REGULAR ARBITRATION PANEL
NORTHERN VIRGINIA DISTRICT

In the Matter of an Arbitration

Between

United States Postal Service

And

American Postal workers Union, AFL-CIO

Grievant:	Class
Post Office:	Merrifield ,VA P&DC
USPS Case Nos.:	K06T-1K-C-09288847
APWU Case Nos.:	M7110109
Before:	Robert Tim Brown, Esq. Arbitrator
Appearances:	
For the Postal Service:	Labor Relations Specialist
For the Union:	Jason Treier, National Arbitration Advocate
Place of Hearing:	Merrifield, VA
Dates of Hearing:	October 23, 2014 (Post hearing submissions)
Date of Award	January 17, 2015
Relevant Contract Provisions:	Art. 32
Contract year:	2006
Type of Grievance:	Contract (Subcontracting)

Award Summary: The Service violated Art. 32.1, as detailed herein. Remedy also detailed herein.

Robert Tim Brown, Esq.

cc:

AWARD

This case was heard under the auspices of the Regular Arbitration Panel for the Northern Virginia District, pursuant to the collective bargaining agreement between the United States Postal Service and the American Postal Workers Union, AFL-CIO. Hearing was held on October 23, 2014 at the Merrifield VA P&DC. APWU National Arbitration Advocate Jason Trier represented the Union and the Grievant at the hearing and Labor Relations Specialist represented the Postal Service. Each side was given a full opportunity to call witnesses and to cross-examine witnesses for the other side. The parties submitted post hearing briefs following the close of hearing, and when those briefs were both received, the record was closed.

The Merrifield P&DC has among its operations a motor vehicle facility (MVF), and this case involved the refueling station at that the facility.

Sometime in the first half of 2009, damage was caused by a truck to ceiling tiles in the overhang of the refueling station, and to certain other components of that installation. The Service made a determination to have it repaired, and, without notice to the Union, contacted higher management outside the facility and arranged to subcontract the work, which was done in the period June 22-26, 2009. A steward noticed the contractor on June 26, and shortly thereafter the Union made a comprehensive request (copy in case file) to management, seeking return on investment, statement of work, decision analysis report on cost comparison, copy of contract, number of hours used, total cost, copy of total authorized compliment, number of employees on rolls by occupational group and level, hours of work, and all documents used for subcontract (solicitation and award).

The Service, in examining the steward regarding his observations, sought, with some success, to prove that he was not at work when he testified he made his observations, but the Service made no effort to deny that the work he said he observed was not done, and file paperwork established that it was done. .

Union witnesses testified that management provided only a single page in response to the demand for documents, a problem report form attached to a letter letter from supervisor saying that the tiles were not usually used at the facility and the structure needed rep and that there were birds nesting in the damaged ceiling (without mention of biohazard or other

risk). The letter also cited additional work including repair/replace light fixtures, and repairs to cracked concrete near the gas pump. It said that the work had to be contracted to a specialty professional.

testified, and acknowledged that the concrete work had not been done until much later, and said he was not privy to the cost of the work and had never seen the contract, as that was done at the Area level, above his.

The attached work request, which was in the file showed that needed repairs, whose latest entry was June 10, 2009, showed that the requested work was as follows:

> A truck has struck the overhang over a fuel stand. Please repair the overhang including the light fixture in the overhang. Install signage on overhang to warn drivers of overhang.

The document, a "problem work sheet" addressed to the "FSO" showed an apparent cost of $4720. A later similar document added repairs to cracked concrete, but there was evidence in the file (an employee statement) that that work was not done at that time, and possibly not at all. No oil contamination issue was mentioned, nor was any mentioned in the work requisition in the file, which had a listed question as to safety, answered "no."

Finally, in its step 2 answer and again at hearing, the Service asserted that when the ground was broken, oil leakage was discovered that necessitated removal of the tank and cleanup of the underlying soil, but it was clear that that work had been done much later.

The file included evidence, including statements from two mechanics, that local mechanical personnel had performed the same repairs at least twice before to other, similar equipment at the facility, and that evidence was not controverted. Statements said that the work required a scissors jack platform available at the facility, and common hand tools.

What was clear and uncontested was that management had never revealed or claimed (to the date of hearing) that it had done any sort of evaluation of the sort required by Art. 32.1 and could not have done so locally because it had neither access to the contract awarded for the work nor knowledge of its cost. initially seemed to indicate he had made the decision locally to subcontract the work, but later acknowledged that the decision was made by a manager above him who did not testify, and no management evidence was presented other than testimony on that subject.

The Union also asserted that there was a binding past practice of notifying the Union in advance of the letting of a subcontract, and that the Service violated the agreement in not doing this.

CONTRACT PROVISIONS

ARTICLE 3
MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

3.1 To direct employees of the Employer in the performance of official duties;

3.2 To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;

3.3 To maintain the efficiency of the operations entrusted to it;

3.4 To determine the methods, means, and personnel by which such operations are to be conducted;

3.5 To prescribe a uniform dress to be worn by designated employees; and

3.6 To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

ThePostal Service's "exclusive rights" under this article are basically the same as its statutory rights under the Postal Reorganization Act of 1970, as set forth in 39U.S.C. § 1001(e). While management has the basic power to "manage" the Postal Service, it must do so accordance with applicable laws, regulations, contract provisions, arbitration awards, letters of intent and memoranda of understanding. Consequently, many of the management rights enumerated in Article 3 are limited by negotiated contract provisions

Art. 3F gives management the right to take whatever actions may be necessary to carry out its mission in emergency situations. An emergency is defined as "an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature."

(Italicized text is from the JCIM, while the remainder is from the agreement itself)

ARTICLE 32

SUBCONTRACTING Section 1. General Principles

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

(See Memos, pages 369, 371, 372, 404 and 412)

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

DISCUSSION

Art. 32.1.A of the National Agreement is set forth above, and requires that the Service give "due consideration" to a series of factors before deciding to subcontract work of the sort in question in this case. It is fair to infer that the parties contemplated that if the Service gave such "due consideration" to these factors, it would make the proper business decision as to how to proceed, and hopefully the decision that most suited its mandated mission to deliver the mail to its customers. The decisional law that evolved around this language has made clear that arbitrators are generally not inclined to judge whether the decision was the correct one in the end, although at least one national arbitrator (Mittenthal) has observed that manifest disregard of a major cost advantage to doing the work in house would certainly suggest that the Service had not given due consideration to the cost factor, assuming as we must at the outset that its motives were proper. The last mentioned point was not reached in this case.

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

make a good faith attempt to evaluate the need for contracting out in terms of the contractual factors. Anything less would fall short of "due consideration."

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

The factors set forth in Section 32.1, for purposes of review, are as follows

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

Taking them one at a time, as applied to this case:

1. Public Interest: There was no discussion of this at the hearing or in the case file.
2. Cost: Local management, as revealed by did not know the cost, presumably either way, and there was no evidence in the file (although the Union requested it at the time) that costs had been compared or that in house costs to do the work had even been quantified .
3. Efficiency: The file document indicated that the problem was identified 05/15/2019 and was rectified, at least up to the point of the lights and tiles, by about 6/10/2019. Management gave no indication of consideration of efficiency except insofar as it considered it urgent, but completing this relatively small and simple 5-day project in a month with a contractor is not particularly fast.

4. Availability of equipment: Here again, there was no evidence that this was specifically considered, but uncontroverted testimony was that the required scissor jack platform and hand tools were on site.
5. Qualification of employees: While said his employees did not know how to install the required tiles or do the mechanical and electrical repairs, that work does not sound sophisticated, and uncontroverted testimony was presented that local mechanics had done it before (the concrete work was not really part of the initial project).

The concrete work and, ultimately the oil spill remediation were not done later. While management asserted at hearing that the removal of bird droppings was an environmental hazard, the work order did not say so and there was no evidence that the contract specified that the contractor had to deal with such a hazard.

The withholding of the contract, in addition to preventing scrutiny of any environmental or health issues, was a major obstacle to processing of the grievance, because with the contract in hand, evidence as to required and available skills would have been readily available instead of being anecdotal as it was at the hearing.

I have reviewed the awards submitted by both sides, and the recurrent pattern seems to have been that where the Service has done at least an adequate analysis of the five factors in reaching a particular decision, it generally prevails (other things being equal of course), and when it has omitted that, it is found in violation of the agreement. In this case the Service did almost nothing in this respect except repeatedly say that it had done it, and the admission at hearing by the local supervisor involved that he did not know the cost and had never seen the subcontract made it clear that comparative costs were not considered. To "ignore" the five factors would place the decision squarely within the above-quoted Mittenthal guidelines for finding a violation.

The nature of this limited but very specific obligation imposed by Art. 32 and the obligation in the handbook to evaluate the need for subcontracting naturally gives rise to a collateral obligation on the part of the Service to provide requested detailed information on request as to the Service's compliance with the rule, and its failure in other cases to so comply has led some arbitrators to find a violation of the agreement. It should be obvious that without such an obligation to comply, the provision would be unenforceable, inasmuch as decisions to subcontract are nearly always made unilaterally by the Service (which is itself not improper) and

behind closed doors, and if the Service could fully comply with this provision by simply saying, without further Union recourse, that it had done so, the provision would have no meaning.

This contractual language is premised on good faith, and the drafters probably had in mind that if transparency of decision-making was compelled, arbitrary determinations would be less likely to be made, and the Union, which inevitably would have preferred (and the employer would have fought hard to avoid) specific limits on subcontracting, would get some semblance of protection from this transparency. The employer, on the other hand, had in that language a straightforward and relatively easy way to avoid violating the agreement. One might hope and conjecture that if the Service was forced to put in writing that one or more of the five factors would dictate subcontracting the work, the work would be less likely to be arbitrarily subcontracted.

That is not what happened here. The initially planned subcontracted work was all but completed before the Union was notified (by one of its own members) of the subcontract. Local management was not privy to the cost, nor did it have (actually through the time of hearing in this case) the contract itself. No evidence was offered that anyone else did the required comparison, either.

Had the Service followed the prescribed procedure, the issue would not have been whether the Service made the correct decision, but rather whether it followed the prescribed procedure in reaching its conclusion (Mittenthal specifically holds that if the process is facially valid and not grossly flawed, the result need not be a correct one). Had management done so in relatively good faith, the Management Rights clause of the agreement would have given it the right to subcontract, because there was at the time no other contractual provision to the contrary, the threshold for finding a violation in that situation would have been as quite high, and a violation based on the making of an unsound business decision was rarely, if ever found. It has even been said that based on the management rights clause, the Service has the authority to mismanage.

There is one reservation that must be made on this finding, and that the concrete work and much later tank replacement and oil spill remediation are really not properly part of this controversy. The concrete work may never have been done as a separate project, and the Union did not contend that the facility had the resources to remove the very and fuel tank from the ground and clean the soil beneath it.

CONCLUSION AND AWARD

I conclude that the Service violated Art. 32.1 of the National Agreement in making its decision to subcontract this repair job at the Merrifield VMF, in that it did not give "due consideration" to the five listed factors in Art. 32, and more specifically could not have considered cost because even at hearing it was unaware of the cost of the subcontract.

REMEDY

The Service argued that a monetary award would be "unjust enrichment." I disagree, as the mechanics work full time at other tasks and would have had to work overtime to do this work, and would have had to be paid for that overtime. The Service is directed to compensate the building mechanics in the bargaining unit the number of hours pay at the then effective overtime rate equivalent to the number of hours spent by the contractor in completing this project, to be calculated based on documentary evidence that I hereby direct the Service to provide to the Union. If the latter, for whatever reason, is not provided, I direct that the cost of the project as revealed in the work problem request cited herein ($4720) be paid in lieu of that amount.

I retain jurisdiction to hear any dispute as to the implementation of this award.

Robert Tim Brown, Esq., Arbitrator Dated and issued January 17, 2015