REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	) Grievant: Class Action
between	) Post Office: Omaha, NE
United States Postal Service	) Case No: E10C-1E-C 14074035
and	)
American Postal Workers Union	
And	
National Postal Mail Handlers Union	

Before: Harry N. MacLean, Arbitrator

Appearances

For the American Postal Workers Union: Christine Pruitt, National Business Agent

For the National Mail Handlers Union: James E. Mills, Local President

For the Postal Service: Nels Truelson, Labor Relations Specialist

Place of Hearing: Omaha, NE

Date of Hearing: October 2, 2015

Date of Award: December 3, 2015

Contractual Provisions: Article 32

AWARD SUMMARY: The grievance is sustained: The Postal Service violated Article 32 when it failed to provide notice to the APWU and to give due consideration to the five factors listed in Article 32.1.A prior to subcontracting. The matter is referred to the Regional Dispute Resolution Committee under RI-399 for a determination as to craft jurisdiction of the work.

I. INTRODUCTION

This matter was heard at the main Omaha postal facility on October 2 2015. The parties were given the opportunity to present oral and documentary evidence, and all witnesses testified under oath as administered by the Arbitrator. The Service challenged the arbitrability of the grievance. The substantive issue before the Arbitrator is: Did the Service violate the National Agreement when it contracted out the work at the Omaha MCC on March 27, 2013? If so, what is the appropriate remedy?

I. FACTS

In July 1997 the Service contracted with a company called New Breed to operate a Mail Consolidation Center (MCC) in a non-postal building in Omaha. The contractor rents the building and owns most of the machinery, although several small machines, such as placard printers and scanners, are owned by the Service. The facility is staffed by the contractor, with one postal employee present in the facility to manage the operation and ensure that postal rules and regulations are complied with.

In 2009 the Service entered into a second contract with New Breed for the work. On November 21, 2011, the APWU filed a grievance, arguing that in contracting out the work the Service had violated Article 32.1.A by not giving due consideration to the five factors mentioned therein prior to subcontracting. The grievance further alleged that the Service violated the Memorandum of Understanding Re: Contracting or Insourcing of Contracted Services (MOU) which states that:

> 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.

After the grievance was denied at Step 2, the APWU withdrew the grievance. On March 27, 2013, the Service entered into a new contract with New Breed for the services at the MCC. The Union filed a grievance over this contract on January 26, 2014, which is the grievance subject to this arbitration. It contains the same allegations as the November 2011 grievance. The Union also argues that under the new National Agreement PSEs could be hired at a negotiated rate of pay to perform work under the contract.

The Step 2 denial was issued on March 10, 2014, on the grounds that the grievance was not timely, was improperly filed at the local level, and that the District was near its cap on PSEs. In the Additions and Corrections, the Union noted that management did not rebut the APWU's contention that the work was clerk work and did not produce any documents indicating that the APWU had been give notice of the signing of the new contract.

On September 24, the National Postal Mail Handlers Union (NPMHU) gave notice of its intent to intervene. The NPMHU participated in the hearing and submitted briefs supporting its position. The NPMHU position is that while the Arbitrator has jurisdiction to decide the merits of the subcontracting grievance, he has no jurisdiction to decide the issue of which craft the work at the MCC belonged to. Under the Dispute Resolution Procedures in Regional Instruction 399, the Arbitrator must remand the jurisdictional issue to the Dispute Resolution Committee.

For the Union, James Evans, an electronic technician, testified that once a week either he or other electric technicians went to the MCC and worked on several pieces of equipment in the building: network switches, manual scans, transaction concentrators, and four pairs of scanners. This was the same work

he performed at the plant. He also observed clerks using the scanners and sorting trays in the same manner as they did at the plant.

Phil Thomas, local APWU president, testified that while he regularly receives notices of subcontracting on maintenance and motor vehicle work, he did not receive any notice of the Service's intention to contract out the work at the MCC. The Service has not provided any evidence that it gave due consideration to the five factors as required by Article 32.1.A. In his view, the new MOU in the 2010-2015 National Agreement with the language requiring cost comparisons was intended to apply to existing contracts that were subsequently renewed. The APWU did not find out that a new contract had been issued for the work at the MCC until January 2014.

Regarding the use of PSEs for the work, Thomas testified that the contract provides for exceptions from the limits on their use, which could have been used in this case. The negotiated wages for the PSEs would have been $14.40 an hour as opposed to $26.24 an hour for the employees of the contractor. Management never disputed in the grievance process that the work at the MCC was properly clerk work

Thomas testified that the work at the MCC consisted of scanning trucks in and out, sorting the mail onto pallets, wrapping the pallets, and loading the pallets onto trucks. It involves the use of the same LCTS system, the same tracking system, and the use of the same scanning and banding machines as at the plant These are the same three functions performed by clerks at the plant. The clerks do not drive forklifts to load pallets on and off the trucks or around the dock.

Shannon Richardson was the Step 2 designee on the November 2011 grievance over the MCC work. She testified that the APWU withdrew the

grievance May 14, 2012. The same work has been going on under the contract since 1997.

Thomas Murphy is the manager of the MCC for the Service. He testified that the purpose of the operation is to sort and consolidate pallets of mail coming in from several major commercial mailers. When the loaded trucks come in, the pallets are unloaded by forklifts, after which the pallets are scanned and moved to staging. The forklifts lift the pallets onto the manual roller systems. Several employees lift the pallets off the rollers, cut off the wrap, and throw the mail onto trays for four different lines, each going to a separate destinations. The trays are then taken off the lines and placed on pallets. When the pallets are full, jacks are use to move the pallets to quality control, where a machine prints out destination placards. The placards are then scanned and placed on the pallets and the pallets are wrapped. Forklift drivers pick up the pallets and load them on trucks. In Murphy's opinion, most of the work at the MCC would properly be Mail Handler work

Murphy testified that all of the large equipment, including the forklifts, is owned by the contractor. Maintenance employees come in to work on the equipment once a week. The contractor also provides custodial services for the facility.

III. ANALYSIS AND CONCLUSON

The issue before the Arbitrator is: Did the Service violate the National Agreement when it contracted out the work at the Omaha MCC on March 27, 2014? If so, what is the appropriate remedy?

The Service additionally challenges the arbitrability of the grievance on three grounds: (1) The APWU failed to prove that the contracted work belonged to the clerk craft, which was an essential element of its case; (2)

The APWU failed to file the grievance within 14 days of when it learned or reasonably should have learned of the alleged violation, thus rendering the grievance untimely; (3) The equitable doctrine of *laches* precludes the awarding of the requested remedy.

Normally, the Arbitrator would deal first with the arbitrability issues before considering the merits of the grievance, In this case, however, some of the findings of fact made in resolving the issue on the merits will impact the findings on the arbitrability issues. Accordingly, the Arbitrator will turn first to the question of whether the Service violated the National Agreement when it contracted out the work at the MCC on March 27, 2013.

In the Arbitrator's opinion, the evidence establishes that the Service violated two provisions of Article 32 of the National Agreement. The first violation was the failure to comply with the requirement of Article 32.1.A to give "due consideration to public interest, cost, efficiency, availability of equipment, and qualification of employees when evaluating the need to subcontract." Further, as noted above, the recent MOU regarding subcontracting requires the Service to essentially determine if the employees could do the work at the same or less cost than a contractor; if the employees can do it at the same or less cost, than the work "should be performed in-house."

The Service did not argue and did not present any evidence to the effect that it had given "due consideration" to the five factors or that it had made a determination that contracting the work out would be less costly than having it performed in-house.

A failure to give due consideration to the five factors has been deemed to be a clear violation of Article 32. *In Case No. A8-NA-0481* (1981), Arbitrator

Mittenthal made the following statement about the necessity of complying with the requirement of due consideration:

> 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 determination 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."

As mentioned, the Service did not contest the fact that it did not give due consideration to the five factors prior contracting out the work.

Secondly, the Service failed to provide notice of the contracting to the APWU. Article 32.B requires the Service to give notification to the Union at the national level if the subcontracting will have a significant impact on bargaining unit work. Article 32.C state that: "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."

In the grievance process the Service argued that because the contracting was handled at the national level the only notice required was to the APWU at the national level. However, in response to a Request for Information from the Union, the Service offered no documents indicating that it had given notice to the Union at either the national or local level. Nor did the Service argue at the hearing or in its brief that it had provided any notice to the APWU of its intent to contract out the MCC work in 2013.

It is essentially the position of the Service that it was not required to comply with the provisions of Article 32 regarding due consideration and notice for the 2013 contract because it had been contracting out the work for 17 years and had in fact contracted out the very same work only two years earlier. The Service seems to be arguing that the requirements of Article 32 do not apply because it was simply renewing an existing contract. This argument is without merit. Neither the fact that the Service had been contracting out the work for 17 years nor that it had contracted out the work only two years earlier relieves the Service from its contractual obligation when it enters into a new contract for the same work. There is nothing in Article 32 to suggest that the Service need not comply with the evaluation and notice requirements if it is renewing a contract. Such an exception would allow the service to avoid the contractual requirements of due consideration and notice *ad infinitum* simply by entering into the same contract with the same contractor for the same work.

The Service's argument that it was not required to give notice to the APWU because in its opinion there was no previous determination that the work at the MCC was clerks' work is not persuasive. First, the APWU offered evidence that all of the work done at the MCC was also done at the plant, and that much of it was done by clerks. Second, the Service was aware of the fact from the previous grievance that the APWU considered the work clerks' work. However, even if the Service was not required to give notice to the APWU, it was still required to comply with the requirements of Article 32.1.A

In the Arbitrator's view, Article 32 requires due consideration and notice every time a new contract is entered into. The evaluation cannot be carried over from one contract to the next. The failure of the Service to give due

consideration and notice in this case requires a finding that it violated Article 32 when it entered into the March 2013 contract for work at the MCC.

Turning to the arbitrability issues, the Service argues that the grievance is untimely because it was filed well beyond the 14-day period required in the contract. The grievance was in fact filed close to ten months after the contract was signed. Article 15.2 requires the Union to file a grievance within 14 days of the date when the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance. The difficulty with the Service's argument here is, of course, that it failed to give the APWU notice of the contracting. The evidence was undisputed that the APWU never received formal notice of the contract, and Thomas' testimony was that he found out about the new contract only in January 2014.

The Service seems to rely on some sort of imputed or constructive notice, arguing that because the APWU had grieved the 2011 contract it was therefor aware that that contract was due to expire in 2013. The APWU should therefor have been on notice that the Service had subcontracted the work in 2013 when the work continued to be performed by New Breed at the MCC. This argument—that the APWU should have been aware that the contract was reissued in 2013 because it had previously grieved the 2011 contract— is far too thin a reed to support dismissing the grievance as untimely. There was no evidence that the APWU had actual notice of the new contract prior to January 2014.

The Service next argues that the grievance should be bared based on the equitable theory of *laches.* This principles holds that one can lose rights if one does not enforce them, or, as the saying goes if one "slumbers on their rights." The Service argued that the APWU slumbered on their rights for 17 years. As one cannot impute notice back to previous contracts, one can also

not go back to the first contract to determine when the APWU should have been enforcing its rights. A new contract creates new obligations and new rights, and one right is to challenge the very issuance of that contract. Accordingly, the time for enforcement did not begin to run until January 2014 when the APWU became aware of the issuance of the new contract.

The final arbitrability issue is the Service's contention that the APWU failed to prove that the work in question was in fact clerk's work. Without such proof, the APWU's claim of a contract violation cannot proceed because it has failed to establish an essential element of its case. The Arbitrator would note first that the APWU did in fact present evidence that the work at the MCC was clerks' work. While the Service and the NPMHU challenged this evidence, it was certainly sufficient to proceed to the merits. Were the Arbitrator to find otherwise, the APWU could be shut out altogether, because if it filed an action under RI-399 the Service could argue that neither union could claim the work because it had been properly contracted out and that that action could not be challenged in a RI-399 hearing.

Having found two violations of Article 32, the Arbitrator turns to the issue of remedy. As noted, the NPMHU intervened in this case, stating that their interest in the case stemmed not from the merits of the contracting issue but from the possibility that a remedy ordered in the case could result in giving the work to the clerks. The NPMHU argues that under the dispute resolution procedures adopted by the two unions in 1992, in a document referred to as Regional Instruction 399, a Regional Arbitrator has no authority to hear and resolve work jurisdiction disputes.

The APWU argues otherwise, pointing out first that the assignment of the work to the clerks was not challenged by the Service during the grievance process. Thus, the challenge to it now is new argument and prohibited under

the provisions of Article 15.2 The APWU also argues that that the provisions of RI-399 do not come into play until after the Service has made an assignment to one union and the other files a claim under RI-399 challenging the assignment. No such claim has been filed under RI-399, which means that it would be improper to refer the issue to the Dispute Resolution Committee. The Service's position is that the Regional Arbitrator does not have the authority to "remand" the case to the dispute resolution process under RI-399.

The question of the Arbitrator's jurisdiction is answered in the Questions and Answers attached to the RI-399 agreement.

> 3. If a grievance exists or is filed alleging a violation of the contract other than RI-399 (e.g. Article 7.2) and one of the parties believes the issue in the grievance constitutes a jurisdictional dispute, what if anything should be done with the grievance?
>
> Answer: It must be referred to the Dispute Resolution Committee for an initial determination as to whether or not it involves a jurisdictional claim. If it is determined that it involves a jurisdictional claim, the grievance will be processed in the Dispute Resolution Procedures. If the Committee is in disagreement as to whether or not it involves a jurisdictional claim, that question is appealable through the Dispute Resolution Process up to and including arbitration for resolution prior to the parties addressing the merits of the dispute. The three parties shall review cases at the lowest possible level which raise the potential of containing a jurisdictional dispute so that the proper procedure is utilized to resolve dispute/grievances.

Although this provision does not address the specific situation at hand, since the jurisdictional issue goes only to the remedy and not the merits, this provision can still be relied upon to provide the authority for the Arbitrator to refer the dispute to the Dispute Resolution Committee for a determination of

the jurisdictional issue. In *Case No. E98M-1E-C 01219672* (2002) Arbitrator Meyers held that under RI-399 the Regional Arbitrator has no jurisdiction to resolve a jurisdictional dispute between the APWU and the NPMHU. He held that once the Arbitrator determines that the grievance involves a jurisdictional dispute, the matter must be referred to the Dispute Resolution Committee.

Based on the above, the Arbitrator finds that the Service violated Article 32 in contracting out the MCC work in 2013. However, the Arbitrator has no jurisdiction to determine the appropriate assignment of the work between the clerks and the mail handlers, both of which claim the work. Accordingly, the work jurisdiction issue is referred to the Dispute Resolution Committee for an appropriate determination. The Arbitrator will retrain jurisdiction of the issue of the appropriate remedy in the event that an assignment of the work is made by the Committee.

IV. AWARD

The grievance is sustained. The Arbitrator refers the matter of work assignment jurisdiction to the Dispute Resolution Committee. The Arbitrator retains jurisdiction of the case solely to determine the appropriate remedy if and when the Dispute Resolution Committee assign the work to one of the unions.

Signed this 3rd day of December 2015.

Harry N. MacLean