President Guffey requested and received a
19 meeting with the Employer that took place on July 31, 2012. Guffey Declaration, ¶ 8. The Postal
20 Service was represented at that meeting by Fred Brill, a manager in the Surface Transport Division
21 at a postal headquarters in Washington, DC; Hahn Dinh, an engineer from the Postal Service
22 facility in Merrifield, Virginia; and Gwendolyn Stenbridge, a Labor Relations Specialist.
23 President Guffey was accompanied by Robert Pritchard, the Director of the Motor Vehicle Services
24 Division of the APWU. *Id.*; Pritchard Declaration, ¶ 5.

25 At the beginning of the July 31, 2012 meeting, Mr. Brill informed President Guffey and Mr.
26 Pritchard that the decision to contract out all PVS jobs in California had “nothing to do with
27 personnel costs,” and that it was a result of a problem complying with emissions standards under
28 California law. Mr. Dinh informed the APWU officers that he was familiar with the cost of

³ Article 5 applies to PSE employees. *Id.* at § 2.

1 complying with emissions standards in California because the Postal Service was in the process of
 2 retrofitting trucks driven by letter carriers in that state. He stated that it would cost the Postal
 3 Service approximately \$8 million to retrofit PVS trucks to comply with the relevant CARB
 4 regulations. Mr. Guffey responded by stating that the cost of retrofitting PVS trucks in California
 5 could be paid from the collectively-bargained “Workforce Benefits, Employment Opportunities,
 6 Training and Education Fund” (the “Workforce Fund” or “Fund”), which is under the control of
 7 himself and the USPS Vice President for Labor Relations, Douglas Tulino. Guffey Declaration, ¶¶
 8 8-12; Pritchard Declaration, ¶¶ 5, 6. Under the terms of the 2010 National Agreement, the Postal
 9 Service must contribute \$60 million per year to the Fund over the term of the parties’ four and one-
 10 half year agreement, a total of \$270 million. Guffey Declaration, ¶ 6. While the Fund’s first
 11 priority is to pay for the Employer’s share of health insurance benefits for PSEs, the Fund can also
 12 pay such expenses as paying the cost of additional benefits for PSE employees, training and
 13 education of employees, and supplementing existing resources to make it more economical to
 14 avoid contracting out. *Id.*

15 President Guffey subsequently confirmed and reiterated his offer to make the \$8 million
 16 needed to retrofit the trucks available from the Workforce Fund in a September 21, 2012 letter to
 17 USPS Vice President Tulino. Guffey Declaration ¶ 15, Exh. E.

18 On August 10, 2012, Mr. Devine sent another letter to President Guffey on the subject of
 19 the Postal Service’s decision to contract out all truck driving jobs in California, stating that Mr.
 20 Devine’s August 10 letter “replaces [his] letter dated June 7, 2012 (enclosed).” Guffey
 21 Declaration, ¶ 13, Exh. D. Mr. Devine’s August 10 letter then states, “After carefully considering
 22 the relevant factors under Article 32.2 of the National Agreement the Postal Service is *proposing* to
 23 subcontract Postal Vehicle Services in all Pacific Area mail processing and network distribution
 24 facilities in the state of California.” *Id.* (emphasis added).

25 **B. The Postal Service Is Implementing Its Decision To Contract Out All**
 26 **California PVS Jobs**

27 Notwithstanding the statement in Mr. Devine’s August 10 letter that the Postal Service was
 28 merely “proposing” to contract out all truck driving jobs in California, the Postal Service continued
 Plfs’ Ntc of Motion & Motion for Preliminary Injunction; Memo or P&A in Support – Case No. 12-cv-5327 6

1 after August 10 to carry out plans to contract out that work. For example, it has issued numerous
 2 notices to PVS employees in California stating that their jobs are being eliminated. Postal Service
 3 officials in California also continued to meet with Union officials in California, including APWU
 4 Western Region Coordinator Omar Gonzalez and APWU Motor Vehicle Service National Business
 5 Agent Javier Pineres, in which they informed Mr. Gonzales and Mr. Pineres that the decision to
 6 contract out all California PVS jobs had been made at Postal Service headquarters in Washington
 7 DC, and that Pacific Area postal officials were being required to carry it out. Gonzalez
 8 Declaration, ¶¶ 4, 6; Pineres Declaration, ¶ 3.

9 On August 30, 2012, postal management made a presentation to PVS employees
 10 represented by the APWU Southwest Coastal Area Local in Anaheim and Santa Ana, California.
 11 In that talk, management informed employees that “[l]egislation approved in 2008 by the
 12 California Air Resources Board (CARB) requires a reduction in vehicle emissions to meet
 13 federally imposed clean air standards It was decided to outsource/convert PVS operations to
 14 Highway Contract As a result it will be necessary to involuntarily reassigned (excess) all
 15 current motor vehicle operators, tractor-trailer operators” Pritchard Declaration, ¶ 9 & Exh. E.

16 On September 6, 2012, the San Francisco Local requested that management post full-time
 17 driving assignments for 2013, so that drivers in San Francisco could bid for those assignments in
 18 accordance with the National Agreement. Postal Service management responded in writing that
 19 “[d]ue to the New California Emission Standards . . . the PVS transportation will convert to
 20 Highway Contract Routes on November 17, 2012,” that is, will be contracted out, and that
 21 therefore “[t]here will be no more assignments available in 2013” Pritchard Declaration, ¶ 8
 22 & Exh. C.

23 **IV. The APWU Grievance**

24 On September 21, 2012, the APWU filed a grievance under Article 15 of the National
 25 Agreement. Gonzalez Declaration, ¶ 7 & Exh. C. That grievance alleges that the Postal Service
 26 violated the National Agreement by failing to (1) provide advance notice of the contracting; (2)
 27 meet with the Union while the Postal Service was preparing its initial Comparative Analysis report;
 28 (3) consider the Union’s views on costs and other factors, together with the Union’s proposals to

1 avoid contracting; (4) include a statement of the Union’s view in the Postal Service’s initial
 2 Comparative Analysis or in any Decision Analysis Report; (5) provide in advance information
 3 relevant to contracting; and (6) make a “fair comparison . . . [o]f all reasonable costs,” in making
 4 its decision to contract out. *Id.*, Exh. C. The grievance also protests the failure of the Postal
 5 Service to agree to APWU President Guffey’s offer to finance the retrofitting of trucks in
 6 California using the Workforce Fund established for that purpose. *Id.*

7 The grievance is scheduled to be heard by the parties’ national-level arbitrator on
 8 November 27 and 28, 2012. Gonzalez Declaration ¶ 7, Exh. C; Morris Declaration ¶ 8; Pritchard
 9 Declaration ¶ 7.

10 ARGUMENT

11 **I. THE LEGAL STANDARD FOR ISSUING A STATUS QUO INJUNCTION UNDER** 12 **BOYS MARKETS**

13 **A. If The Employer Has Promised To Maintain The Status Quo, Or If The** 14 **Arbitration Process Would Be Frustrated Or Made Futile Absent An Injunction,** **The Court Has Jurisdiction To Provide Injunctive Relief**

15 Although the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15, normally bars courts from
 16 issuing injunctions in labor disputes, the Supreme Court has created an exception that permits
 17 injunctions in cases where an injunction is required to prevent actions that would frustrate and
 18 interfere with the arbitration process.⁴ This exception was first recognized in a case in which a
 19 union struck over a dispute that the CBA required to be resolved in arbitration, and the Supreme
 20 Court held that such a strike could be enjoined. *Boys Markets*, 398 U.S. at 248 (union enjoined
 21 from striking because the parties’ agreement included a no-strike clause and an arbitration
 22 provision that required disputes to be resolved in arbitration). The decision in *Boys Markets* has
 23 since been expanded to permit injunctions in the reverse situation in which *the employer* threatens
 24 to alter the status quo prior to arbitration, and the union seeks to enjoin the employer from making
 25

26 ⁴ Because the employer in this case is an agency of the United States Government, the
 27 Norris-LaGuardia Act likely does not apply. See 29 U.S.C. §§ 104, 107 (limiting the
 28 circumstances under which a federal court may issue injunctive relief in labor disputes). *United*
States v. United Mine Workers, 330 U.S. 258 (1947); cf. *Postal Service v. Flamingo Industries*
(USA) Ltd, 540 U.S. 736 (2004). However, we make this point in an abundance of caution, to
 confirm the jurisdiction of this Court.

the changes until the grievance is resolved through arbitration. *See, e.g., San Francisco Newspaper Agency*, 89 F.3d at 634; *Boys Markets*, 398 U.S. at 254.

As this Court observed in *Oakland Local, American Postal Workers Union v. United States Postal Service*, 1981 WL 2383, 107 L.R.R.M. (BNA) 2943 (N.D. Cal. 1981), reverse *Boys Markets* injunctions may be issued “when the injunction is necessary to protect the arbitration process itself or when there is an implied promise by the union to maintain the status quo pending resolution of the dispute.” *Id.*, 1981 WL 2383 at *1 (citing *Boys Markets* and *Amalgamated Transit Union, Div. 1384 v. Greyhound Lines, Inc. (“Greyhound II”)*, 550 F.2d 1237, 1238 (9th Cir. 1977)). “Case law is clear that when the grievance process cannot restore the status quo ante in acceptable form, courts will allow an injunction.” *Id.* at 2 (citing *Lever Bros. Co. v. Int’l Chemical Workers Union Local 217*, 554 F.2d 115 (4th Cir. 1976)); accord *United Electrical, Radio and Machine Workers v. Simpson Mfg. Co.*, 1983 WL 31108, 115 L.R.R.M. (BNA) 2149 (N.D. Cal. 1983); see *San Francisco Newspaper Agency*, 89 F.3d at 635 (“Consequently, the district court concluded that maintenance of the status quo was essential to preserving the Union’s arbitral remedy. We cannot say the district court abused its discretion in doing so.”); *Graphic Communications Conference, IBT, Local 404M v. The Bakersfield Californian*, 541 F.Supp.2d 1117 (E.D. Cal. 2008).

Although, under the forgoing authorities, the Union need only prove either that the Employer promised to maintain the status quo or that a status quo injunction is necessary to preserve the arbitral remedy, we show below that both of these tests are satisfied in the present case.

B. If Arbitration Is Mandatory, The Grievance Is Arbitrable, The Plaintiff Is Willing To Arbitrate, and The Traditional Standards for Granting a Preliminary Injunction Can Be Met, The Court Should Issue an Injunction Preserving The Status Quo Pending Arbitration

In issuing a reverse *Boys Markets* injunction, in addition to the inquiry we have just discussed regarding whether the employer promised to maintain the status quo or whether a status quo injunction is necessary to preserve the arbitral remedy, the Court must also evaluate the following considerations: (1) whether the CBA contains a mandatory arbitration provision; (2) whether the underlying dispute is arbitrable; (3) whether the party seeking arbitration is prepared to

1 arbitrate; and (4) whether the issuance of an injunction would be warranted under ordinary
 2 principles of equity. *San Francisco Newspaper Agency*, 89 F.3d at 634. The fourth of these
 3 considerations in essence incorporates the traditional analysis for issuing preliminary injunctive
 4 relief, pursuant to which a plaintiff must establish that “he is likely to succeed on the merits, that he
 5 is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities
 6 tips in his favor, and that an injunction is in the public interest.” *American Trucking Ass’n Inc. v.*
 7 *City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Natural Res. Def.*
 8 *Council, Inc.*, 555 U.S. 7, 20 (2008)). The Union easily satisfies those requirements.

9 There is no question but that the National Agreement contains a mandatory arbitration
 10 provision, the dispute is arbitrable, and the Plaintiff APWU is prepared to arbitrate. Indeed, the
 11 grievance is scheduled to be arbitrated on November 27 and 28, 2012. The only questions for the
 12 Court are whether (1) the Postal Service has promised to maintain the status quo pending
 13 arbitration or the arbitration process would be futile absent a status quo injunction; and (2) the
 14 Union can satisfy the traditional standard for issuing preliminary injunctive relief, that is, whether
 15 it can show a likelihood of success on the merits, the existence of irreparable harm, and that the
 16 balance of the equities and the public interest favor granting the requested injunction. We discuss
 17 each of these considerations below; where an issue (e.g., the harm resulting from a change in the
 18 status quo) is relevant to more than one of those considerations, we discuss it in full the first time
 19 and then incorporate that analysis in short form in the subsequent discussion.

20 **II. THE POSTAL SERVICE HAS PROMISED NOT TO ACT UNILATERALLY AND** 21 **THE ARBITRATION PROCESS WOULD BE FRUSTRATED AND RENDERED** 22 **FUTILE ABSENT A STATUS QUO INJUNCTION**

23 **A. The Employer Agreed To Maintain The Status Quo Until The Conditions In** **Article 32 Have Been Met**

24 The Postal Service has agreed, in Article 32 of the National Agreement, that, before it
 25 engages in contracting out that has a significant impact on the bargaining unit, it will (1) give
 26 advance notification to the Union, (2) meet with the Union while developing the initial
 27 Comparative Analysis Report; (3) consider the Union’s views on costs and other factors together
 28 with proposals to avoid subcontracting; (4) include a statement of the Union’s views and proposals
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1 will be included in the initial Comparative Analysis and in any Decision Analysis Report relating
2 to the subcontracting; and (5) make no final decision until the matter is discussed with the Union.
3 *See pp. 3-4, supra.*

4 None of these agreements was kept before the Postal Service announced that it had decided
5 to contract out all PVS jobs in California, approximately 12 percent of all PVS jobs in the
6 bargaining unit.

7 The Postal Service also agreed, in Article 5, of the National Agreement, that it would not
8 change employees' wages, hours or working conditions in violation of the Agreement. Pineres
9 Exh. B. The Agreement also has a broad grievance-arbitration clause that gives either the
10 Employer or the Union the right to initiate a dispute at the national level. And it provides for final
11 and binding arbitration of such disputes. *Id.*

12 Under these circumstances, where the Employer has agreed not to act until certain
13 conditions have been met, where it also has agreed not to make any changes that violate the
14 Agreement, and where there is an agreement to resolve disputes through arbitration, the Employer
15 must be held to have agreed not to make alterations in the status quo until after arbitration has been
16 completed.

17 **B. Arbitration Will Be Frustrated and Made Futile Absent Injunctive Relief**

18 Additionally, it is clear that the grievance process will be frustrated and made futile if an
19 injunction is not issued. APWU officers, all of whom have decades of experience negotiating with
20 the Postal Service, have filed declarations demonstrating the numerous ways in which restoring the
21 status quo will be impossible without preliminary injunctive relief. Moreover, even if restoration
22 of the status quo were theoretically possible, as a practical matter it would be difficult to persuade
23 an arbitrator to order a restoration of all of the Union's work in California as a remedy in this case
24 if the Postal Service has already implemented its announced scheme to subcontract that work.
25 Many affected employees will have retired or transferred to other jobs or other locations, PSE
26 employees will have been terminated, postal vehicles will have been reassigned or disposed of,
27 outside contractors will have been engaged to replace postal employees, and many other changes
28 associated with a decision of this magnitude will have occurred. Guffey Declaration ¶ 22.

1. The Subcontracting Process, as Agreed to by the Parties in the National Agreement, Will Be Irreparably Changed to the Disadvantage of the Union

Even if the arbitrator were to attempt to order a full remedy, he could not restore the status quo ante. Under the National Agreement, the Union is entitled to have its proposed alternatives to subcontracting considered before the decision to subcontract is made. *Id.* at ¶ 23. That process can still work if the Postal Service is required to forgo excessing and terminating its workers and is required to comply with the Agreement before it makes a decision whether to go forward. *Id.* If the Postal Service is permitted to go forward before arbitration, the reality is that the economics and the dynamics of that process will have been permanently changed to the disadvantage of the Union. *Id.* The Union's contractual right to obtain a fair and reasonable comparison before the decision is made to subcontract would have been lost, and it would be far more difficult, if not impossible, for the Union to achieve a satisfactory result. *Id.* APWU President Guffey has explained in detail that, given a fair opportunity, the parties could reach an agreement that will preserve postal union motor vehicle jobs in California, but that such agreement will be rendered impossible if the Postal Service is permitted to carry out its decision to subcontract the Union's California motor vehicle work. *Id.*

For example, if the Postal Service is permitted to contract out the PVS jobs without waiting for arbitration, the Postal Service will bind itself to contractual commitments to contractors and will therefore be in a position where it will feel committed to defending its decision to contract out. Under those circumstances, even an order by an arbitrator that seeks to restore the status quo ante and orders compliance with the Agreement thereafter will result in no more than pro forma discussions with the Union, with no reasonable likelihood of success. Morris Declaration, ¶ 9. Whatever agreement might have been possible before the contracting out takes place will be essentially foreclosed by the impact of contracting out in the interim. Pritchard Declaration, ¶ 17.

2. The Postal Service has a History of Failing to Comply With Arbitration Awards Awarded After Subcontracting Has Occurred.

An example of how difficult it would be to convince the Postal Service to restore PVS and keep it in place even if the Union prevails in the arbitration is provided by an arbitration case

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1 arising in the state of Washington. Gonzalez Declaration ¶¶ 11-13. In a November 19, 2008
 2 award, Arbitrator Eduardo Escamilla found that the Postal Service had violated the National
 3 Agreement by the manner in which it reassigned truck drivers from Tacoma to Seattle. Arbitrator
 4 Escamilla ordered the Postal Service to “cancel the HCR contracts and return the PVS operation to
 5 the Tacoma facility.” Gonzalez Declaration, Exh. D at 41-40.

6 The Postal Service did not comply with the Escamilla award ordering the return of PVS
 7 jobs to Tacoma, however, and the APWU subsequently filed a grievance to require compliance
 8 with that award. That grievance resulted in a second arbitration decision, issued by Arbitrator Vern
 9 E. Hauck on January 23, 2012, sustaining the grievance and ordering the Postal Service to comply
 10 with the Escamilla award. *Id.*, Exh. E. Despite the fact that both of those awards are final and
 11 binding, and the fact that the Postal Service has not challenged either of them, it has nonetheless
 12 failed to comply with them and has not returned the PVS jobs to Tacoma. Accordingly, the Union
 13 was forced to file suit in the U.S. District Court for the Western District of Washington to enforce
 14 the Hauck award. Gonzalez Declaration, Exh. F. The stalemate over the return of PVS work to
 15 Tacoma, which now has been ordered by two arbitrators, illustrates that the arbitrator will not be
 16 able effectively to restore the status quo ante in California if the Postal Service is permitted to
 17 contract out the work at issue pending arbitration. Gonzales Declaration, ¶ 11.

18 **3. Postal Truck Drivers Will Be Irreparably Harmed by Contracting Out** 19 **Pending Arbitration of the Grievance.**

20 **a. Many Career Drivers Will Be Forced to Take Early Retirement**

21 There are not enough vacant assignments to accommodate the many drivers who will lose
 22 their driving jobs if the Postal Service’s contracting out plan proceeds. Pineres Declaration, ¶ 7.
 23 Among the limited number of assignments available, the vast majority of those assignments will be
 24 in the letter carrier craft. Pineres Declaration, ¶ 9. The number of positions available in other
 25 crafts, such as clerk and maintenance, are shrinking and thus those crafts are unlikely to have many
 26 open assignments. *Id.* Moreover, the job of letter carrier is very physically demanding, having the
 27 following physical requirements:
 28

Applicants must be physically able to efficiently perform the duties of the position, which require arduous exertion involved prolonged standing, walking, bending and reaching and may involve handling heavy containers of mail weighing up to the allowable maximum weight.

Pineres Declaration, Exh. F. The allowable maximum weight for lifting is 70 pounds. *Id.*

In contrast, Tractor Trailer Operators and Motor Vehicle Operators have no such requirements. Pineres Declaration, ¶ 11. Many excessed employees will be unable to perform the duties required of a carrier because of their age, physical condition or health issues. *Id.* at ¶¶ 12-14. Many of these excessed employees who are assigned to the position of letter carrier will choose to take an early retirement rather than perform a job they are incapable of doing due to its physical demands. Pineres Declaration, ¶ 14; Pittman Declaration, ¶¶ 2-7. Taking early retirement will result in a smaller pension than the employees would otherwise be entitled to if they were to retire at the normal retirement age. Pittman Declaration, ¶ 7. This will have a severe impact on their lives and the lives of their families.

b. Hundreds of Postal Support Employees Will Likely Be Terminated and Lose their Health Insurance as a Result

Although career Postal Service employees are protected from layoff, this is not true for Postal Support Employees (“PSEs”). Pineres Declaration, ¶ 2. PSEs are non-career bargaining unit employees who do not have the same protections as career employees, meaning they can be terminated for lack of work with very limited appeal rights. *Id.* There are approximately 69 PSEs in the Motor Vehicle Craft in California. Pineres Declaration, ¶ 14 and Exh. F at 3. Article 12, Section 4.D of the National Agreement requires that the Postal Service terminate PSEs working in the affected craft prior to excessing any regular employees in that craft or installation. Pineres Declaration, Exh. B. This means that the Postal Service must terminate the 69 PSEs in the motor vehicle craft before it can excess any career motor vehicle drivers. Pineres Declaration, ¶ 15.

Furthermore, Article 12, Section 5.B.2 of the National Agreement requires that “[m]anagement shall identify duty assignments within the appropriate radius held by PSEs, which shall be made available for the reassignment of excess career employees.” Pineres Declaration, Exh. B. This means that PSEs holding jobs in crafts other than the PVS will be terminated in order

1 to make assignments available for the career employees, if those jobs can be performed by the
 2 excessed career drivers. Pineres Declaration, ¶ 16. There are currently approximately 788 PSEs
 3 working in the maintenance and clerk crafts who may lose their job as a result of contracting out
 4 California truck driver jobs. Pineres Declaration, ¶ 16. Those of the PSE employees who currently
 5 participate in the Federal Employees Health Benefits Program will lose the employer contribution
 6 to their insurance premium 32 days after their termination and will thereafter likely lose their
 7 health insurance coverage, as they are unlikely to be able to afford to pay the entire premium
 8 themselves while unemployed. See 5 C.F.R. §§ 890.304, 890.401.

9 **III. PLAINTIFFS ALSO EASILY SATISFY ALL TRADITIONAL EQUITABLE** 10 **FACTORS REQUIRED FOR INJUNCTIVE RELIEF**

11 As discussed above, under the traditional analysis for a preliminary injunction, a plaintiff
 12 must establish that “he is likely to succeed on the merits, that he is likely to suffer irreparable harm
 13 in the absence of preliminary relief, that the balance of equities tips in his favor, and that an
 14 injunction is in the public interest.” *American Trucking Ass’n*, 559 F.3d at 1052. The Union easily
 15 satisfies those requirements.

16 **A. Likelihood Of Success On The Merits**

17 In a reverse *Boys Markets* case, the question of likelihood of success on the merits does not
 18 depend on the Court’s view on the likelihood that the grievance ultimately will be sustained by the
 19 arbitrator. To perform that analysis, the Court would have to enmesh itself in the merits of the
 20 labor dispute in a way that could have an impact on the arbitration. This principle was established
 21 by the Ninth Circuit in *Amalgamated Transit Union, Div. 1384 v. Greyhound Lines, Inc.*
 22 (“*Greyhound I*”), 529 F.2d 1073, 1077-78 (9th Cir. 1976), *vacated on other grounds*, 492 U.S. 807
 23 (1976), in a portion of that decision that has been widely followed. The Ninth Circuit held that “a
 24 plaintiff . . . seeking to maintain the status quo pending arbitration pursuant to the principles of
 25 *Boys Markets* need only establish that the position he will espouse in arbitration is sufficiently
 26 sound to prevent the arbitration from being a futile endeavor. If there is a genuine dispute with
 27 respect to an arbitrable issue the barrier we believe appropriate has been cleared.” 529 F.2d 1073,
 28 at 1077-78; *accord, e.g., Oil Chemical and Atomic Workers International Union, AFL-CIO v.*

1 *Amoco Oil Company (Salt Lake Refinery)*, 885 F.2d 697, 702 (10th Cir. 1989); *Local Lodge No.*
 2 *1266, Int'l Ass'n of Machinists v. Panoramic Corp.*, 668 F.2d 276, 285 (7th Cir. 1981).

3 For the reasons discussed above, it cannot be seriously disputed that the Union has satisfied
 4 this standard. Indeed, although it is not necessary here for the Union to prove anything beyond that
 5 there is a genuine dispute over an arbitrable issue, for the reasons discussed above the Union is
 6 likely to prevail at arbitration, as the Postal Service is in blatant violation of many provisions of the
 7 National Agreement. *See* pp. 5-8, *supra*.

8 **B. Plaintiffs Will Suffer Irreparable Harm if Relief is Not Granted**

9 As discussed above, the traditional equitable analysis requires the party seeking a
 10 preliminary injunction to demonstrate that irreparable harm will result absent such relief.
 11 *American Trucking*, 559 F.3d 1046. As we have already discussed in greater detail above at pages
 12 11-15, permitting the Postal Service to subcontract the work in question pending arbitration will
 13 result in irreparable injury in several ways: (1) the subcontracting process required by the National
 14 Agreement will be irreparably changed to the great disadvantage of the Union; (2) the Postal
 15 Service is unlikely to comply with an Arbitration Award issued after the subcontracting has already
 16 occurred; (3) many career postal truck drivers will be forced to take early retirement; and (4) many
 17 Postal Support Employees will lose their jobs and access to health insurance.

18 **C. The Balance Of Hardships Favors Issuance of a Status Quo Injunction Because** 19 **The Employer Will Not Be Harmed, And May Be Benefitted, By Maintaining The** **Status Quo Pending Arbitration**

20 The parties have agreed to arbitrate the Union's grievance on November 27 and 28, 2012.
 21 In that proceeding, the Union will seek an arbitration award requiring the Employer to comply with
 22 Article 32 of the National Agreement. This will require the Employer to meet with the Union, as it
 23 should have done while it was preparing its initial Comparative Analysis report. The Postal
 24 Service will be required to consider the Union's views on costs and other factors, together with the
 25 Union's proposals to avoid contracting; and it will, if the Union prevails in arbitration, be required
 26 to prepare another Comparative Analysis and include a statement of the Union's views in that
 27 Analysis or in any Decision Analysis Report.
 28

1 Several substantive financial considerations will be important to the reconsideration of the
2 Postal Service's decision to contract out. One will be a rigorous reconsideration of the relative
3 costs of PVS operations and HCR operations. Some of the flaws of the Postal Service's
4 analysis are detailed below at p. 19, fn. 5, which demonstrates that the Postal Service failed to
5 make a fair comparison of all reasonable costs, as required by the National Agreement. *See also*
6 Pritchard Declaration, ¶ 13.

7 Another major consideration that is not included in the Postal Service's analysis of
8 comparative costs is the cost of providing excess PVS drivers with "saved grade" protection.
9 There will no driving jobs for these PVS truck drivers. If they are made letter carriers, as is most
10 likely, they will be holding jobs that ordinarily are paid at lower grades, but the Postal Service will
11 be contractually obligated to pay them as though there were still working as truck drivers. Pineres
12 Declaration, ¶ 17. Furthermore, as discussed above, if there are insufficient open career jobs for
13 the displaced drivers, PSE employees within the pertinent area for excessing must be terminated to
14 make a place for the excessed career drivers. PSE employees are paid far lower wages than career
15 drivers and receive no retirement benefits. When "loaded wage rates" (meaning the addition of the
16 cost of fringe benefits paid by the employer and the value of leave benefits per hour divided by
17 hours worked added to the straight time wage) are considered, the hourly rate for PSEs is
18 approximately \$25 per hour lower than the rate for career PVS drivers. Kobe Declaration, ¶ 5, Exh.
19 D. This means that every PSE replaced by an excessed career driver will cost the Postal Service
20 about \$52,000 per year, and this could occur hundreds of times given the lack of career positions
21 and the large number of PSEs employed in California. Pineres Declaration, ¶ 16. Yet none of
22 these costs were estimated or considered by the Postal Service as part of the decision to contract
23 out. *See* Pritchard Declaration, ¶ 13(d).

24 Alternatively, the Union could propose that the Postal Service employ a larger percentage
25 of PSE employees in California than is presently permitted under the National Agreement.
26 Because the loaded wage rate of PSE drivers is approximately \$15 per hour less than the Service
27 Contract Act wage paid by HCR contractors, *see* Kobe Declaration, Exh. D, increasing the
28 percentage of PSEs in the bargaining unit would rapidly change the cost equation between PVS

1 and HCR, that is, keeping the work in-house versus contracting it out. Mr. Pritchard has already
2 indicated that the Union is willing to consider such an alternative if the Postal Service complies
3 with the National Agreement and considers the Union's views and proposals. Pritchard
4 Declaration, ¶ 14 & Exh. F; *see also* Guffey Declaration, Exh. E.

5 Finally, we observe that the Postal Service has not responded to President Guffey's
6 proposal that the \$8 million retrofit of PVS trucks in California be paid from the Workforce Fund
7 created under the 2010 National Agreement. When the Postal Service first announced that it had
8 decided to contract out all California PVS jobs, before it had given the APWU an opportunity to
9 propose an alternative, it told Mr. Pritchard and Mr. Guffey that the reason underlying the
10 decisions was that it would cost \$8 million to retrofit postal trucks in California to comply with
11 CARB. In a July 31, 2012 meeting and in a September 21, 2012 letter, Mr. Guffey suggested using
12 the Workforce Fund to pay for that expense, rendering it cost-free to the Postal Service. The Postal
13 Service has never responded. Pritchard Declaration, ¶¶ 5-6; Guffey Declaration, ¶¶ 7-15, Exh. E.
14 The APWU is entitled to have this suggested solution to the CARB retrofit cost included in the
15 Postal Service's Comparative Analysis and Decision Analysis Report.

16 All of the foregoing financial considerations must be considered and factored into the
17 decision about whether to maintain PVS or convert to HCR. At the very least, they demonstrate
18 that the cost savings to the Postal Service that could result from the Union's proposals are
19 sufficiently great that the balance of hardships favors granting preliminary injunctive relief. On the
20 one hand, great hardship will be suffered by the employees if such relief is denied, and that
21 hardship will be needlessly incurred if the Union prevails at arbitration. On the other hand,
22 preventing the Postal Service from implementing a contracting out scheme that it has asserted is
23 cost-driven will not cause it to experience hardship because the Union's proposals to avoid
24 contracting out the work in question have the potential to assist the Postal Service in achieving cost
25 savings from keeping the work in-house and, if the Postal Service prevails at arbitration, it will
26 only have been delayed in contracting out the work for the short time remaining until the
27 arbitration is concluded.

D. A Status Quo Injunction Is In the Public Interest.

As we have just shown, it is in the Postal Service's interest to comply with its contractual obligation to consider the Union's position that it would be *more economical* for the Postal Service to keep the disputed PVS operations in-house, before implementing its contracting-out plan. For the same reason, it is in the public interest, as well.

As explained by Mr. Pritchard in his Declaration in this case, "The Postal Service has failed to make a fair comparison of all reasonable costs in its consideration of contracting out all California truck driving work." Pritchard Declaration, ¶ 13.⁵ On October 5, 2012, Mr. Pritchard

⁵ The Postal Service uses a form called the "Form 5505" to make comparisons between the cost of using the Postal Vehicle Service and the cost of using contractors to perform the work using Highway Contract Routes ("HCRs"). The Postal Service provided the APWU with a Form 5505 for each of the affected locations in California and a consolidated Form 5505 showing the comparison of the cost of performing postal transportation in California using the Postal Service's PVS drivers versus using contractors. That analysis is deficient and flawed in at least the following ways:

- a) It double counts the cost of postal vehicles.
- b) It inflates postal truck costs by using only Tractor Trailer costs when most postal vehicles are smaller, less expensive trucks.
- c) It triple-counts the cost of postal management attributable to postal truck drivers, because the cost of postal management is included in calculating the cost of trucks, which is then double-counted, and then the cost of management is charged to the PVS in a separate additional entry on the Form 5505..
- d) It inflates postal personnel costs by assuming all postal personnel are Tractor-Trailer Operators, the most expensive postal truck drivers, when most affected drivers are Motor Vehicle Operators, a less expensive driver.
- e) It misstates the mileage to be driven by postal drivers as compared to contract drivers, inflating the relative mileage attributed to postal drivers.
- f) It omits almost all the costs of administering highway contracts, assuming for each contract a total administrative cost of \$999. APWU can show that in the San Diego office alone the Postal Service employs three highway contract managers to administer HCR contracts in the vicinity of San Diego at a cost of more than \$300,000.
- g) It ignores the fact that the 2010 National Agreement will lower the average hourly cost of PVS drivers.
- h) It ignores the fact that the APWU has proposed to the Postal Service that a much higher percentage of PVS drivers in California be changed to low-cost temporary postal drivers in order to reduce PVS costs in California.

1 sent Mr. Devine a detailed letter spelling out the various ways the Postal Service failed to make a
 2 fair and reasonable comparison of postal costs to the cost of contracting out PVS in California, and
 3 offering to show the Postal Service how it would benefit more by keeping its PVS operations in
 4 California. Pritchard Declaration, Exh. F. Mr. Pritchard reminded Mr. Devine of President
 5 Guffey's offer to make the Workforce Fund available to retrofit postal trucks and suggested that
 6 the parties discuss the best mix of career and non-career employees to keep PVS viable in
 7 California. Mr. Pritchard has received no response to his October 5 letter. Pritchard Declaration
 8 ¶ 14.

9 Again, the public interest will be served by requiring the Postal Service to base any
 10 contracting out decision on an accurate comparison of the relative costs of keeping the work in-
 11 house versus contracting it out. Only issuing a status quo injunction will accomplish that goal.

12 CONCLUSION

13 For the foregoing reasons, the Union's motion for a preliminary injunction maintaining the
 14 status quo pending arbitration should be granted.

15 Dated: October 22, 2012.

Respectfully submitted,

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 17 Sarah Kanter
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 21 Darryl J. Anderson

22 Attorneys for Plaintiffs

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- 23
 24
 25
 26 i) It ignores the fact that, due to a retirement incentive of \$15,000 currently being
 27 offered to postal employees, many postal drivers in California will retire and, as
 they retire, they can be replaced by lower-cost drivers.

28 Pritchard Declaration, ¶ 13.