American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

October 2, 2017

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Greetings Sisters and Brothers:

Welcome to Las Vegas and the 39th Annual Motor Vehicle Service Directors' Conference.

Enclosed are some of the issues that were arbitrated in the Eastern Region. I hope this will provide some help to you in your dealings with the Postal Service.

1. Arbitrator Randall Kelly
C15V-4C-D 17181418 Buffalo, NY Contract Year 2015-2018
This case involved the Grievant getting into a physical confrontation with another Automotive Technician. Arbitrator Kelly ruled that the removal was not for **Just Cause** because management did not properly consider mitigating factors raised by the Grievant at the PDI. The removal was a time served suspension and the Grievant is reinstated with no loss of seniority.

2. Arbitrator Robert Donna Thomas
K10V-1K-C 14351184 Richmond, VA Contract Year 2010-2015
This grievance involved management abolishing Motor Vehicle Driver positions when the majority of the work assigned to those positions continued to be performed. Arbitrator Thomas ruled that the Postal Service has to rescind the new duty assignments. Return the affected Motor Vehicle Operators to their former duty assignments. Pay all affected Motor Vehicle Operators **Out of Schedule** pay.

3. Arbitrator Randall Kelly
C10V-1C-D 15252575 Philadelphia, PA Contract Year 2010-2015
The Grievant received an Emergency Placement for allegations that he called out sick from his postal position while working for another employer. Arbitrator Kelly ruled that the Emergency Placement extended beyond thirty days was excessive and not for **Just Cause**. The Grievant is to be returned to work and be paid five months of lost back pay.

4. Arbitrator Irene Donna Thomas
K10V-4K-C 11300812 Baltimore, MD Contract Year 2010-2015
The Union filed this grievance that the Postal Service violated Article 32 of the national agreement when it subcontracted the maintenance of vehicles to local contractors without giving due consideration to the five factors. Arbitrator Thomas ruled each OTDL employee be paid up to the maximum of 60 hours each week from June 2011 until June 2016. The Postal Service was also directed to hire 13 VMF employees.

5. Arbitrator Randall Kelly
C010V-1C-D 16331240 Buffalo, NY Contract Year 2010-2015
The grievant filed this grievance when he received a Notice of Removal for failure to work safely when he had an accident when the spotter tractor mirror struck the fuel pump booth and allegedly caused $50,000 damage. The grievant had a prior 14 day suspension as a PSE for failure to properly discharge his duties. The Union made numerous procedure arguments. Arbitrator Kelly ruled the removal was not progressive and not for Just Cause. The removal was reduced to a Letter of Warning and reinstated with back pay.

6. Arbitrator Joseph DeMarco
K10C-1K-C 12118738 Gaithersburg, MD Contract Year 2010-2015
This grievance was filed by the grievant, a level 8 TTO when he was denied a bid for a TTO position. Management awarded the position to a level 7 MVO with more seniority than the grievant. Management argued at arbitration that there was no statement in the file by the grievant or copy of his bid card. The problem in this case was the grievant passed away before the case was arbitrated. Arbitrator DeMarco ruled Management violated Article 39.1.B.7 when a level 8 TTO position was awarded to a level 7 MVO. Remedy in the form of Out of Schedule Premium and lost overtime opportunities was awarded to the Grievant's estate as requested by the Union.

I want to thank the Craft Directors and Stewards for the work they do, having to deal with difficult postal supervisors and some of our own members.

I also want to commend the advocates who present cases on behalf of the Union and the membership. They do a terrific job under a challenging system while still meeting the requirements of their postal positions.

Yours in solidarity,

Kenneth Prinz
National Business Agent
Motor Vehicle Services Division

KP/cs
Attachments

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION, AFL-CIO

Grievant: Class Action (Wayne Ellis)

Post Office: Suburban MD P&DC

USPS Case No: K10V-1K-C 12118738

APWU Case No: SMV27377

BEFORE: Joseph A. DeMarco, Arbitrator

APPEARANCES:

For the U.S. Postal Service:	Louis W. Minor, Jr. Labor Relations Specialist
For the Union:	Kenneth Prinz National Business Agent
Place of Hearing:	16501 Shady Grove Road, Gaithersburg, MD
Date of Hearing:	May 4, 2016
Date of Award:	May 16, 2016
Relevant Contract Provisions:	Articles 3, 5, 15, 17, 19, 31, 39
Contract Year:	2010 - 2015
Type of Grievance:	Contract

Award Summary:

The Union's grievance is sustained for the reasons set forth in the attached decision.

Date of Award: May 16, 2016

Joseph A. DeMarco
Arbitrator

This Arbitrator was notified of his appointment to hear the grievance at issue on March 25, 2016. The grievance was filed under the 2010 - 2015 Collective Bargaining Agreement (CBA) between the parties. Pursuant to the provisions of Article 15 of the Collective Bargaining Agreement between the United States Postal Service (hereafter referred to as the Postal Service, Employer, Service or Management), and the American Postal Workers Union (hereafter referred to as the Union), a hearing was held before the undersigned Arbitrator on May 4, 2016, at the Postal Service facility located at 16501 Shady Grove Road, Gaithersburg, MD.

At the hearing, the parties were given a full and fair opportunity to present evidence, examine and cross-examine one witness called by the Union, and make arguments in support of their respective positions. The Arbitrator tape recorded the proceedings as a supplement to his personal notes. References to exhibits appear as follows: Joint Exhibit (Jt. Ex.); Union Exhibit (U. Ex.); Employer Exhibit (Emp. Ex.). The witness was sworn prior to testifying and also sequestered. At the conclusion of the hearing, the record in this case was closed. This Arbitrator has given careful consideration to all evidence of record, all arguments, and all citations offered by the parties.

BACKGROUND OF THE CASE

This grievance concerns the Postal Service's failure to award Tractor Trailer Run #372 to the Grievant, Wayne Ellis, a level 8 Tractor-Trailer Operator, on December 22, 2011.[1] Instead, the bid was awarded to Motor Vehicle Operator level 7 Michael Watkins with an effective date of January 7, 2012. The Union argued that the Grievant should have been assigned to this vacant position before posting the level 8 position, and awarding said position to a level 7 operator.

A grievance was filed by the Montgomery County Area Local #3630 following a mutually agreed extension of time limits at step 1 of the grievance procedure. Following the Employer's denial of this grievance, it was appealed to step 2. According to the Union's witness, Nannette

[1] It was stipulated by the parties that the Grievant is deceased. Mr. Ellis passed away on March 28, 2015.

Corley, a step 2 meeting did take place on March 6, 2012. Management, however, did not provide the Union with a timely decision, triggering their appeal to arbitration on March 28, 2012. The file reflects no response to this grievance by Management at any step of the grievance procedure.

During the Union's investigative phase of this grievance, they requested certain documents – bid sheets, bid postings, awards for bid postings 5703-0005 Run #372, a seniority list, a list of unassigned employees at all levels, work schedules for PP 1 & 2 - Week 1 & 2, and documentation pertaining to the award for bid posting Run #372 – all of which were denied by Walter Stokes, Manager Transportation (Jt. Ex 2, page 5).

ISSUE

Did the Postal Service violate the Collective Bargaining Agreement (CBA) when it failed to award Tractor-Trailer Operator assignment #372 to the Grievant? If yes, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE AGREEMENT

ARTICLE 3 – MANAGEMENT RIGHTS

ARTICLE 5 - PROHIBITION OF UNILATERAL ACTION

ARTICLE 15 – GRIEVANCE-ARBITRATION PROCEDURE

ARTICLE 17 - REPRESENTATION

ARTICLE 19 – HANDBOOKS AND MANUALS

ARTICLE 31 – UNION-MANAGEMENT COOPERATION

ARTICLE 39 – MOTOR VEHICLE CRAFT

SUMMARY OF THE TESTIMONY

Nannette Corley, President of the local union for the last 9 years, testified as to her participation in this grievance at steps 1 and 2 of the grievance procedure. She stated that although she met with Management's representative Carlos Cantor at step 2, she never received a decision concerning their meeting. Corley testified that the grievance stemmed from Walter Stokes' failure to award Run #372 with drop days of Saturday and Sunday to Wayne Ellis. According to Corley, Stokes awarded the job to Mike Watkins, a level 7 Motor Vehicle Operator. The position should have been assigned to Ellis for the reason that it was a level 8 Run. Ms. Corley discussed the information she requested from Stokes in order for her to investigate the grievance. It was her testimony that she did not get any of the requested documentation from Stokes to which she was entitled. There was also a second application for information to Vickie Gibbs (Jt. Ex. 2, page 4), which did not produce any results. Corley identified the seniority lists for the Suburban Maryland Processing & Distribution Center's Motor Vehicle Craft that established a seniority date for Watkins at July 12, 2003, and December 27, 2003, for Ellis. At the time the job was posted, Corley referencing Jt. Ex. 3, explained that the Grievant's non-scheduled days were Thursday and Friday, while the new positions drop days were Saturday and Sunday. Corley mentioned that the Grievant approached her about a level 7 employee being awarded the level 8 job, when he was a level 8, and should have been the successful bidder. At that point, Corley advised Ellis that she would file a grievance. She also recalled that Ellis attended the Union's general membership meeting and voiced his disapproval over what took place with the level 8 Tractor-Trailer Operator job. In cross-examination, Corley was asked as to the evidence provided by Ellis (e.g. a bid card) documenting that he bid on the job. Corley answered that the Grievant showed her a bid card before he placed it in the mail box. She also answered that a 1717A would be one way for a driver to show that he/she bid on a particular

job. Unfortunately, Corley stated that Manager Stokes was less than cooperative and wouldn't provide her with any information pertaining to the grievance.

CONTENTIONS OF THE PARTIES

UNION

The Union asserts that the case before me concerns the Postal Service's violation of Article 39.1.B.7.A of the Collective Bargaining Agreement (CBA) when it awarded a bid (Tractor Trailer Run #372) to employee Michael Watkins, a Motor Vehicle Operator level 7, on January 7, 2012. They advise that Grievant, Wayne Ellis, a Tractor-Trailer Operator level 8, who submitted a bid for this assignment, should have been assigned to the full-time level 8 Tractor-Trailer Operator vacancy. The Union also submits that the Joint Contract Interpretation Manual (JCIM) at Article 39.1.B.7 supports their understanding that when filling full-time Tractor-Trailer Operator vacancies, the duty assignment must be posted to Tractor-Trailer Operators before posting the assignments to Motor Vehicle Operators.

As a threshold issue, the Union argues that the Service's failure to provide relevant information is a clear violation of Article 17.3 and 31.3. Management's refusal to supply said information has breached the Grievant's due process rights and prevented resolution at the lowest level possible. The Union also cites a violation of Article 15.2, Step 2, C, D, and F when the Employer refused/failed to provide the Union with their decision at step 2, which in effect prohibits the Service from now raising a late defense in this proceeding.

In support of the argument limiting what the Postal Service may submit at the arbitration phase of this dispute, the Union references the frequently cited seminal award by Arbitrator Arron in establishing the admissibility of new evidence or argument in arbitration.[2]

[2] USPS and NALC; Case No. NC-E-1135; Arbitrator B. Arron; 1984; page 3 and 4

"It is now well settled that parties to arbitration under a National Agreement between the Postal Service and a signatory Union are barred from introducing evidence or arguments not presented at the preceding steps of the grievance procedure, and that this principle must be strictly observed. The reason for the rule is obvious: neither party should have to deal with evidence or argument presented for the first time in an arbitration hearing, which it has not previously considered and for which it has had no time to prepare rebuttal evidence and argument. The spirit of the rule, however, should not be diminished by excessively technical construction."

The Postal Service must be limited to that which it included within its step 2 decision, and should not be permitted to present argument or evidence it did not advance at step 2, so argues the Union. Any argument or question at this late date, e.g. "where is the Grievant's bid card," should have been made at step 2, and not in the arbitration proceeding.

As a rebuttal to Management's closing, the Union also highlighted the posting for the job in question (Jt. Ex. 2 page 7 "How to Bid,") which reads in part as follows:

"Any employee who has submitted a bid, has the right to withdraw their bid(s) in writing on or before the closing date and the time specified on this posting. To be official, card must be backstamped (sic) and signed. All bids for these vacancies must be placed in the bid box next to the procurement/supply room."

The Union argues that there is nothing cited in the bid language that would suggest that a receipt is provided. According to the Union, the bid is simply placed in the bid box in order for it to be official.

The Union requests that the grievance be sustained to the extent that his estate is awarded out-of-schedule premium and lost overtime wages from January 7, 2012 until the day the Grievant last worked with the Postal Service. It is also requested that I retain jurisdiction until the Union receives proof that the estate has been paid the duly amount set forth in this grievance.

MANAGEMENT

The Postal Service does not dispute the language cited by the Union in the contract, JCIM, and its applicability to the circumstances which surfaced in this case.

What Management does challenge is the lack of proof presented by the Union with respect to whether the Grievant actually bid on the assignment in question. According to Corley, while the Grievant should have had a copy of his bid card, which is date stamped, it was not provided to her. With nothing in the file to prove otherwise, the Union was unable to demonstrate that the Grievant actually bid on the run. Management insists that a copy of the bid sheet would have taken care of this issue as they have no quarrel with the contractual provisions cited by the Union.

Regarding the Article 17 claimed violation that information was not provided to the Union, the file reflects that some requested items are contained in JE-2. Management, however, acknowledges the absence of a few requested documents. With respect to the Union's "Information Request," the Service questions whether a second request was even made based on what was presented in the file.

While Corley testified that she met with Carlos Cantor but never received a decision, the contract is clear that the Union is free to move the case to the next step, which is what took place in this case.

The Postal Service calls into question the absence of any statement made by the Grievant as to his version of what took place regarding the bidding process. Again, there was no proof in the file that Mr. Ellis actually bid on the assignment.

Management allows that if the Arbitrator should sustain this grievance, any liability would terminate at some point in 2014, the date the position was abolished.

DISCUSSION AND OPINION

This Arbitrator has carefully reviewed the pertinent testimony presented in this case, the evidentiary record, and the parties' arguments in support of their respective positions. Since no procedural challenges concerning arbitrability were presented by either party, I have determined that the grievance is properly before me. Arbitration awards were submitted by the Union, which I have also considered in this decision.

Undisputed facts as determined by the Arbitrator are as follows: A bid notice dated December 22, 2011, was posted at the Suburban Maryland Processing & Distribution Center with a closing date of January 1, 2012. The Vacancy Notice stated that it was an unrestricted Level 8 residual job posting with manual bidding only. All full time Motor Vehicle Operators and full time Tractor-Trailer Operators on the rolls at Suburban MD P&DC with a valid Commercial Drivers' License were invited to bid by submitting a 1717A (yellow bid card). The Tractor-Trailer Operator position was assigned to tour 3 with Saturday and Sunday as its non-scheduled days. The successful bidder for this position was Michael Watkins, a Motor Vehicle Operator with a seniority date of July 12, 2003.[3] As a result, a timely grievance was filed by the local Union contending that the Grievant, Wayne Ellis, a Tractor-Trailer Operator, should have been selected as the successful bidder. The seniority date for the Grievant was December 27, 2003 (Jt. Ex. 2, page 8). Management's representative, Victoria Gibbs, denied the Union's grievance at step 1. While Union representative Nannette Corley and Management's designee Carlos Cantor met at step 2, no decision was ever given to the Union causing them to appeal this grievance to arbitration without a written decision from the Postal Service. Certain documents were requested on two occasions by the Union, which were denied by Walter Stokes, Manager Transportation (Jt. Ex 2, page 5). Those requested documents as confirmed in the record included bid sheets, bid postings, awards for bid postings 5703-0005 Run #372, a seniority list, a listing of unassigned employees at all levels, work schedules for PP 1 & 2 - Week 1 & 2, and

[3] In 2014 – month yet to be determined – the Tractor Trailer Operator position was abolished.

documentation pertaining to Run #372. At some point in this dispute, a few, but not all of the asked for documents found their way into the grievance file. This grievance was appealed to Arbitration on March 28, 2012. Subsequent to the filing of this grievance, the Grievant passed away on March 28, 2015.

I intend to exam the Union's position that any contention presented by Management at the arbitration hearing should be barred as new argument. Concurrently, I will assess the absence of a step 2 decision, and its impact on the Union's ability to advocate their case in conjunction with Management's refusal to provide the Union with requested information. I also will consider the issue of whether the Grievant was the successful bidder for the Level 8 Tractor-Trailer position and not Michael Watkins.

With respect to whether any claims at arbitration advanced by the Service should be precluded, Management's only argument at the arbitration hearing was their assertion that the Union failed to prove that the Grievant actually bid on the Tractor-Trailer position. They argued further that the Union's case was flawed given the absence of a statement from the Grievant regarding his bid, and a copy of the bid card executed by Mr. Ellis. A careful review of the grievance file, however, disclosed no such argument made by Management in the grievance procedure. In fact, I was unable to locate any defense raised by Management pertaining to their decision to award the job to Michael Watkins. Given no step 2 decision, no testimony from a Management witness, and a file devoid of any Management position, I am compelled to rule in favor of the Union's contention that the Employer should be barred from introducing new evidence or argument at the hearing. In making this decision, I have taken into consideration the Union's inability to initially obtain any information from the Manager of Transportation, Walter Stokes. It is abundantly unfair and places the Union in an untenable position for the Postal Service to now come forward and fashion an argument not made at any juncture prior to the arbitration hearing.

I have also considered decisions by Arbitrators Aaron (NC-E-11359) and Mittenthal (H8N-5L-C10418) which were submitted by the Union. Essentially, these Arbitrators ruled that basic fairness concerns require that either party not be compelled to reply to surprise evidence or argument at the arbitration hearing. These observations are also supplemented by Article 15.2 and the JCIM which discusses ..... ***"The existing obligation of either party to fully develop all arguments at Step 2 or at Step 3".....***and.....***"The language is not intended for either party to withhold evidence for submission at the latest stages of the process."*** Given the Article 15 language, and my reading of the above Arbitrators' dictum, Management could have restored their opportunity to articulate a sound position by, e.g. "an all-inclusive step 3 decision." That, however, did not occur.

For the reasons stated above, the Postal Service is prohibited from introducing new evidence and arguments made at the Arbitration hearing.

The next question concerns whether the Grievant should have been named as the successful bidder for the Level 8 Tractor-Trailer position. In deciding this question, Article 39 – Motor Vehicle Craft relevant language is addressed below:

Section 1. Seniority – Motor Vehicle Craft

Article 39.1.B.7

7. Motor Vehicle Operators and Tractor-Trailer Operators:

a. Full-time regular tractor-trailer operators bidding for PS-8 tractor-trailer assignments shall be assigned before posting any vacant level 8 assignment for bids by full-time regular level 7 operators.
b. Remaining PS-8 tractor-trailer assignments shall be filled by promoting the senior qualified PS-7 motor vehicle operator who bids.
c. A PS-8 tractor-trailer operator may bid in competition with a PS-7 motor vehicle operator for a PS-7 motor vehicle operator assignment.
d. Seniority for preferred assignments is retained upon change from a motor vehicle operator to a tractor-trailer operator, or the reverse.

Also pertinent to the issue in question is language set forth in the Joint Contract Interpretation Manual (JCIM) under Article 39.1.B.7 below:

TRACTOR-TRAILER – MOTOR VEHICLE OPERATOR VACANCIES

Article 39.1.B.7 applies to Motor Vehicle Operators and Tractor-Trailer Operators. When filling full-time Tractor Trailer Operator vacancies, the duty assignments must be posted to Tractor-Trailer Operators before posting the assignments to Motor Vehicle Operators. Once full-time Tractor Trailer Operators have had the opportunity to bid on the vacancies, qualified full-time Motor Vehicle Operators may bid for any remaining Tractor-Trailer Operator duty assignments using their preferred assignments seniority. While a Motor Vehicle Operator cannot compete with a Tractor-Trailer Operator for a vacant Tractor Trailer duty assignment, a Tractor-Trailer Operator may directly compete with a Motor Vehicle Operator during bidding for a vacant Motor Vehicle Operator duty assignment. Article 39.1.B.7.d provides that seniority for preferred assignment is retained when changing between Motor Vehicle Operator and Tractor-Trailer Operator.

Notwithstanding Management's contention that the Union was unable to establish that the Grievant applied for the level 8 Tractor-Trailer Operator position, which I have barred as new argument, the Service agreed that Mr. Ellis would have been the successful bidder.

A reading of the above contractual language along with the Joint Contract Interpretation Manual (JCIM) leaves no doubt that a level 8 Tractor-Trailer Operator vacancy must be posted to Tractor-Trailer Operators, which the Grievant was, before posting the assignment to Motor Vehicle Operators. Awarding the assignment to Watkins, a level 7 Motor Vehicle Operator, in lieu of Ellis, violated Article 39.1.B.7. The JCIM is equally clear that a Motor Vehicle Operator cannot compete with a Tractor-Trailer Operator for a vacant Tractor-Trailer duty assignment, which is what took place in this case. I have determined that local Management violated Article 39.1.B.7 when job ID# 5703-0004 Tractor-Trailer Operator Level 8 on tour 3 was awarded to level 7 Motor Vehicle Operator Michael Watkins on January 7, 2012, instead of the Grievant.

The Union's grievance is sustained and the remedy is set forth below.

AWARD

After careful examination and evaluation of the evidence submitted and the arguments made, it is my conclusion that the grievance should be sustained for the reasons set forth above.

In determining the remedy, I have also considered Management's declaration that if this grievance were sustained, liability should terminate on the date the position was abolished. Likewise, there was no argument by the Service that would prevent compensation flowing to the deceased Grievant's estate if this grievance should be sustained. Overall, I note that the Employer elected not to challenge that the Grievant's claim was outside the mandatory arbitration provisions of the CBA.

Remedy in the form of out-of-schedule premium from January 7, 2012, through 2014, when the position was abolished, is to be awarded to the Grievant's estate as requested by the Union. Documentation establishing the exact date in which the position was abolished in 2014 should be made available to the Union. A make whole remedy is also granted for any lost overtime opportunities during the same time frame as mentioned above. Implementation of this award is remanded to the parties.

I will retain jurisdiction until the Union is satisfied that the Postal Service has complied with the remedy as stated above.

Respectfully Submitted,

Joseph A. DeMarco
Arbitrator

Dated this 16Th **day of May 2016, at West Chester, Pennsylvania.**

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration
between
UNITED STATES POSTAL SERVICE
and
AMERICAN POSTAL WORKERS UNION

Grievant: WILLIAM J. WEBER

Post Office: WESTERN NY VMF
BUFFALO, NEW YORK

Case No.: C15V-4C-D 17181418
CJM91C

Before: RANDALL M. KELLY, Arbitrator

Appearances:

For the Postal Service:

TIMOTHY NORTHEM, Manager, Labor Relations
REBECCA LANGA, Technical Advisor
MARTIN L. SCHULTZ, JR., Manager, Vehicle Maintenance
RADMAN WARD, Supervisor, Vehicle Maintenance

For the Union:

KEN PRINZ, National Business Agent
WILLIAM J. WEBER, Grievant
CURTIS J. McGUIRE, Motor Vehicle Craft Director

Place of Hearing: Western New York P&DC, Buffalo, New York

Date of Hearing: April 4, 2017

Date of Award:

Relevant Contract Provisions: Article 16

Contract Year: 2015-2018

Type of Grievance: Discipline

AWARD

1. That for reasons set forth herein, the Service did not have just cause to remove the Grievant, Automotive Technician William J. Weber, based on the Notice of Removal dated October 4, 2016;
2. That for reasons set forth herein, the removal is time served suspension; and
3. That the Grievant is to be reinstated with no loss of seniority.

Randall M. Kelly, Arbitrator

Stipulated Issue:

Was the removal of the Grievant, William J. Weber, based on the Notice of Removal dated October 4, 2016 for Unacceptable Conduct for just cause under the terms of the National Agreement? If not, what shall be the remedy?

Background Facts and Circumstances of the Dispute:

The Grievant, William J. Weber, was employed as a Full-Time Automotive Technician in the Western New York VMF in Buffalo, New York with over 11 years of service.

The Grievant was involved in a physical confrontation with another VMF employee, Dennis DeTamble, on September 9, 2016 (all dates hereinafter are 2016 unless otherwise indicated). According to management, "On this date, the grievant approached a fellow co-worker, Mr. DeTamble, sprayed him with a garden hose from approximately 20-25 feet. The grievant then dropped the hose, walked the rest of the distance to Mr. DeTamble, attempted to kick a tool from his hands and then immediately grabbed Mr. DeTamble around his neck with both of his hands and while choking him yelled, 'I am going to fucking kill you.'"

Supervisor Radman Ward saw the confrontation from a distance and ultimately intervened to separate the two. He called the Postal Inspectors and they interviewed the Grievant and DeTamble with Union representation that same day. Both employees were placed on Emergency Placement in Off-Duty Status and sent home. The Investigative Memorandum was issued on September 26 (Svc. Exh. 2). Ward gave the Grievant a PDI on September 15 with Craft Director Curtis McGuire.

Supervisor Ward sent a request for discipline to Labor Relations on September 30 (Svc. Exh. 1) and issued the NOR on October 4, mailing it to the Grievant's address of record (Svc. Exh. 3).

The Grievant filed a grievance protesting the removal. The Union pursued the grievance through the contractual grievance procedure to arbitration. The matter not being resolved, it is properly before me for final and binding arbitration pursuant to the terms of the National Agreement.

Charge:

You are charged with unacceptable conduct.

Specifically, on September 9, 2016, I observed you using the hose in the wash bay to spray water at a co-worker who was attempting to cut a lock securing a floor fan. As I approached you, you turned to look at me; you smiled, laughed and continued to spray him while yelling, "get away from that lock". You then put the hose down and approached your co-worker, kicking at the bolt cutters in his hands. The two of you engaged in a shoving match screaming at each other and bumping chests. I observed your hands around his neck and heard you say, "I'll fucking kill you!" I attempted to get your attention by yelling "Hey!" numerous times throughout this altercation, but to no avail. When I reached your location, you released your grip from his neck and walked away.

When questioned, you stated you followed your co-worker to the wash bay because you thought he might try to cut the lock off the fan. You acknowledge being the person who chained and locked the fan in the first place. You said you sprayed him with water from the hose, and continued to do so after seeing me, to try and prevent him from cutting the lock.

When asked why you began choking your co-worker, you stated you got hit in the shin when you tried to kick the bolt cutters from his hand. You said your actions were out of character for you. You added that you had been off your medication for 4 days because of a miss-communication between your doctor and the mail order pharmacy. You said you almost got into an accident on your way into work and that you had no intention of getting physical.

Your actions in this matter are in violation of Postal Rule & Regulations including, but not limited to, the following: [ELM 665.24, 665.16]

In addition, the following elements of your past record have been considered in taking this action:

In a letter dated July 6, 2016, you were issued a Letter of Warning charging you with failure to work safely (Svc. Exh. 3).

OPINION

Most of the facts concerning the confrontation between the Grievant and Dennis DeTamble on September 9 are not in dispute. The Grievant admitted to what he did to the Postal Inspectors when he was interviewed on that same day.

To put it in perspective, September 9 was at the end of another notoriously hot and humid Summer in Buffalo. The Grievant had been working in the wash bay in the days immediately before September 9; there was no air conditioning and no fan. He saw a standing

electric fan in DeTamble's work area; he moved the fan from DeTamble's work area to the wash bay and locked it to a beam with a chain and trailer lock. As summarized by the Postal Inspectors in the IM:

> Prior to the incident, Weber stated he was working at the drill press in the body shop and he noticed DeTamble get bolt cutters out of the body shop. DeTamble made no comment and didn't ask Weber about the fan. Weber "headed off" DeTamble in the wash bay and told him he would soak him with the hose if he cut the lock off the fan. Weber "squirted" DeTamble with the hose and Ward told him to put the hose down. Weber walked towards DeTamble, who was holding the bolt cutters, and told him to not cut the lock.
>
> Weber said DeTamble bent over to cut the lock and Weber kicked the bolt cutters off the lock. The bolt cutters hit Weber in the shin when he kicked them off the lock. Weber then grabbed DeTamble by the neck with both hands. Weber explained both he and DeTamble were upset and he realized the incident was "out of hand." Weber released his grip on DeTamble and Ward told him to walk away.
>
> Weber said DeTamble went to the office with Ward and Weber returned to the drill press. After about ten minutes, Ward called Weber to the office and with DeTamble still present. Weber told DeTamble he would unlock the fan and move it back to his work area (Svc. Exh. 2).[1]

Supervisor Radman Ward testified that he saw the Grievant walking toward the wash bay; he noticed that he was walking fast and that was unusual. Ward followed him just to see what, if anything, was going on. Ward was about 20-25 feet behind him. The Grievant disappeared around a corner and when Ward turned the corner, he saw the Grievant spraying DeTamble with a garden hose. Ward was "taken aback." Ward testified that at one point, the Grievant looked over to him, smiled and laughed. He stopped spraying DeTamble but then resumed spraying DeTamble. DeTamble had a pair of bolt cutters in his hand.

Then, the Grievant dropped the hose and walked toward DeTamble. According to Ward, there was a semi in the truck bay right behind DeTamble and a pressure washer and oil tanks, making it impossible for the Grievant and DeTamble to pass each other. Ward started to follow the Grievant, but before he could reach him, he saw the Grievant kick the bolt cutters from DeTamble's hand. Ward yelled "hey" at them several times, trying to get them to stop, but the Grievant did not react. At this point, the Grievant and DeTamble bumped chests and Ward saw

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[1] The IM was issued on September 26 but not given to the Union until October 17. It was received over the objection of the Union not for the truth of the contents but to show when it was issued and its relation to the decision to remove the Grievant.

the Grievant reach his hands up and around DeTamble's neck; choking DeTamble and pushing him down. The Grievant yelled out, "I'll fucking kill you!"

Ward yelled "Go, go!" 3 or 4 times, trying to get the Grievant to leave DeTamble alone. The Grievant did not appear to respond but finally let go of DeTamble and walked away.

Ward went over and checked out DeTamble. He observed red marks on DeTamble's neck.

Ward contacted the Inspection Service and they interviewed the Grievant and DeTamble that same day. According to Ward, the Inspectors only asked about the events of that day. The Grievant and DeTamble were both sent home on Emergency Placement.

Ward gave the Grievant a PDI on September 15 with Craft Director Curtis McGuire (Svc. Exh. 1). He received the IM on September 26. Finally, Ward sent a request for discipline to Labor Relations on September 30 (Svc. Exh. 1) and issued the NOR on October 4, mailing it to the Grievant's address of record (Svc. Exh. 3).

On October 17, the Union send a written request that Supervisor Ward recuse himself from the grievance process because he had a conflict of interest as a witness. Ward denied the request and the parties met at Step 1 on October 21.

The Grievant testified that he was under considerable stress on September 9; marital, financial and a near car accident that morning. Most specifically, he testified that he was temporarily off his medications (see U. Exh. 2), and that what happened on September 9 was "not who I am." He testified that he got hit on the shin by the bolt cutter and that made him angry. In fact, he testified that he apologized to DeTamble on September 9 in Ward's office and he and Ward actually ate lunch in the break room after the incident (not together, but not getting into any further altercation). At the end of the meeting, he told Ward and DeTamble that he would unlock the fan; he did and went back to work until the Postal Inspectors arrived.

When he was sent home, he immediately contacted EAP; he was referred to counselling and got the first available appointment on October 11. He admitted that he went to the library and took out books on anger management because he wanted to try to understand why he exploded on September 9.

The Grievant called his own doctor the following Monday and has been undergoing treatment ever since (U. Exhs. 2-3). As part of his treatment, he now knows that he has to stay on his medications and has also learned mechanisms to control his anger.

The Grievant testified that Ward did not explain that he was contemplating removal during the PDI on September 15. The Grievant explained about the medications during the PDI. He also told Ward that it would not happen again because he had already called EAP, already

contacted his doctor, already gotten the library books, and now knew he could not let his medications lapse; that this was a "wake up call'. He admitted that he knew about the Zero Tolerance Policy.

MVS Craft Director Curtis McGuire testified that he attended the Postal Inspector interviews. After the interviews, they asked the Grievant to turn in his keys and id, that he had been placed on Emergency Placement. They also suggested EAP.

McGuire also attended the PDI on September 15. Ward did not say that he was considering removal and did not name a charge. Ward did not offer any documents at the PDI.

Finally, the Service offered evidence that management called in the Postal Inspectors to conduct Service Talks in April/May 2016 to remind employees, including the Grievant, that harassment and "horse play" was not appropriate in the VMF (Svc. Exh. 5). Whatever happened before that, there were no complaints or incidents of alleged harassment until this incident with the Grievant.

Positions of the Parties

The Service position is that the Grievant committed a clear violation of the Zero Tolerance Policy and that he was fully aware of that policy. The Postal Service cannot allow or condone violence such as this by any employee against another employee.

The Union argued that there was no thorough and objective investigation because Ward was a witness, participated in the Postal Inspection interviews, conducted an imperfect PDI, made the decision to remove and made the decision at Step 1. It also argues that management relied solely on the IM. The Union also raises the fact that the Grievant raises the mitigating factors at the PDI and was ignored.

Next, the Union argues that management has not consistently and equitably enforced the Zero Tolerance policy; that there was not proper higher level review prior to concurrence and that the concurring official also conducted the Step 2. Finally, the Union argues that the severity of the discipline was not reasonable and certainly not corrective.

Discussion

The Postal Service subscribes to a Zero Tolerance Policy for employee violence and threats of violence. I have endorsed that Policy and sustained immediate removal for violation of that Policy in prior cases. Here, I find that the Grievant, in fact, violated the Zero Tolerance Policy when he followed DeTamble into the wash bay, squirted him with a hose, kicked at him, bumped him and, finally, choked him.

However, that does not end the analysis. As explained by Prof. Marvin F. Hill, Jr. in *Remedies in Arbitration,* in The Common Law of the Workplace: The Views of Arbitrators,

National Academy of Arbitrators (BNA Books, 2005), "Most arbitrators find no-fault plans reasonable in principle but may reject their 'perverse application' in exceptional cases on the grounds of a conflict with just cause requirement" (citing among others, Richard Mittenthal and David Gregory). Essentially, the no-fault or Zero Tolerance policy does not trump the express just cause protections of the collective bargaining agreement. This is especially so when, as here, the Zero Tolerance policy was not negotiated by the parties.

Significantly, the Western New York District Zero Tolerance Policy does not mandate immediate discharge as the only appropriate discipline. It states:

> Acts of intimidation, threats or violence will receive an immediate and firm response from management that may include immediate emergency placement in an off-duty status and appropriate action, up to and including discharge from the Postal Service (p.15 of Svc. Exh. 1).

As the parties recognize in the JCIM, "'just cause' establishes a standard that must apply to any discipline or discharge of an employee." "Just cause is a 'term of art' created by labor arbitrators. It has no precise definition. It contains no rigid rules that apply in the same way in each case of discipline or discharge." The JCIM goes on to list six criteria considered to be the basic considerations that the supervisor must use before initiating disciplinary action. Those criteria are based on the Seven Tests of just cause first developed in the railroad industry. However, as indicated in the JCIM, those criteria are not exhaustive.

One criterion that has always been an element of just cause is whether there are mitigating or explanatory factors that "mitigate" against imposing any disciplinary action or lessening the "normal level" of discipline. For example, in Federal employment, the MSPB has established the so-called *Douglas Factors* for determining the appropriate penalty to impose for an act of employee misconduct. Factor 11 is:

> Mitigating circumstances surrounding the offense such as unusual job tension, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter.

Discipline of a federal employee will be overturned if management did not consider such mitigating circumstances.

The Service argues that the Grievant did not raise any of his alleged mitigating circumstances on September 9, either to the Postal Inspectors or to Supervisor Ward. However, he clearly raised those issues at the PDI six days later. One of the stated purposes of the PDI is give the employee "a reasonable opportunity to defend themselves before the discipline is imposed" (emphasis added). The PDI is the time for an employee to raise mitigating factors in his own defense before the discipline is imposed.

Here, the Grievant specifically told Supervisor Ward in the PDI that he was on medications for "mood swings" and that he had been without his medications for 4 days on the day of the incident. In fact, the Grievant presented Ward with a letter dated September 12 from Dent Neurologic Institute that states:

> Please be advised that William Weber was seen in our office today. We discussed the work incident that occurred on Friday, September 9, 2016. This behavior is out of character for Mr. Weber. He had been without his medications for 4 days due to a miscommunication between this office and mail order pharmacy (p.10 of Svc. Exh. 1).

The letter was included with the Action Request Form.

When Ward asked him what would stop him from "doing this in the future" he answered that he had called EAP immediately after the incident, set up an appointment with his doctor, visited the library to get anger management books (receipt from the library, also included with the Action Request Form (p.11 of Svc. Exh. 1)) and understood that he could not let his medications lapse (Svc. Exh. 1). At the arbitration hearing, he presented notes from his therapist (U. Exhs. 1 and 3) and his treating physician (U. Exh. 2) to the effect that he had sought treatment and that he was continuing his treatment.[2] He told Ward that this was "out of character"; that almost got in a car accident on the way to work and that was hot ("sweating his ass off"). Ward testified that the Grievant bought up family issues but did not mention them in his notes.

Once the Grievant told Ward that he had a medical condition and had been without his medication for 4 days on the date of the incident, Ward testified that he gave these issues a lot of weight. In fact, Ward included this information in his Action Request Form but there is no evidence that anyone considered this to be a mitigating factor prior to making the decision to remove the Grievant.

At Step 2, Manager Martin Schultz addressed the Union's concerns with the Grievant's condition and being without his medications, as follows:

> The Union also brought up the topic of giving Mr. Weber consideration due to a disability. First we are not doctors. This is the first that we have been informed that a disability existed. The documentation that was dated 9/12/16 was after the incident and management had no documentation prior to the incident on the workroom floor or in any prior discussions was it raised. The provided documentation stated "**This behavior is out of character for Mr. Weber**. He had been without his medications for 4 days due to a miscommunication between this office and mail order pharmacy". This was also provide to the medical department after the incident. Also the documentation does not specify what days he was without the medication or if the days without it were before, during or after the incident. The documentation didn't provide any further information.

[2] The notes are dated after the removal of the Grievant. They were received over the objection of the Service as confirmation of the Grievant's testimony.

This was given to the medical department for review and not found to justify Mr. Weber's actions.

The documentation clearly stated it was out of character however this was presented as evidence to excuse his actions. If the suggestion is that the lack of medication caused Mr. Weber to act out this way then this raises another concern. If Mr. Weber clearly knew at the time that he wasn't taking the mentioned medication and such medication was for a condition, then why would he risk putting others or himself in danger when he knew he wasn't taking it? Or why hadn't he brought it to management's attention so they could monitor or evaluate the situation, look for possible solutions or assess the potential danger to others within the department. He did none of those.

We do have compassion for any employee who may experience difficulties in life and made all employees aware of the EAP program. However we have an obligation to all employees to maintain a violence free and harmonious work environment. Mr. Weber's actions can't simply be overlooked and excused. The additional documentation that was provided was also all dated after the fact. If Mr. Weber had prior knowledge of this condition that is suggested to be the cause why wasn't it addressed until after the fact? Why did he risk coming to work without taking this medication? No answer was given.

Management has provided employees with the available resources that we have to help employees address such issues however when management has no prior knowledge we cannot be expected to predict and try to intervene as suggested.

In addition, the union has also provided at the step 2 level further documentation from Social Worker Zannoni stating that Mr. Weber voluntarily began therapy on October 11, 2016. Again, this documentation shows a date the therapy began over a month from the date of workroom floor incident and his removal. While the document suggests that Mr. Weber is taking action to address his behavior, it should be noted that he also had access to such therapy prior to the incident which he did not pursue or engage in (Jt. Exh. 2).

Schultz testified that he considered the Grievant's medical issues but was concerned that if the Grievant knew he had a medical condition that might cause him to do something "completely out of line" that he should have advised management before anything happened. Schultz questioned why the Grievant would come to work when there was a risk he might do something that would harm others or himself. However, he admitted that he had discussed EAP with the Grievant in the past. Ultimately, in part because the Grievant did not tell the Postal Inspectors about his condition, Schultz thought that the whole off his medications was "an angle to try to excuse his behavior."

Schultz testified that the Grievant had "issues" with another employee on the workroom floor a few years ago. He gave them both official discussions and there were no other issues until this one. The prior element of a warning for unsafe working practice is not relevant here.

The problem with the way that management approached the potential mitigating factors

is that they would require the Grievant to bring those issues up before the incident even occurred. As can be seen, both Ward and Schultz considered the fact that the Grievant had been off his medications but seem to put the burden on the Grievant to either not come to work or inform management that there was a problem. That is an unrealistic expectation. The Grievant could not have known that he would get into a near accident on his way to work, that DeTamble would attempt to cut the chain off the fan to remove it, or that he would get clipped by the bolt cutters. The obligation to raise mitigating factors is not before the incident but as an attempt to explain and potentially excuse an employee's misconduct. The Grievant did that at the PDI.

Thus, I find that removal was not for just cause because management did not properly consider mitigating factors raised by the Grievant at the PDI. His behavior cannot be condoned, however, and due to the seriousness of the offense, reinstatement is without back pay. Given this result, I am not addressing the other issues raised by the Union.

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration
between
UNITED STATES POSTAL SERVICE
and
AMERICAN POSTAL WORKERS UNION

Grievant: PAUL M. WARTKO

Post Office: WESTERN NY P&DC
BUFFALO, NEW YORK

Case No.: C10V-1C-D 16331240
CJMB4C

Before: RANDALL M. KELLY, Arbitrator

Appearances:

For the Postal Service:

BRENDAN J. SHEA, Labor Relations Specialist
REGINA DeFEO, Technical Advisor
JOHN A. GULLO, Supervisor, Transportation Operations
PAMALA KIMBALE, Acting Manager Transportation Operations

For the Union:

KEN PRINZ, National Business Agent
PAUL M. WARTKO, Grievant
CURTIS J. McGUIRE, Motor Vehicle Craft Director

Place of Hearing: Western New York P&DC, Buffalo, New York

Date of Hearing: October 13, 2016; Briefs filed November 14, 2016

Date of Award: December 16, 2016

Relevant Contract Provisions: Article 16

Contract Year: 2010-2015

Type of Grievance: Discipline

AWARD

1. That for reasons set forth herein, the Service did not have just cause to remove the Grievant, Tractor-Trailer Operator Paul Wartko, based on the Notice of Removal dated April 12, 2016;
2. That for reasons set forth herein, the removal is converted to a Letter of Warning; and
3. That the Grievant is to be reinstated with back pay and benefits (subject to the terms of the ELM).

Stipulated Issue:

Was the removal of the Grievant, Tractor-Trailer Operator Paul Wartko, based on the Notice of Removal dated April 12, 2016 for just cause? If not, what shall be the remedy?

Background Facts and Circumstances of the Dispute:

The Grievant, Paul Wartko, was employed as a Full-Time Tractor-Trailer Operator in the Western New York P&DC in Buffalo, New York. He started as a PSE in October 2014 and was made regular in October 2015. He was assigned to Tour 3, working from 2:00 a.m. to 11:00 a.m.

The Grievant was involved in an at-fault accident on March 27, 2016 (all dates hereinafter are 2016 unless otherwise indicated). "While approaching the gas pumps located outside the Vehicle Maintenance Facility, your vehicle passenger mirrors struck the booth, knocking it off its foundation and causing it to hit the rear tires of your truck." According to the Service, the damage amounted to $50,000. Acting MDO Adina Costanzo investigated the accident and issued her Report on March 28 (pp. 11-13 of Jt. Exh. 2). Supervisor John Gullo reviewed the report, spoke to Costanzo and a witness, Security Supervisor Eric Klepp (Svc. Exh. 2). He then interviewed the Grievant at a PDI on March 30. Gullo also consulted with Labor Relations. Labor Relations informed him that the Grievant had a prior 14-day suspension on his record.

Supervisor Gullo submitted an Action Request Form on March 30 seeking the Removal of the Grievant (pp. 7-8 of Jt. Exh. 2). Acting Transportation Manager Pamala Kimball concurred. Gullo issued the NOR on April 12 (pp. 5-6 of Jt. Exh. 2).

The Grievant filed a grievance protesting the removal. The Union pursued the grievance through the contractual grievance procedure to arbitration. The matter not being resolved, it is properly before me for final and binding arbitration pursuant to the terms of the National Agreement.

Charge:

> You are hereby notified that you will be removed from the Postal Service effective May 16, 2016. This action is based on the following reasons:
>
> **You are being charged with failure to work safely.**
>
> Specifically on Sunday, March 27, 2016, at approximately 7:40 PM you were involved in an at fault motor vehicle accident. While approaching the gas pumps located outside the

Vehicle Maintenance Facility, your vehicle passenger mirrors struck the booth, knocking it off its foundation and causing it to hit the rear tires of your truck. Your misjudgment and inattention resulted not only in damage to your postal trailer, but approximately fifty thousand (50,000) dollars' worth of damage to the gas pump booth and fire suppression system.

When questioned, you stated that you pulled up to the gas pump and your side view mirror hit the booth and then your rear tires hit the booth and blew it apart. You stated you misjudged the distance and hit the booth.

Your actions in this matter are in violation of Postal Rule & Regulations including, but not limited to, the following:

Section 814.2 of the Employee & Labor Relations Manual, which states:
All employees are responsible for:
d. Performing all duties in a safe manner.
g. Driving defensively and professionally, extending courtesy in all situations, and obeying all state, local, and Postal Service regulations when driving a vehicle owned, leased, or contracted for by the Postal Service.

In addition, the following elements of your past record have been considered in taking this action:

In a letter dated July 30, 2015, you were issued a Fourteen Day Suspension charging you with failure to properly discharge the duties of your position.

OPINION

The Union and the Grievant do not challenge the facts of the accident. In fact, although the Grievant testified, he did not testify about the accident itself. The management investigation of the accident is summarized in Manager Pamala Kimbale's Post-Accident Interview dated March 30 (Svc. Exh. 3).

> Accident Description: On 3/27/16 around 19:40 MVS driver Paul Wartko was involved in an At-Fault motor vehicle accident at the Buffalo NY P&DC plant at 1200 William St. Buffalo NY. Nothing out of the ordinary occurred before the accident. When Paul went to pull up to the gas pumps (not speeding) the passenger side mirror on the tractor hit the booth by the gas pumps. When the wheel of the rig hit the booth it moved and was dislodged from its spot. After Paul realized he hit the booth he informed me that he flinched taking his foot off the pedal and immediately pressed the brakes. The conduit was knocked off the roof and was hanging. Shattered glass and pieces of the booth had to be cleaned up. The damage to the gas pump has resulted in $50,000.00 worth of damage. Also there was damage to the smoke stack and mirror on the tractor which was fixed by the VMF. Per Jake Schultz, VMF Manager there were no mechanical issues with the tractor before the accident. No injuries resulted from the accident. Paul was immediately pulled from driving on 3/27 until he took a refresher course with Safety instructor. Marty Abramson on Wednesday 3/30/16.

T-3 SDO, Adina Costanzo was the supervisor on duty and did the investigation. Paul provided a verbal statement to Adina and I have attached the emailed statement and pictures taken of the accident, (per union written statements are not provided). Supervisor of Security Eric Klepp witnessed the event and provided a statement advising that MVS driver Paul Wartko was driving at least 15 mph.

On 3/28/16, Maintenance had to take gas pumps out of service until further notice causing MVS, the Eastside carriers, VMF and Maintenance to use Voyager cards at regular gas stations.

When doing this interview I inquired with MVS driver Paul Wartko if he was distracted and he informed me that he may have been thinking about lunch.

Root Cause: Driver not paying attention by thinking about lunch and failed to drive safely by misjudging the clearance between the truck and booth.

Preventive Action: A safety talk was given to all the MVS drivers on 'Distracted Driving'. Before Paul was cleared to drive on 3/30, he took a refresher course as well. STO, John Gullo, also issued him a PDI which could lead to a Notice of Removal.

STO Gullo testified that he conducted a PDI with the Grievant and Shop Steward Curtis McGuire on March 30. He testified that he had prepared questions and took notes of the Grievant's answers. The Union requested copies of Gullo's notes from the PDI (U. Exh. 1). Labor Relations Specialists Brendan Shea and Regina DeFeo asked him to find the notes. Gullo testified that the notes were somewhere in his locker but the locker was so messy that he could not find them.

The Grievant insisted that there was no PDI on March 30; that when he was approached by Gullo for a PDI, he insisted on having a steward present and that there was no meeting after that. Craft Director and Shop Steward Curtis McGuire testified that he did not attend a PDI on March 30 and that he was not aware that any Union representative attended a PDI on March 30. He never received copies of Gullo's notes from the alleged PDI as requested on April 21 (U. Exh. 1).

Gullo testified that he made the decision to request the removal of the Grievant. He prepared a Request on March 31 and Acting Manager Kimbale concurred that same day (pp. 7-8 of Jt. Exh. 2). Gullo testified that his decision was based on the Grievant's admitted misjudging of the distance at the gas pumps; the degree of penalty, Removal, was based on the fact that the Grievant had a 14-day suspension for "failure to properly discharge the duties of your position" on his record. In the request, Gullo stated that he had disciplined other employees for a similar offense with a Letter of Warning (presumably, they did not have a prior suspension). In fact, Gullo testified that a major reason for the decision to remove the Grievant was that he had two "performance and safety" incidents in less than two years.

The Grievant did not deny the facts of the accident. However, he did testify that he had no immediate supervisor and had worked 26 consecutive days leading up to the accident.

Craft Director McGuire testified that he submitted requests of information on April 21 requesting the estimate for damage from the accident, a copy of Supervisor Gullo's notes from the alleged PDI, and accident reports (U. Exh. 1). He testified that filed the Step 1 grievance on April 28, in part to get the information requested (Jt. Exh. 2). He received some information after the grievance was filed, but never received the PDI notes despite a renewed request on May 24 (U. Exh. 1). The Information Log Sheets kept by Labor Relations show that Labor Relations forwarded copies of Gullo's PDI notes to the Union on April 28 (Svc. Exh. 5).

McGuire filed a separate grievance challenging the failure to provide requested information. That grievance was settled on May 17 (U. Exhs. 2 and 3). The parties agreed:

> It is agreed that this instance of requested information was an anomaly and not normal in nature. The information request process was reviewed. Management has and will continue to abide by the contract and provide information requested in a timely manner.

As to the prior 14-day suspension, Gullo testified that he was not initially aware of the suspension; that another supervisor mentioned it to him. He called Labor Relations to get the prior elements and reviewed the Grievant's file after Step 1. The suspension was for "Failure to properly discharge the duties of your position" (Svc. Exh. 4). The Grievant was charged with leaving a trailer full of mail in the wrong dock resulting in the trailer being placed into the yard without being opened or its contents verified. The Grievant was charged with failing to follow procedures that resulted in delayed mail and a failure to meet the service commitment to our customers. The discipline was grieved and settled with the 14-day suspension (3-days, time-served).

The Grievant testified that he was in the midst of a period as a PSE went he was "working constantly." He brought the trailer to the assigned dock but anther trailer was already there. He testified that he went inside and a "guy on a forklift" told him to put it on the next dock. He finished his tour. Craft Director McGuire testified that he grieved the discipline and got the discipline and the discipline of the Expeditor also charged reduced. McGuire testified that he accepted the lesser discipline because the manager made it clear he would not bring the Grievant back after the end of his PSE term with the stronger discipline on his record.

Positions of the Parties

The Union has raised several issues challenging the just cause of the removal. The Union starts with the contractual proposition memorialized in Article 14.1 of the JCIM that:

> There should be no automatic discipline for employees in accidents (motor vehicle or industrial). Disciplinary action must be appropriate considering the safety rule violation, not dependent on whether an accident occurred.

From this, it follows that any discipline must be corrective per Article 16.1.

The Union then attacks management's reliance on the Grievant's prior 14-day suspension for failure to properly discharge his duties. First, the Union asserts that there is no nexus between that suspension and the accident. Next, it asserts that the suspension while the Grievant was a PSE does not carry forward with him after he became a regular employee. The Union starts with the proposition that PSEs who convert to career status are new employees. Thus, National Arbitrator Shyam Das held in Case No. Q11N-4Q-C 14239951 (2015) that Section 512.313 of the ELM requires that former City Carrier Assistants (the NALC equivalent of PSEs) must complete a 90-day qualifying period following their conversion to career status before being credited with or taking annual leave. This was the Service position during that arbitration. According to the Union, "The Postal Service cannot take the position that newly created converted employees are new employees in the National Arbitration case and now claim they are not new employees when they want to cite previous discipline for progressive discipline."

The Union then cites the decision of Regional Arbitrator Irene Donna Thomas in Case No. B10C-1B-D 15063172/NY-14-200 (2016). Thomas concluded that, "[U]nder the terms of the national agreement, the employer may not carry over to a career appointment unscheduled leave usage and prior disciplinary actions. PSEs converted to a career appointment are entitled to a clean disciplinary record, indeed a clean record - regardless of whether they had accrued unscheduled leave usage and regardless of whether disciplinary action had been imposed during a non-career, limited appointment." Thomas based her conclusion on the fact that a career employee is a "new employee" and especially the new oath of office.

As to Article 16 and the discipline itself, the Union asserts that management lacked just cause as defined in the JCIM. For example, there was no evidence of a required PDI, management failed to provide the Union with requested documents, the penalty was not imposed on other similarly situated employees and there was no effective concurrence.

The Service asserts that it has met the contractual standard for showing just cause. It disputes the Union positions as follows:

> The union failed to argue any merits of the case at arbitration. In fact, Mr. Arbitrator, you stated and I quote "Let me remind everybody that the fact that there was an accident on that date and that Mr. Wartko was driving is not in dispute."

What happened? What did Mr. Wartko do wrong? Yes, an accident is an unfortunate incident; however, most accidents are preventable. **Had Mr. Wartko been paying attention to driving his Postal Vehicle instead of thinking of lunch, he would not have been in the accident.** Mr. Wartko was inattentive, he did not judge his clearance, he was not aware of his surroundings while operating a LARGE motor vehicle. He knocked down the entire gas pump booth, broke the fire suppression system. This was not a fender bender. The point here is not the cost of the accident, it is the seriousness of the accident. Bumping something with your mirror - tap tap - is minor. Mr. Wartko had to be seriously off course to cause that much damage. That is the point.

The union did not respond to the fact that the grievant was thinking of lunch instead of concentrating on driving.

The grievant does not have a bank of goodwill. The grievant has been employed a very short period of time. The union brought up no mitigating circumstances.

The union's entire argument is based upon a fairy tale alleging that the supervisor did not do a pre-disciplinary interview, did not request the discipline, did not write the discipline, and did not provide the information. The union expects you to believe that through all the processes that are standard operating procedures, and all of the people involved in these processes in Management including Labor Relations fabricated the pre-disciplinary interview, the letter and everything in between.

There was no argument at earlier levels of the grievance/arbitration procedure on the part of the union or grievant that a PDI did not take place. There was no argument that Gullo did not request the removal. There was no argument until the arbitration hearing.

Steward McGuire signed a grievance settlement stating he did in fact receive all of the information he requested and it was proven at the hearing via Labor Relations Information Request Logs that McGuire was provided everything he requested to the address of record that he provided. In fact, the Labor Relations General Clerk sends EVERYTHING to the APWU via tracking to avoid these type of allegations.

The Union advocate harassed Mr. Gullo on the stand with questions such as what is the EL-921, do you know what Article 16 is, was it a trailer or a spotter, what is the cut-off point, what is the ELM 814 in an attempt to make Gullo look incompetent. Steward McGuire did the same thing with Mr. Gullo throughout the grievance process. Supervisors do not have National Agreements and Labor Manuals memorized. They have a support department called Labor Relations.

Steward McGuire was not at the pre-disciplinary interview. When asked if anyone from the union was there he replied "Not that I am aware of." He didn't reply that there was no interview; he replied he was not aware of a steward being present. There is a difference. There was a pre-disciplinary interview. Additionally, the grievant testified that he did not receive a pre-disciplinary interview at the hearing, but NEVER argued that prior. A result of coaching I presume. He stated he did not

remember having a meeting with John Gullo. Was that a white lie then; didn't remember. Labor Relations policy is that discipline will not be written unless all of the tests of just cause are met and certainly of major importance would be the employee's day in court.

PRIOR DISCIPLINE

July 30, 2015, 14 day paper suspension with 3 days served (9/12-14/2015) reviewable after 1 year. Charge: failure to properly discharge the duties of position - delayed mail, service commitment failures.

This discipline was adjudicated September 19, 2015 with an agreement signed by Myrlene Lee, USPS and Curtis McGuire APWU. The discipline stands. The union did not argue the validity of the 14 day suspension at any level of the grievance/arbitration procedure prior to hearing. Anything at hearing relating to this is new argument.

Discussion

There were several problems with the way that management handled this disciplinary action. The most significant for me is the jump from a 14-day suspension for failure to properly discharge the duties of his position to a removal for failure to work safely. I am not deciding whether management has to wipe clean an employee's disciplinary record as a PSE once he becomes a career employee, however, I find that the misconduct that resulted in the 14-day suspension is not the same as failure to work safely and should not have been considered a direct link in progressive discipline. Article 16 states that discipline must be corrective and not punitive. The JCIM states:

> The basis of this principle of corrective or progressive discipline is that it is issued for the purpose of correcting or improving employee behavior and not as punishment or retribution.

Thus, in his request to remove the Grievant, Gullo stated that he had disciplined other employees for a similar offense with a Letter of Warning and testified that a major reason for the decision to remove the Grievant was that he had two "performance and safety" incidents in less than two years. Management gave the Grievant an opportunity to correct his performance issues with the suspension and he apparently did so. Removing him for a first accident is not corrective; nothing he "learned" from his prior suspension would have helped him avoid driving unsafely. In fact, management undertook to correct the Grievant's behavior when he was sent for training and returned to his driving duties.

The Service submitted one of my arbitration awards (Case No. C10V-1C-D 131606135/13-705, 2014), in which I sustained the removal of a PSE driver for unsafe driving.

The difference in that case is that that grievant had two preventable accidents within 112 days; for the first accident, he was sent for refresher training. And, while PSEs are entitled to just cause, the timetable for progression can be truncated. I do not find that decision necessarily inconsistent with my conclusions here.

The removal was therefore not progressive and not for just cause. The removal is to be reduced to a Letter of Warning and the Grievant reinstated with backpay and seniority, subject to the terms of the ELM.

In addition, the Union is correct that it was entitled to the information requested, but I do not need to address that issue further in light of my conclusions concerning the removal. Finally, I would caution management that a PDI has become a required element of just cause and that management has the burden to prove that it properly conducted the PDI; the lack of any contemporaneous documentation when the Union and Grievant deny that a PDI occurred will probably not meet that burden.

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration
between
UNITED STATES POSTAL SERVICE
and
AMERICAN POSTAL WORKERS UNION

Grievant: ANDRE T. MORRIS

Post Office: PHILADELPHIA P&DC
PHILADELPHIA, PA

Case No.: C10V-1C-D 15252575
15-1701

Before: RANDALL M. KELLY, Arbitrator

Appearances:

For the Postal Service:

YOLANDA WILEY, Labor Relations Specialist

For the Union:

KEN PRINZ, National Business Agent

Place of Hearing: Philadelphia, PA

Date of Hearing: January 14, 2016

Date of Award: January 21, 2016

Relevant Contract Provisions: Article 16

Contract Year: 2010-2015

Type of Grievance: Discipline

AWARD

1. That for reasons set forth herein, the imposition of the Emergency Placement of the Grievant, Andre Morris, on June 30, 2015 was for just cause;
2. That the Emergency Placement of the Grievant extending beyond thirty-days was excessive and not for just cause;
3. That the Grievant is to be returned to work from the Emergency Placement with no loss of seniority; and
4. That the Grievant is to be paid back pay for a period of five months.

Randall M. Kelly, Arbitrator

Stipulated Issues:

Was the Emergency Placement of the Grievant, Andre Morris, on June 30, 2015 for just cause? If not, what shall be the remedy?

Background Facts and Circumstances of the Dispute:

The Grievant, Andre Morris, is employed as a Motor Vehicle Operator in the Philadelphia P&DC. On June 30, 2015, he was interviewed by Special Agents from the Office of the Inspector General (OIG) regarding allegations that he was calling out sick from his postal position while working for another employer. Manager of Transportation/Networks John Nacey was also present. At the start of the meeting (also attended by his Union representatives), the Grievant stopped the meeting and stated he wanted to consult with his lawyer before answering any questions. The Grievant also refused to sign any document acknowledging his rights. At that point the OIG Special Agents and Nacey left the interview. Nacey then returned and placed the Grievant on an Emergency Placement in Off Duty Status that same day. The written notice of Emergency Placement states that the reason for the action was, "as a result of conduct that may potentially result in the loss of Postal Service funds."

The Grievant filed a grievance protesting the Emergency Placement and the Union appealed the grievance to arbitration. The matter not being resolved, it is before me for final and binding arbitration pursuant to the terms of the National Agreement.

OPINION

Article 16.7 of the National Agreement gives management the right to immediately send an employee home under certain circumstances. This is, of course, an exception to the "normal" procedures for discipline which give an employee ten days' notice of a suspension of 14 days or less and 30 days' notice of a suspension of 14 days or more or discharge.

Article 16.7 provides, in pertinent part, "An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls, in cases where retaining the employee may be result in . . . loss of mail or funds . . . until disposition of the case has been made. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance."

Here, the Office of the Inspector General had information that the Grievant was holding down another job with US Airways. At the same time, the Grievant called in sick on several occasions when he may have been working at US Airways. This was a legitimate reason to interview the Grievant and OIG Special Agents did so on June 30, 2015 with Manager of

Transportation/Networks John Nacey and two of his Shop Steward present. According to Steward Alex Hawthorne, the Special Agents read the Grievant his rights and requested that he sign and acknowledgement. "The grievant refused to sign but agreed to continue on with the meeting." According to Management, "Upon the start of the meeting, Mr. Morris stopped the meeting and stated that he wanted to consult with his lawyer before answering any questions." In either event, the meeting ended and Nacey and the Special Agents left.

Nacey returned and placed the Grievant on an Emergency Placement in Off Duty Status that same day. The written notice of Emergency Placement dated July 1 states that the reason for the action was:

> This action is being taken as a result of conduct that may potentially result in the loss of Postal Service funds.
>
> A determination as to whether you will be issued disciplinary action related to the allegations set forth above will be made in the near future. Additionally, you will be notified if and when you are to return to duty.

One of the purposes of the Emergency Placement in Off-Duty Status to remove an employee from the workplace when management has reasonable suspicion that an employee may be guilty of misappropriation of funds to prevent a further possible misappropriation. The Service met that test here and the Emergency Placement was for just cause. Significantly, management does not have to prove that the employee would, in fact, have misappropriated funds, only that there is good reason to be concerned that he or she might do so. That is the meaning of the language, cases where retaining the employee may result in loss of funds. . The obvious intent is to remove the potential source of a problem and give management time to fully investigate the situation ("until disposition of the case has been made"). Management did so here.

However, Article 16.7 contains an implied limitation of the length of time that an Emergency Placement can extend before management makes a decision to suspend the employee for more than 30 days or discharge the employee or lift the Emergency Placement. Without some compelling reason for extending the Emergency Placement beyond 30 days, I have consistently held that extending it beyond 30 days is excessive. See, e.g., Case No. C10C-4C-D 11219069 (Arbitrator Randall M. Kelly, 2013). Here, there is nothing in the record to justify extending the Emergency Placement for so long. Accordingly, I find that the Emergency Placement of the Grievant extending beyond thirty-days was excessive and not for just cause. The Grievant is to be returned to work with no loss of seniority. Finally, the Grievant is to be paid five months of lost back pay.

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	§	
	§	Grievant: Class Action
between	§	
	§	Post Office: Baltimore
UNITED STATES POSTAL SERVICE	§	
	§	Case No.: K10V4KC11300812–110635
	§	
AMERICAN POSTAL WORKERS UNION, AFL-CIO	§	
	§	

BEFORE: Irene Donna Thomas, Arbitrator

APPEARANCES:

For the United States Postal Service: Richard M. Norcross, Area Labor Relations Specialist, P.O. Box 929994; Columbia, SC 29292

Witnesses: Thomas E. Elias, Manager Human Resources
Christine Kyer, Tool and Parts Clerk / Shop Steward

For the APWU: Kenneth "Ken" Prinz, National Business Agent, Motor Vehicle Service Division, Eastern Region, 1401 Liberty Place, Sicklerville, NJ 08081

Witnesses: Raymond Scanlon, Shop Steward

Place of hearing: 900 E. Fayette Street; Baltimore, MD

Date of hearing: May 27, 2016

Record closed: June 27, 2016

Date of award: September 26, 2016

Relevant Contract Article(s): 1, 5, 15, 19, 32

Contract Year: 2006 - 2010

AWARD SUMMARY

The grievance is sustained. The employer violated Article 32 of the national agreement when it subcontracted maintenance of vehicles to local contractors without giving due consideration to the five factors outlined in Article 32 of the national agreement. The employer is directed to maximize the compensation each OTDL employee received, up to the contractual maximum of 60 hours per week for the period beginning at the start of the June 2011 fiscal period (as identified by Joint Exhibit #2, p. 24 and ending on June 27, 2016 up to the maximum demonstrated sum that the employer spent on subcontracting services for each year. This payment is for lost wages. The employer is further directed to pay the affected employees interest on these lost wages as allowed under the Back Pay Act. Th employer is further directed to make all employees whole due to the inclusion of this payment as lost wages. To be entitled to a remedy, each employee must have been available to work, i.e., not on annual leave or on an extended sick leave, and must have been on the overtime desired list. Of course, if there was a proven period that the employer did not use contract workers, bargaining unit employees are not entitled to receive compensation for that period.

The employer is also directed to hire 13 VMF employees pursuant to the agreement reached by the parties (Union #2). The employer is directed to begin taking all steps necessary to maintain an adequate hiring register, including the steps directed in ELM 334.32 and 334.33 within the next 60 days.

The employer is directed to cease and desist the practice of subcontracting bargaining unit work without giving due consideration to the five contractual factors stated in Article 32 of the national agreement.

This arbitrator retains jurisdiction of this matter to the extent of questions involving the interpretation and application of this Opinion and Award.

Irene Donna Thomas, Arbitrator

INTRODUCTION

Pursuant to the grievance-arbitration procedures between the United States Postal Service and the American Postal Workers Union, AFL-CIO, the undersigned arbitrator was selected to hear and decide the dispute herein and to render a final and binding Opinion and Award. The union filed this grievance alleging that the employer violated the national agreement when it subcontracted Motor Vehicle Craft work and failed to hire additional employees pursuant to an agreement between the parties.

The arbitration hearing opened before this arbitrator on May 27, 2016, at which time both parties were provided with an opportunity to offer the testimony of sworn witnesses, to make arguments and to submit documentary evidence in support of their respective positions. The parties submitted post-hearing briefs on June 27, 2016. The sworn testimony, submissions, the parties' arguments and post-hearing briefs and submissions were carefully considered in rendering the following Opinion and Award.

ISSUE

The union stated the issue as "did the Postal Service violate the collective bargaining agreement when they subcontracted Motor Vehicle Craft work, and if so, what shall the remedy be?

The employer stated the issue as "Was there a violation of the national agreement when management at the Baltimore VMF contracted out some of the

maintenance of vehicles to local contractors?

After careful consideration of the parties' arguments, the documentary evidence and the sworn testimony, I conclude that the issue to be decided is whether management at the Baltimore VMF violated Articles 32 and 39 of the national agreement when they contracted out maintenance of vehicles to local contractors and refused to hire 13 additional employees as agreed upon by the parties? If so, what should the remedy be?

THE MATERIAL FACTS

It is undisputed that the employer subcontracted bargaining unit work, the maintenance of postal vehicles, to local contractors during the fiscal period represented by the Vehicle Maintenance Cost Report (Report) for June 2011.[1] The Report for the June 2011 period shows that the employer spent $955,510 in subcontracted labor costs for this period.

Beginning on July 26, 2011, the union, by Raymond Scanlon, Shop Steward, pursuant to Article 15 of the national agreement and the parties' past practice, notified the employer, at the Baltimore District Labor Relations Office, that the union intended to file a class action grievance and asked the employer to identify the employer representative to whom the grievance should be directed. The employer did not

[1]In framing the issue statement, the employer admitted that it subcontracted vehicle maintenance bargaining unit work to local contractors.

respond. When the employer did not identify a Step 1 designee in a timely manner, Mr. Scanlon appealed the grievance to Step 2 on August 11, 2011.

In its Step 2 appeal, the union argued that management of the Baltimore VMF, including auxiliaries, violated Articles 1, 3, 5, 15, 19, 32 and 39 of the collective bargaining agreement and applicable handbooks and manuals by "arbitrarily and capriciously contracting out Scheduled maintenance "A" and "B" services, tag repairs, towing, and road calls to various local shops." The union contended that "[t]hese services and repairs are regularly and routinely performed by VMF employees at lower cost." The union further argued, *inter alia*:

> Management at the Baltimore VMF routinely contract work to outside garages while only working limited overtime, leaving jobs vacant, and limiting the operational hours of the VMF's. Parkville and Halethorpe auxiliaries are only open tour 2 and the Main VMF only uses tours 2 and 3. There are currently vacancies that are not being filed. Management claims they can only work limited overtime due to budget restraints while, as of 7/11/2011, spending $955,510 on contract labor.
>
> According to a Letter sent by the Postal Service to Robert Pritchard, Director, MS, the average labor rate for VMF maintenance employee productive work hour, including fringe benefits, service wide cost, and applicable lump sum payments if $42.83. A list of contractors provided by management at the Baltimore VMF show hourly rates of $60.00 up to $95.00 per hour. This is clearly a waste of Postal Service money. The CBA states 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 cost, the work WILL be performed in-house. The Postal Service has established the rate of $42.893 as the average VMF hourly rate and therefore this amount should be used as a comparison to the contractor cost.
>
> The Union contends that management is improperly contracting work in violation of the CBA Articles 1, 3, 5, 19, 32 and 39. Additionally management

> has not followed provisions outlined in the JCIM, ELM, and AS-707A, also by not meeting at step 1. Management is not bargaining in good faith and not trying to settle at the lowest step.

For its remedy, the union requested that the employer fill all vacant positions, hire additional people to handle the work load at the VMF, establish additional tours at all three VMFs as needed to handle the number of vehicles serviced, pay all employees on the overtime desired list for all hours worked less than 60 per week, and eliminate all work being sent to contractors except for the work that the VMF is not capable of performing, and make the union whole. The union added a further remedy that "[t]his grievance is considered ongoing until adjudicated."

After the union appealed to Step 2, the employer did not schedule a Step 2 meeting. Finally, Mr. Scanlon contacted Acting Labor Relations Manager Ronnie Thomas who ultimately met with him at Step 2. The parties agreed to send the grievance back to Step 1 so that the parties could develop the case.

Again, Mr. Scanlon attempted to schedule a Step 1 meeting. Mr. Scanlon submitted a letter to Mr. Larry Watzerman, Manager, Motor Vehicles, requesting a date to meet at Step 1. Mr. Watzerman did not respond to the request. On or about September 6, 2011, the union forwarded another letter to Baltimore Labor Relations stating that management, again, failed to meet with the union at Step 1. Scanlon appealed the grievance to Step 2.

This time, no one from the labor relations department called him with a date for a Step 2 meeting. On September 14, 2011, Mr. Scanlon appealed to Step 3. The Step 3 appeal form states, "After repeated attempts to meet on this grievance, management failed to meet at any level and therefore has raised no defense against the Union's contentions and is barred from raising new arguments." Mr. Thomas E. Elias, the employer's Step 3 designee, met with National Business Agent Ken Prinz at Step 3.

On July 29, 2013, Mr. Elias issued a Step 3 decision denying the grievance after meeting with National Business Agent Ken Prinz. The Step 3 decision states:

> Management argues that the decision to contract out the Schedule A & B services was done contractually and in full consideration of Article 32. All five factors, public interest, efficiency, availability of equipment, and the qualifications of employees were considered carefully.
>
> According to Larry Wasserman, VMF manager, the Baltimore VMF has contracted out a significant portion of vehicle maintenance for over 25 years. Even in the early 1980's when the VMF workforce was about 60% larger than it is today and the vehicle fleet 40% smaller, contracting out of vehicle maintenance and repair was required to keep the fleet safe and meet operational needs and maintenance standards. The union has been aware of this fact.
>
> Clearly it is in the public's interest for the Postal Service to maintain its vehicles in safe operating condition. Beyond our obvious obligation to safely share the road with other drivers, mail delivery requires Postal vehicles to always be available and serviceable. That is the purpose of having them. Our vehicles are domiciled across the district which encompasses hundreds of miles making contract repair as a necessity in some cases.
>
> Cost and efficiency, including maintaining vehicle maintenance schedules are interrelated and are here considered, together.
>
> Headquarters Fleet Management has directed the VMF's to use the hourly rate of $42.24 when calculating the cost of in-house automotive mechanic labor. While this favorably compares with typical commercial rates of $65 and higher (particularly if no Postal overtime is involved), consideration of several other factors is required to make a valid cost comparison. Contractors, for example, charge a set fee for many services, sometimes tied to a vehicle labor time guide, other times matching the prices charged to retail customers for similar services. The LLV labor time guide, for instance, allows about 10.5 to 12 hours for engine replacement. Our contractors do not charge more even if their time exceeds this figure. When a Postal employee performs the same repair, we pay for actual labor time spent on the replacement. A review of VMF work orders will show that with few exceptions, the VMF labor time for an engine replacement is consistently and significantly higher. A similar situation exists for replacement of transmissions and other vehicle components.
>
> Vehicle transportation presents another opportunity for cost savings by

contracting. Vehicles must be transported to and from the vMF either with VMF labor or by paying a commercial towing company. In contract, many contractors absorb these transportation costs with no additional charges to the Postal Service.

There are other cost considerations but I will mention only one more here. Many of our light delivery vehicles are over 20 years old. It is unavoidable that some problems may not be correctly diagnosed and repaired on the first try. Occasionally vehicle components are even damages by improper or negligent repair procedures. This is equally true at the VMF and commercial repair shops. When a contractor fails to repair a vehicle correctly, they refund improper charges or correct the problem at no additional cost. When the VMF makes such a mistake, the Postal Service must pay for the additional labor and parts necessary to correct the problem.

Efficiency also encompasses timely completion of vehicle maintenance services. HQ Postal Fleet Management has developed a program of preventive maintenance that requires vehicle service at scheduled intervals so as to maximize availability of the fleet for delivery of mail or other intended use. The Baltimore District VMFs, like most, do not have sufficient human or capital resources to meet all vehicle maintenance needs, making contracting a necessity.

Availability of equipment must also be considered. While the VMF has most of the tools and equipment required to maintain the delivery fleet, it is not practical or possible for any single vehicle maintenance shop, VMF or commercial, to perform all possible repairs a vehicle may require during its lifetime. Highly specialized equipment required for certain repairs is very rarely found outside of vehicle dealerships. Non-mail-hauling vehicles are a small but significant percentage of the Postal Fleet. Outside contractors, through their exposure to similar vehicles owned by their retail customers, are much better equipped to repair these vehicles than are Postal facilities. Auxiliary VMFs do not have room for front end alignment machines. They also have space and physical limitations that make repairs of certain sizes and configurations of vehicles impossible. Body work and accident repairs exceed the capacity of the main VMF body shop. The list goes on.

Regarding qualifications of employees, the VMF has many skilled mechanics and technicians, and so do our contractors. VMF technicians, working on a limited range of vehicle types and being more familiar with Postal requirements, will have strengths in certain areas and contractors will have strengths in others. Management recognizes this by utilizing VMF labor when it is advantageous to the Postal service and commercial shops when contracting would be more

appropriate.

Finally, the union asks for a rather sweeping remedy. It is tempting to think that the Postal Service could hire its way out of the need for contracting. The reality is that the position requirements and the available labor pool make this highly unlikely. For better or worse, potential Postal mechanics are screed to a relatively high standard. Only a small percentage pass the written test and those who do must then pass a practical, hands-on test to qualify. As the only certified Test 941 Administrator in the Baltimore District for some time now, I personally have administered the Bench Test to over 70 applicants over the last few years. While test protocols preclude me from seeing final test scores, based on personal observation I feel safe in saying that fewer than 1 in 5 of those applicants who take the practical test meet the requirements of the position. Further, when confronted with the low Postal starting salary for this skilled position and probability of working nights and weekends, it is not surprising that many of this small qualified group decline Postal employment. Certainly the recent economic downturn and the difficulties of vehicle manufacturers and dealerships make Postal employment less unattractive right now, but the fact remains that many skilled technicians would not make Postal employment their first choice. Further evidence of this is that in recent years, at least 3 new Baltimore VMF hires resigned from the Postal Service after a short time to work elsewhere.

All arguments contained in Managements Step 2 decision (if filed), including any and all procedural arguments, including timeliness, raised at that step are incorporated and carried forward in the Step 3 decision. Any Step 2 that the USPS did not schedule, meet on, or provide a written decision, the USPS t takes the position that the National Agreement already provides a specific remedy, which is, the Union may appeal to the next level.

The Service concludes the above information is [in] compliancy with the 2010-2015 APWU National Agreement Article 15.2.Step 3(b) which states in relevant part:

> *"Where either party believes the facts and contentions were not adequately addressed or documented at Step 2, the party's representatives shall clearly identify those additional facts and/or contentions for consideration and provide any additional relevant documentation to facilitate discussion and possible resolution at Step 3."*

For the reasons above and the reasons provided in previous steps the grievance

is denied.

The Step 3 decision did not include documents or other evidence to support the employer's position. On August 2, 2013, the union, by Mr. Prinz, submitted additions and corrections. Mr. Prinz stated:

> The American Postal Workers Union rejects your assertion that the Step 3 decision incorporates, automatically includes and carries forward with it the U.S. Postal Service Step 2 decision and the position so stated therein. This U.S. Postal Service assertion is not in compliance with its obligation to specifically state its position in detail within the Step 3 decision. Presumption, inference or osmosis are rejected.
>
> The arguments you included within your Step 3 decision were not raised by you during the Step 3 discussion. They represent new arguments and do not comply with the U.S. Postal Service's obligation to fully state its position during the Step 3 discussion.
>
> The arguments you raised during the Step 3 discussion were not raised by the U.S. Postal Service at Step 2 of the process. The U.S. Postal Service has the contractual obligation – in accordance with Article 15.2.Step 2(d) and Article 15.4A to raise and state all its positions at the Step 2 Meeting so as to facilitate lowest possible grievance step resolution in accordance with Article 15 Section 4A.
>
> The American Postal Workers Union restates its position that the U.S. Postal Service failed/refused to present any evidence in support of any espoused position at either the Step 2 or Step 3 discussion junctures of the grievance procedure.

That same day, August 2, the union demanded arbitration.

DISCUSSION AND ANALYSIS

Article 1.1 of the national agreement provides:

> The Employer recognizes the Union designated below as the exclusive

bargaining representative of all employees in the bargaining unit for which each has been recognized and certified at the national level:

* * * *

American Postal Workers Union, AFL-CIO – Motor Vehicle Employees

* * * *

Article 5, Prohibition of Unilateral Action, of the parties' contract provides that: The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

Article 15.2.Step 1(a) of the national agreement provides, in pertinent part:

When the Union files a class action grievance, Management will designate the appropriate employer representative responsible for handling each complaint.

Article 15.2.Step1(b) of the national agreement provides, in pertinent part:

In any such discussion, the supervisor shall have authority to settle the grievance.

Article 15.2.Step 2(c) provides:

[At Step 2 the] installation head or designee will meet with the steward or a Union representative as expeditiously as possible but no later than seven (7) days following receipt of the Step 2 appeal unless the parties agree upon a later date. . . . The installation head or designee in Step 2 also shall have authority to grant or settle the grievance in whole or in part.

Article 15.2.Step 2(d) provides, in pertinent part:

At the [Step 2] meeting ... [t]he Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon.

Article 15.2.Step 3(b) provides, in pertinent part:

> Where either party believes the facts and contentions were not adequately addressed or documented at Step 2, the party's representatives shall clearly identify those additional facts and/or contentions for consideration and provide any additional relevant documentation to facilitate discussion and possible resolution at Step 3.

Article 15.2.Step 3(b) and (c) of the parties' Joint Contract Interpretation Manual provides, in pertinent part:

> Each party's Step 2 representative shall be responsible for making certain that all relevant facts and contentions have been developed and considered....
>
> The parties reserve the right to supplement the grievance file with correspondence up to and including arbitration.
>
> This language does not alter the existing obligation of either party to fully develop all arguments and evidence at Step 2 or at Step 3. The language recognizes the parties mutual obligation to supplement the record with correspondence regarding postponements, intervention invitations, interim awards, etc. The language is not intended for either party to withhold evidence for submission at the latest stages of the process.

Article 32.1.A, Subcontracting (General Principles) of the national agreement provides that:

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

Under Article 32.1.B, the parties agree that "if the service [under consideration for subcontracting] can be performed at a cost equal or less than that of contract service, when a fair comparison is made of all reasonable costs, the work will be performed in-

house. *See* JCIM, Article 32.1.B. After careful consideration of the national agreement, the parties' JCIM, the sworn testimony, the admissible documentary evidence and the parties' arguments, I conclude that this grievance should be sustained.

As a threshold matter, this arbitrator must address the employer's accusation that this arbitrator "interfered" in the arbitration hearing, thus precluding the employer from properly presenting its case during the hearing.[2] Mr. Norcross, the employer's advocate declared in his post-hearing submission:

> Another issue that raises concern for the Postal Service is the Arbitrator's interference in the hearing. Madam Arbitrator you limited the testimony of Mr. Elias, affecting the ability of the Postal Service to present the case at bar. It does not appear that the Postal Service was granted the full opportunity to present its case. The Union was allowed to enter four documents Union 1, 2, 3, and 4 into the record. I objected to these as they had never been made a part of the record until your acceptance. At the hearing when Tom Elias attempted to answer the questions I asked, you objected acting on behalf of the Union advocate. There were several questions relating to the Step 3 decision which you objected to, which hindered my ability to adequately represent the Postal Service in this hearing. Additionally, you cross examined my second witness acting on behalf of the Union.

These baseless accusations demonstrate a fundamental misunderstanding of elementary, basic principles of the arbitration procedure and process and the arbitrator's role in that process. The "objections" have no merit and, therefore, the

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[2]The accusations raised by the employer must be addressed because they concern this arbitrator's conduct during the hearing and, ultimately, the admissibility of certain evidence accepted into the record by this arbitrator. Otherwise, this arbitrator would have ignored the baseless accusations.

evidentiary rulings stand.

Notably, the employer raised its accusations about this arbitrator failing to give it a fair opportunity to present its case for the first time during its post-hearing submission. At the hearing, the employer did not state that the arbitrator's rulings denied it of a full opportunity to present its case. At no time did the employer assert how this arbitrator's rulings prejudiced its position in any way. If true, these issues should have been raised at the hearing where the arbitrator could have had an opportunity to re-consider her rulings and not in a post-hearing submission in an effort to blind-side the arbitrator and to make a record for some purpose.

The post-hoc accusations smack of nothing more than an attempt to find a scapegoat. In this case, almost one million dollars was at stake for the employer. *See* Union #2. But, at Steps 1 and 2, the employer thumbed its nose at the employer's vast potential liability and ignored its contractual obligation to hold hearings at these Steps. Because Mr. Norcross did not assert his accusations at the arbitration hearing, they have been waived.

Alleged conduct of limiting testimony of Thomas Elias

In this accusation, Mr. Norcross claims that "it *appears* that the employer did not have a full opportunity to present its case" and that this arbitrator "hindered [his] ability to adequately represent the Postal Service in this hearing." Mr. Norcross is

apparently not sure if this arbitrator denied the employer a fair proceeding or not. Mr. Norcross does not even attempt to describe the alleged evidence that this arbitrator allegedly refused to allow him to present at the hearing. Mr. Norcross further claims that this arbitrator "objected acting on behalf of the Union advocate" when Elias attempted to answer the questions that he asked "relating to the Step 3 decision."

An arbitrator is not required to hear all of the evidence proffered by a party. Since due process only requires notice and an opportunity to be heard, all that the arbitrator is required to do is ensure a fair hearing and to give each party an adequate opportunity to present their evidence and argument before reaching a conclusion. Here, the employer had an opportunity to present its evidence. It was only precluded from eliciting testimony from his own witness through the use of leading questions while on direct examination.

At the hearing, this arbitrator did not limit Mr. Elias' testimony because Mr. Elias did not have an independent recollection of the events underlying this grievance. During direct examination with a narrative question, Mr. Elias *initially* testified that he did not recall the specifics of his Step 3 discussions with National Business Agent Ken Prinz about this subcontracting grievance because he met with Mr. Prinz about "hundreds of grievances." He did recall, however, that he met with Mr. Prinz about "a

subcontracting grievance."[3] The only fact that Mr. Elias recalled was that he and Mr. Prinz disagreed about whether the work should have been performed by bargaining unit employees. After identifying the Step 3 decision he claimed to author, Mr. Norcross asked a question:

> Q. Does the Step 3 decision reflect everything that was discussed during the Step 3 meeting?

Mr. Prinz objected to the question as leading.[4] Without waiting for a ruling, Mr. Elias began testifying – suddenly very knowledgeable about his meeting with Mr. Prinz. He testified:

> A. Yes. Everything in the Step 3 decision was discussed with Mr. Prinz.[5]

This arbitrator sustained the objection[6] and reminded Mr. Norcross that he should not use leading questions to elicit testimony from his own witness. After a few more

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[3]Interestingly enough, Mr. Elias could not recite a single fact discussed with Mr. Prinz during the Step 3 meeting but claimed that he was able to recall the specific GATS number of this grievance despite discussing "hundreds of grievances" about subcontracting with Mr. Prinz.

[4]In the employer's post-hearing brief at page 4, Mr. Norcross admitted that it was the *Union* who objected to testimony concerning Mr. Elias' attempt "to testify that everything in the Step 3 decision was discussed at the Step 3 meeting." This fact, however, did not stop Mr. Norcross from inconsistently accusing this arbitrator of "objecting" on behalf of the Union advocate. *See* employer post-hearing brief at page 6.

[5]Mr. Elias' burst of knowledge after hearing the leading question, standing alone, rendered his testimony concerning the Step 3 discussion not credible in the absence of supporting documentary evidence. Also, the union denied discussing the issues stated in the Step 3 decision with Mr. Elias.

[6]It is a part of this arbitrator's responsibility to rule on the parties' objections during the arbitration hearing.

attempts to elicit testimony from Mr. Elias with leading questions, upon the union's sustained objections, and Mr. Norcross' increased frustration, this arbitrator warned Mr. Norcross that continuing to lead his own witness will result in this arbitrator not giving Mr. Elias' testimony much weight. The guidance provided to Mr. Norcross by this arbitrator is standard in arbitration practice and is considered a "best practice" in the field.[7] Moreover, it is important to note that Mr. Norcross never laid the proper foundation for use of the Step 3 decision to refresh the witnesses recollection nor for use of the document as a past recollection recorded. In any event, Mr. Norcross could not elicit testimony from his own witness by using leading questions.

Unsurprisingly, Mr. Norcross does not recite a single, properly framed question that he wanted to ask Mr. Elias about the Step 3 decision or the facts underlying this

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[7]*See* Ariana R. Levinson, Lawyering Skills, Principles and Methods Offer Insight As to Best Practices for Arbitration, 60 Baylor L. Rev. 1, 40 (2008). *The Best Practice: The Parties Should Not be Permitted to Use Leading Questions on Direct Examination.*

> The litigation principles suggest that an effective arbitration procedure should not permit leading questions on direct examination. An effective procedure encourages the witnesses to use narrative to aid the arbitrator to understand the facts. Leading questions instead substitute the advocate's argument for the story of the witness and may sometimes even prevent the arbitrator from hearing relevant and helpful information. Prohibiting leading questions need not unduly delay the procedure. Because the arbitration process is informal, *the arbitrator can simply note to the advocate that leading is occurring and request the advocate to use more open questions. Of course, if the advocate continues to lead, the arbitrator may need to take additional measure,* ***whether in response to the opposition's objections or not.*** *The arbitrator might simply point out that the testimony will be given less weight than had it been provided in narrative form.* This will avoid the time-delay of repeatedly striking the evidence from the transcript, if there is one, or having the counsel rephrase each question.

In other words, "best practices" in arbitrator authorize the arbitrator to "take additional measures regardless of whether the opposition (here, the union) raises an objection.

grievance that this arbitrator did not allow. Instead, Mr. Norcross relies on vague generalities and unsupported accusations in an attempt to denigrate this arbitrator's professional reputation by accusing her of bias and misconduct and to camoflauge the tender of an unprepared witness.

The employer argued that the union's objections to [Elias' testimony about the Step 3 decision] "was not proper because the Union had the opportunity to cross examine the witness." Again, this argument demonstrates a fundamental misunderstanding of the purpose of objections at an arbitration hearing. The purpose of an objection is to *preclude* inadmissible evidence, either testimonial evidence or real, demonstrative or documentary evidence, from being presented to and considered by the arbitrator. Contrary to the employer's post-hearing argument, the purpose of an objection is not to preserve evidence for a party to attempt to challenge the weight it should receive. The failure to object to the admissibility of evidence will result in a waiver–and consideration of the evidence by the arbitrator. Merely cross-examining a witness about objectionable evidence will not preserve a party's rights at the hearing. The union's advocate properly objected to consideration of evidence that the union deemed objectionable. A timely raised objection concerning evidentiary matters requires a ruling from the arbitrator. A party is entitled to know what evidence the arbitrator will use to make her determination.

Arbitrator's alleged cross-examination of employer's second witness

An arbitrator is permitted to ask questions of witnesses. *See, e.g., Carpenter v. Brooks*, 139 N.C. App. 745, 753, 534 S.E.2d 641, 646 (2000). Such questioning, particularly when it seeks to clarify testimony, is proper even if the questions are perceived as hostile–so long as the examination does not prejudice either party. *Id.*

In this case, this arbitrator did not "cross-examine" anyone. During and after the testimony of Ms. Christine Kyer, a Tools and Parts Clerk, this arbitrator either asked Ms. Kyer to repeat her testimony (her low voice while testifying required verification of her actual testimony) or asked questions to clarify her testimony for the purpose of understanding her knowledge of vacancies at the Parkville and Hailthorpe facilities. Mr. Norcross failed to show how this arbitrator "cross-examined" its second witness and, also, has not shown how, even if this arbitrator questioned the witness, the employer's position was prejudiced at the hearing.

Arbitrator's admission of Union Exhibits 1, 2, 3, 4

Mr. Norcross complains that this arbitrator accepted into evidence the above-referenced union exhibits although he objected to their introduction and that these documents "had never been made a part of the record until [my] acceptance."[8] Had the

[8]Union Exhibit 1 is a list of vacancies for the facility. Union Exhibit 2 is the Postal Service's agreement to hire 13 additional positions in Baltimore. Union Exhibit 3 is a vacancy report from WebCOINS dated January 19, 2015. Union Exhibit 4 is a letter signed by Mr. Peter Sgro, dated January 6, 2000 concerning the criteria for performing maintenance work due to use

employer participated in Steps 1 and 2 of the grievance procedure as required under provisions of the national agreement, the documents most likely would have been entered into the record at that time. Step 2 is the time for the parties to fully develop all arguments and evidence. The employer cannot refuse to participate in the negotiated grievance procedure and then cry that it did not receive relevant information until arbitration. In any event, an arbitrator has broad discretion in ruling on the admissibility of evidence, of course, subject to the parties' agreement. Had the employer properly met with the union, it would have received the documents at that time. The employer has not demonstrated that admission of Union Exhibits 1, 2, 3 and 4 prejudiced its position at the hearing. A bald claim of prejudice will not suffice.

In sum, the employer has not shown that the Postal Service did not have a full and fair opportunity to present its case.

Union's Threshold Objection

The union also raised a threshold issue regarding the admissibility of evidence. The union asserted that the new arguments raised in the employer's Step 3 decision should not be considered because the employer did not assert these arguments in the lower steps of the grievance arbitration procedure. Furthermore, the union asserted, "[t]he arguments [the employer] included [in the] Step 3 decision were not raised by

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of the Fleet card.

[the employer] during the Step 3 discussion." The union argued that the Step 3 decision "is no more than hearsay, unsubstantiated by any evidence at anytime during the grievance procedure."

The employer, recognizing the hurdle it faced by not holding Step 1 and 2 meetings, took the position that the national agreement provides a specific remedy for not holding a Step 2 meeting – "the Union may appeal to the next level." In other words, the employer argued that it was not required to participate in Steps 1 and 2 of the grievance procedure because the union could have pursued the grievance to arbitration without its participation in the process. To support this argument, the employer referenced decisions by various arbitrators to the effect that the "only remedy [for management's failure to provide a Step 2 meeting or decision] is for the Union to appeal the grievance to Step 3 or to arbitration (as appropriate)."[9] The employer also asserted that it is permitted to supplement the record at Step 3, despite its failure to participate in Steps 1 and 2, because Article 15.2.Step 3(b) was amended to provide, among other things, that:

> Where either party believes the facts and contentions were not adequately addressed or documented at Step 2, the party's representatives shall clearly identify those additional facts and/or contentions for consideration and provide any additional relevant documentation to facilitate discussion and possible resolution at Step 3.

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[9]C98C4CD01037726 (Arbitrator Michael Wolf); F06C1FC09251283 (Arbitrator Gary L. Connely).

The employer did not present an explanation, valid or otherwise, for its refusal identify a management representative to hear the class action grievance. The employer did not present an explanation for its failure to participate at Steps 1 and 2 of the grievance procedure. The employer did not present an explanation for refusing to participate in the full development of the record at the lower steps of the grievance arbitration procedure. I disagree with the employer's position.

Under Article 15.2.Step 3.(b), the parties may submit "additional" information and/or evidence to facilitate discussions at Step 3. But, this language presupposes that *some* information had already been discussed by the parties. The word "additional" means "more" or "supplementary." To permit the employer to ignore Steps 1 and 2 of the grievance procedure only to make and support a complete argument at Step 3, turns the concept of "additional" on its head. Such an argument cannot be supported under the national agreement, the JCIM or under the national level awards issued by Arbitrators Eischen and Aaron.

Moreover, the parties' JCIM directly undermines the employer's position. The parties clearly and unambiguously explain that the language of Article 15.2.Step 3.(b) and (c) of the national agreement (relied upon management in this case) "does not alter the existing obligation of either party to fully develop all arguments and evidence at Step 2 or at Step 3." The JCIM continues: *"[t]he language is not intended for either party to*

withhold evidence for submission at the latest stages of the process." Thus, the employer's argument cannot withstand scrutiny under the parties' own interpretation of Article 15.2.Step 3.(b). The employer failed to present evidence to show that the parties intended to undermine or eliminate 32 years of postal arbitral precedent. *See* Arbitrator Benjamin Aaron. I take notice after many, many years of arbitration practice with the parties, that many arbitrators, including this one, have held that the employer's failure to present evidence at Step 2 results in a waiver of presentation of the evidence at arbitration.

In *Matter of the Arbitration between USPS and National Postal Mail handlers Union (APWU Intervenor)*, I14MI1C98072898 (2009), Arbitrator Dana Edward Eischen considered the question of whether a Step 2 decision, issued after a grievance had been deemed moved to Step 3 by "dint of Article 15.3.C of the national agreement has "any contractual validity, force or effect" such that a suspension under Article 16.5 could be implemented. In the case before Arbitrator Eischen, the employer informed the grievant that it proposed a fourteen day suspension for alleged misconduct. *Id.* at 7. Under the collective bargaining agreement, implementation of the suspension is tolled until the employer issues a Step 2 decision. *See* Article 16.5.[10] The union (NPMHU)

[10]In the case before Arbitrator Eischen, Article 16.5 read: "If the Union or the employee initiates a timely grievance prior to the effective date of the action and if the grievance is timely appealed to Step 2, the grievant shall not begin to serve the suspension until after the Step 2 decision has been rendered."

timely filed a Step 1 grievance protesting the action. After the employer denied the grievance at Step 1, the union appealed to Step 2. *Id.* The employer failed to schedule a Step 2 meeting within the time limits provided under the national agreement. Thus, the union invoked the "deemed to move" provision of the national agreement (Article 15.3.C) and, also, filed a formal appeal of the grievance to Step 3. *Id.* at 8. After the NPMHU denied the employer's request to remand the case back to Step 2, the employer issued a document labeled "Step 2 Denial." The employer implemented the fourteen day suspension after issuance of the belated Step 2 decision.

After further procedural wrangling, the matter reached Arbitrator Eischen. He stated that the "real" question before him was whether "a belatedly issued Step 2 decision has any contractual validity, force or effect" for the purpose of requiring the grievant to begin serving a fourteen-day suspension under Article 16.5 that had been tolled, pending rendition of the Step 2 decision. Arbitrator Eischen held that the parties did not intend that a belatedly issued Step 2 decision has any validity, force or effect to require implementation of the fourteen-day suspension. In short, Arbitrator Eischen held that it was too late for the employer to implement a fourteen day suspension under Article 16.5 after a grievance has been deemed to move (or has been appealed) to Step 3 of the grievance procedure. *Id.* at 23.

In that case, like here, the Postal Service argued that "[t]he clear and

unambiguous language of the parties' agreement does not prohibit the Postal Service from issuing a Step 2 decision if there has been no Step 2 meeting. Rather, the employer argued, the collective bargaining agreement specifies the single consequence of failing to schedule a step 2 meeting or failing to timely issue step 2 decision--the Union may, after the relevant time periods have expired, move the grievance to the next step of the process."

Arbitrator Eischen rejected this argument. He reasoned:

> Courts and arbitrators routinely recognize that it is proper and fitting to give effect to the manifest intent of contracting parties plainly evidenced in the 'necessary implications' of their express contract language. Such judicious inference of mutual intent founded in the local, reasonable, natural and necessary implications of express contract language is readily distinguishable from improper arbitral rewriting of the Agreement. * * * *
>
> [T]o allow the Postal Service a unilateral 'do-over' of Step 2, after a grievance properly has been progressed to Step 3 under the 'deemed to move' provision of Article 15.3.C of the National Agreement, because of the Postal Service's failure to get the contractually-required Step 2 procedures right the first time, would plainly conflict with the mutual intent of the Parties, as manifested in the plain language and the logical, reasonable and necessary implications of Articles 15.2.Step 2(c), 15.3.C and the last sentence of ¶ 2 of Article 16.5 (formerly 16.4) of the USPS/NPMHU National Agreement.

Applying the reasoning of Arbitrator Eischen's Opinion and Award to this case, I conclude that the necessary implication when a party refuses to participate in a Step 2 meeting is that the party waives the opportunity to raise new evidence and arguments to support its position at Step 3. That party does not have a "do-over" opportunity to

make its full and detailed statement of facts and contractual provisions relied upon.

The fact that the contract does not contain "express language" precluding the employer from asserting new arguments at Step 3 where it refused to schedule or participate in a Step 2 hearing, is not fatal. The necessary implication of the express language, considered with national level arbitral precedent, requires that belated arguments, like belated Step 2 decisions, lack contractual validity, force and effect.

The national agreement requires the parties to make "a full and detailed statement of facts and contractual provisions relied upon" at Step 2. The JCIM explains that it is not intended for the parties to withhold evidence for submission at the latest stages of the [grievance-arbitration] process. Arbitrator Benjamin Aaron, in a national level arbitration award, in *Matter of the Arbitration between USPS and NALC,* NCE11359 (1984), held that the parties are barred from introducing evidence or arguments not presented at the preceding steps of the grievance procedure to support the merits of their case and that this principle must be strictly observed. Arbitrator Aaron reasoned: neither party should have to deal with evidence or argument presented for the first time in an arbitration hearing, which has not been previously considered and for which it has had no time to prepare rebuttal evidence and argument.

In *NALC,* Arbitrator Aaron confronted the union's argument that the employer waived the right to present a "claim" (argument) at arbitration other than its timeliness

argument because the Postal Service did not rely upon other arguments as a defense "at any step of the grievance procedure." *Id.* at 2.

In that case, the employer assigned employee Baich to a fixed Saturday nonwork day in settlement of a religious discrimination complaint filed with the EEOC. But, the Local Memorandum of Understanding provided that: "Non-scheduled days shall be on a rotating basis (except for parcel routes) for all carriers. Carriers will rotate on a weekly basis." Thus, the employer's assignment of Baich to a fixed Saturday nonwork day was contrary to the specific terms of the MOU. Indeed, the employer's assignment of Baich, violated the seniority rights of employee Slavick.

In the grievance procedure, the employer did not tell the union the reason for its assignment of Baich to a fixed Saturday onwork day and the employer did not rely on the religious discrimination settlement as a defense to the contract violation. At the lower steps of the procedure, the employer confined its arguments to the question of whether the grievance was timely filed two years after the employer first assigned Baich to a fixed Saturday nonwork day.

But, when the matter reached arbitration, the employer introduced evidence to explain the reason for Baich's assignment to a fixed nonworkday – settlement of a religious discrimination claim – that Baich had been made to work on Saturdays, despite the fact that his religious beliefs did not permit him to work on that day.

The union protested introduction of this evidence under Article 15 of the national agreement vigorously asserting that because the Postal Service had not disclosed the reason for its assignment of Baich to a nonrotating day off, nor relied upon it as a defense to Slavick's grievance, at any step of the grievance procedure, it was precluded from introducing this evidence at arbitration. Arbitration Aaron held:

> It is now well settled that parties to an arbitration under a National Agreement between the Postal Service and a signatory Union are barred from introducing evidence or arguments not presented at preceding steps of the grievance procedure, and that this principle *must be strictly observed.* The reason for the rule is obvious: neither party should have to deal with evidence or argument presented for the first time in an arbitration hearing, which it has not previously considered and for which it has had no time to prepare rebuttal evidence and argument.

Nonetheless, Arbitrator Aaron permitted introduction of the evidence. He reasoned that the "spirit of the rule ... should not be diminished by excessively technical construction." Significantly, evidence of the reason for the employer's assignment of Baich to the fixed, nonrotating day off was unrelated from the issue then in arbitration: "Was the grievance timely submitted? If so, what is the appropriate remedy?"

Arbitrator Aaron explained,

[a]t the arbitration hearing, the Postal Service explained *by way of background information,* that] nonwork day [in settlement of a religious discrimination claim].

The lesson taught by the national agreement, the JCIM and the Opinion and Awards of national Arbitrators Eischen and Aaron all support the conclusion that when a party,

here the employer, has failed to participate in the Step 2 process, and, thus, failed to make a full and detailed statement of facts and contentions, it is barred from introducing new evidence or new arguments at Step 3 and at arbitration that were not presented at the preceding steps of the grievance procedure. The employer raised new arguments in a Step 3 decision after all opportunities to meet and confer in the grievance procedure has passed – a practice that is explicitly frowned upon by the parties (parties can't withhold evidence for submission at the lastest stages of the process).

Under Article 15.2.Step 2 of the national agreement, the employer must hold a Step 2 hearing. It is also clear that the parties intended for discussions at that Step to clarify and/or narrow the issues for consideration. The parties' JCIM explains that "[e]ach party's Step 2 representative shall be responsible for making certain that all relevant facts and contentions have been developed and considered." When the employer ignores its obligations at Step 2, the intended narrowing of the issues under consideration does not occur. As Arbitrator Eischen observed: "the most basic purpose of the Parties' grievance resolution mechanism–prompt discussion and consideration of issues at informal and earlier stages of the greivance procedure with the goal of resolution short of arbitration–would be frustrated," *Id.* at 18, if the employer were allowed to have a Step 3 "do-over." Although the parties contemplated that they could

"provide *additional* relevant documentation to facilitate discussion and possible resolution at Step 3," the parties did not intend that they would withhold supporting evidence until the "latest stages of the process."

When it refused to meet with the union at Steps 1 and 2 of the grievance-arbitration procedure, the employer refused to meet and deal with the Union's designated agent as stated in Article 1.1 (Union Recognition) of the national agreement it violated Article 5 (Prohibition of Unilateral Action) of the national agreement. The employer's refusal to participate at Step 1 and at Step 2 of the grievance-arbitration process violates their duty under Section 8(d) of the National Labor Relations Act to "meet at reasonable times and confer in good faith with respect to ... any question arising" under the collective bargaining agreement. *See, e.g.*, Article 5, *see also In re Contract Carriers Corp.*, 339 NLRB 851, 852 (2003), *see also Hoffman Air & Filtration Systems*, 316 NLRB 353, 356 (1995)("It is well settled that an employer is obligated ... to meet with the employees' bargaining representative to discuss its grievances and to do so in a sincere effort to resolve them. A pattern of conduct that frustrates the intended operation of the grievance procedure violates this obligation." *See id.* at 357).

As the National Labor Relations Board observed, the practice of meeting between the parties to a collective bargaining relationship is important to constructive dispute resolution and, thus, to labor peace and industrial stability.

> The Act encourages parties to meet face-to-face and engage in dialogue in order to mutually resolve differences. The point is that mutual communication enhances the prospects for labor and management to work out better solutions to problems facing them and thereby achieve more stable relations. The need for face-to-face communication regarding disputes between the parties is heightened where, as in this case, written requests for information have been ignored by one of the parties.

In re Contract Carriers, 339 NLRB at 852. The fact that there is a strong likelihood that the employer's conduct also violates Section 8(d) of the Act provides additional support for the conclusion that the new evidence and new arguments should be excluded from consideration as a party should not benefit from its unfair labor practices.[11]

Prejudice to the union's position is easily demonstrated. In its Step 3 decision, the employer makes numerous general arguments, that the union did not have an opportunity to counter in the grievance procedure. For example, the employer argued:

> Even in the early 1980's when the VMF workforce was abut 60% larger than it is today and the vehicle fleet 40% smaller contracting out of vehicle maintenance and repair was required to keep the fleet safe and meet operational needs and maintenance standards.

The employer did not produce documentary evidence to support this contention. Mr. Elias, the Step 3 decisions' author, claimed to rely upon information from Larry Wasserman, VMF manager, however, Mr. Wasserman was not called to testify in this matter. Similarly, the employer contended:

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[11]Consideration of Section 8(d) of the National Labor Relations Act is authorized under Article 5 of the national agreement, Prohibition of Unilateral Action.

> The LLV labor time guide ... allows about 10.5 to 12 hours for engine replacement. Our contractors do not charge more even if their time exceeds this figure.

The employer did not produce evidence to support this contention. Had the employer met at Steps 1 or 2, it could have introduced the LLV labor time guide, the current contract (subcontractors) for vehicle maintenance and invoices for work performed during the relevant time period. The union was hampered in its ability to challenge this vague, unsupported allegation.

Mr. Elias stated in support of the cost factor:

> When a contractor fails to repair a vehicle correctly, they refund improper charges or correct the problem at no additional cost. When the VMF makes such a mistake, the Postal Service must pay for the additional labor and parts necessary to correct the problem.

Again, the employer did not produce a single document or contract to support this claim. This prejudice militates in favor of excluding the employer's new Step 3 arguments.

Merits Discussion

Article 32.1 of the national agreement provides that the "Employer will give due consideration to public interest, cost, efficiency, availability of equipment, and qualification of employees when evaluating the need to subcontract." The parties' Joint Contract Interpretation Manual (JCIM) affirms this language. Indeed, the JCIM takes the cost consideration one step further. If the service can be performed at a cost equal to

or less than contract service, when a fair comparison is made of all reasonable costs, the work will be performed in-house. JCIM Article 32.1.B.

In a binding, national arbitration award, A8NA0481 ((1981), Arbitrator Richard Mittenthal held that

> These factors [public interest, cost, efficiency, availability of equipment, and qualification of employees] are not weighted. Article [32][Section 1] does not say, for example, that "cost" is more important than "efficiency" or vice-versa. It simply requires that these factors be given "due consideration."
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> 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 ... work. To ignore these factors or to examine them in a cursory fashion in making its decision would be improper. (*Ignoring all factors would involve a lack of "due consideration." Examining them in a cursory fashion might constitute "consideration" but certainly not the "due consideration" contemplated by Paragraph A.") 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....

Arbitrator Mittenthal continued:

> An incorrect decision does not necessarily mean a violation of Paragraph A. Incorrectness does suggest, to some extent at least, a lack of 'due consideration.' But this implication may be overcome by a Management showing that it did in fact give "due consideration" to the several factors in reaching its decision.* [Conversely, a correct decision does not preclude

finding a violation of Paragraph A where the proofs reveal a lack of 'due consideration."] 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.**[[[None of this is inconsistent with Arbitrator Gamser's observation in Case No. AB-NAT-6291 that the contracting out language 'does not go on to provide that if the Employer could undertake the work as efficiently and cheaply with its own employees and its own equipment then it cannot enter the subcontracting arrangement.'].

Therefore, as interpreted by national level arbitrators, under Article 32.1, the employer has an affirmative obligation to give "due consideration" to the five factors listed above. For the cost factor, the employer generally asserts that while the hourly rate of $42.24 for bargaining unit employees compares favorably to the more than $65.00 per hour rate charged by outside contractors, the contractors do not charge for time in excess of LLV labor time guidelines while bargaining unit employees must be paid. Because the employer did not make a full and detailed statement of facts and contractual provisions relied upon at Steps 1 and 2 of the grievance arbitration procedure, it waived the opportunity to make these arguments at Step 3 and at arbitration. Therefore, the employer is unable to counter the union's arguments concerning its application of the Article 32 factors.

But, even if this arbitrator considered the Step 3 decision, the union must still

prevail. For instance, the cost factor requires the employer to determine if the costs for the services being subcontracted can be performed at a cost equal to or less than that of contracted service when a fair comparison is made of all reasonable costs. If the service can be performed at a cost equal or less than the use of bargaining unit employees, the work "will be performed in-house." *See* JCIM Article 31.1.B. Necessarily, this comparison must occur before subcontracting occurs. As stated above, the employer did not identify any specific contractor for which it made the required cost comparison. Vague generalizations are insufficient. The Step 3 decision merely shows that the hourly rate of $42.24 for in-hour service "favorably compares with typical commerial rates of $65 and higher (particularly if no Postal overtime is involved). The employer rejected this favorable factor. The employer is not necessarily required to use bargaining unit employees over contract employees when the employer's cost is less. *See* Mittenthal, A8NA0481 (1981). But, the employer must show that it gave "due consideration" to the costs. The parties agreed that this showing will include an analysis of whether the rate for bargaining unit employees ($42.24) compares favorably with the contractors' rate (between $65.00 and 95.00 per hour).[12] Out of the list of 36 contractors used by the employer, it did not provide a contractor by contractor analysis

[12]The VMF Contractor Rates list, J#2 at 17, generally shows that the hourly rate for the contractors, with few exceptions, i.e., "Bob's Automotive" and "Ray's body works" (in some cases), is less than the rate used for bargaining unit employees.

of why paying the higher rate is more beneficial and more efficient for the employer than the use of bargaining unit employees. Also, the employer did not provide an analysis of transportation costs that it claims represents a cost savings in favor of contracting out bargaining unit work. The employer failed to introduce a single agreement with contractors and failed to identify a single contractor who agreed to absorb additional costs. The Step 3 decision is big on rhetoric and small on identified proof.

In the Step 3 decision, Mr. Elias did not claim to have entered into a Vehicle Maintenance Agreement (VMA) for vehicle maintenance and repair services. Under such an agreement, the employer would be required to follow procedures for order placement, inspection and acceptance of services performed, verification of Forms 4541, preparing and submitting monthly billing summaries for payment, and record keeping, as well as any necessary VMA modification, termination, or dispute resolution activities. *See* Handbook AS-707A. Because the employer cannot show that it gave the cost factor appropriate consideration as required by the collective bargaining agreement and the JCIM, it violated the mandate of Article 32.1.[13]

In addition, the Step 3 decisions shows that management did not give due

[13]A showing that the employer did not give due consideration to even one factor gives rise to a contract violation. *See* Mittenthal: if the cost factor is the only factor upon which the employer relied upon in engaging a contractor, if its assessment is wrong, it would be "almost irresistible that Management had not given 'due consideration' in arriving at its decision."

consideration to other required factors. Regarding the qualifications of employees, for example, Mr. Elias stated:

> [T]he VMF has many skilled mechanics and technicians, and so do our contractors. VMF technicians, working on a limited range of vehicle types and being more familiar with Postal requirements, will have strengths in certain areas and contractors will have strengths in others. *Management recognizes this by utilizing VMF labor when it is advantageous to the Postal service and commercial shops when contracting would be more appropriate.*

But, the employer fails to provide evidence to show how it determined that subcontracting bargaining unit work was "more appropriate" for the period involved in this case. The employer failed to show exactly what work was subcontracted during the relevant period of time and failed to discuss why the admittedly skilled VMF mechanics and technicians were not assigned to perform the work.[14] Furthermore, the employer failed to identify the areas where VMF technicians had limited strengths and the areas where it believed that the contractors had more strengths.

Similarly, Elias stated in the Step 3 decision that he gave consideration to efficiency concerns. Specifically, he stated:

> Efficiency also encompasses timely completion of vehicle maintenance services. HQ Postal Fleet Management has developed a program of preventive maintenance that requires vehicle service at scheduled intervals so as to maximize availability of the fleet for delivery of mail or other intended use. The Baltimore District VMFs, like most, do not have sufficient human or capital resources to meet all vehicle maintenance

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[14]The employer does not deny that it subcontracted bargaining unit work during the period in question.

needs, making contracting a necessity.

This general observation does not meet the employer's duty to give due consideration to efficiency. The employer did not provide evidence of the employer's schedule for vehicle service. The employer did not document the Baltimore District's VMF personnel resources and Elias did not identify the "capital resources" relevant to his consideration. Also, the employer did not provide evidence that it even tried to meet the "timely completion of vehicle maintenance" with bargaining unit employees. In short, the employer failed to prove that it gave due consideration to all five Article 32 factors.

The question, therefore, is what remedy is the bargaining unit entitled to receive due to the employer's contract violation. Mr. Elias' focus on overtime pay in its cost analysis shows that one goal of the employer's subcontracting decision was to limit the amount of overtime paid to bargaining unit employees. The potential loss of overtime or reasonably anticipated work opportunities poses a detriment to bargaining unit employees, even if it is not established with exactness. Had the employer maximized usage of bargaining unit employees to perform the contracted work, the question of exactness would not be presented in this grievance. Because the employer's decision was driven, in part, by concerns over reducing overtime pay, it logically follows that overtime opportunities for bargaining unit employees were limited when the employer

implemented its decision to use contract employees. Overtime opportunities are lost when work which would or could have been performed by the bargaining unit is subcontracted away. Adversely affected bargaining unit employees are entitled to be maximized for overtime during the relevant period.

I. Article 39 violation

Since the early stages of the grievance procedure, the union has vigorously argued that the alleged need for the employer's use of contract services is due to its failure to hire 13 additional employees for the District as agreed upon by the parties. *See* Union #2. Specifically, the union argued that by not filling positions, management created an artificial need to subcontract out bargaining unit work. The union also argued that management "has made many excuses for not filling positions and chooses to use contractors because it's easier than hiring new employees."[15] The use of contract services, where the employer has failed to hire 13 additional employees as required in an agreement between the parties, represents a direct replacement of bargaining unit employees by contractor employees. Contractor employees perform the same work as that performed by bargaining unit employees, namely vehicle maintenance. As Mr. Elias recognized in the Step 3 decision, bargaining unit mechanics "are screened to a

[15]The union also observed that the Employee and Labor Relations Manual, section 334.32 requires management to maintain adequate registers to fill vacant positions and to take necessary actions to open appropriate examinations when the register is exhausted.

relatively high standard." He further declared, albeit without proof, that "fewer than 1 in 5 of those applicants who take the [employer's] practical test meet the requirements of the position." Thus, the employer essentially hires less qualified contract workers to perform the important job of safe vehicle maintenance for the transport of postal service employees. In short, the contract employees are performing the same work for the Postal Service that is performed at the Baltimore District by bargaining unit employees.

The Step 3 decision does not deny that an agreement between the parties required the employer to hire 13 additional employees. The employer argued only that the employer cannot "hire its way out of the need for contracting." Based upon sheer speculation, the employer argued that "the position requirements and the available labor pool make [hiring new employees] highly unlikely." But, the employer has not shown that it made an attempt to hire the 13 additional VMF employees. Ms. Christine Kyer, testified on behalf of the employer. She testified that she was unaware of VMF job vacancies at the Parkville and Hailthorpe facilities. But, in questioning this witness, the employer did not establish that Ms. Kyer was in a position to have knowledge of all job vacancies at these facilities. Moreover, the employer did not establish that Ms. Kyer was aware of the agreement between the parties requiring the hiring of 13 additional VMF employees. Because the union has demonstrated, unchallenged by the employer, that the parties agreed to hire additional employees, because the employer has not hired

the additional employees, there are 13 vacant positions that the employer is required to fill. *See* Article 39.2.A.12.

Remedy

The employer argued that the union's remedy should be limited to the fourteen day period before the union filed the grievance. The employer asserted that this is the appropriate date because the documentation being used by the union is more than 14 days old. The employer's argument is nothing more than a dressed up argument for a zero remedy. For instance, the employer argued:

> [T]here is a fourteen (14) day liability that cannot extend retroactively more than fourteen days prior to initiation of the grievance [AB-NAT-2541 Gamser]. The documentation the Union is using is more than 14 days old. Second, *there is nothing in the file that supports a violation within fourteen days of the filing of the grievance to include either before or after.*

If the grievance is limited to start fourteen days before the union filed the grievance, and there was no violation within fourteen days of the filing of the grievance or even after the filing of the grievance, the union is not entitled to any remedy. Moreover, the employer is cleverly making an arbitrability (timeliness) argument. The time to first assert the arbitrability argument was at Step 2. That time has passed. Accordingly,

AWARD

The grievance is sustained. The employer violated Article 32 of the national agreement when it subcontracted maintenance of vehicles to local contractors without giving due consideration to the five factors outlined in Article 32 of the national agreement. The employer is directed to maximize the compensation each OTDL employee received, up

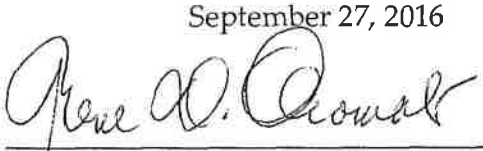
to the contractual maximum of 60 hours per week for the period beginning at the start of the June 2011 fiscal period (as identified by Joint Exhibit #2, p. 24 and ending on June 27, 2016 up to the maximum demonstrated sum that the employer spent on subcontracting services for each year. This payment is for lost wages. The employer is further directed to pay the affected employees interest on these lost wages as allowed under the Back Pay Act. Th employer is further directed to make all employees whole due to the inclusion of this payment as lost wages. To be entitled to a remedy, each employee must have been available to work, i.e., not on annual leave or on an extended sick leave, and must have been on the overtime desired list. Of course, if there was a proven period that the employer did not use contract workers, bargaining unit employees are not entitled to receive compensation for that period.

The employer is also directed to hire 13 VMF employees pursuant to the agreement reached by the parties (Union #2). The employer is directed to begin taking all steps necessary to maintain an adequate hiring register, including the steps directed in ELM 334.32 and 334.33 within the next 60 days.

The employer is directed to cease and desist the practice of subcontracting bargaining unit work without giving due consideration to the five contractual factors stated in Article 32 of the national agreement.

This arbitrator retains jurisdiction of this matter to the extent of questions involving the interpretation and application of this Opinion and Award.

Dated: Brooklyn, New York
September 27, 2016



Irene Donna Thomas, Arbitrator

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	§	
	§	Grievant: Class Action
between	§	
	§	Post Office: Sandston, VA
UNITED STATES POSTAL SERVICE	§	
	§	Case No. K10V1KC14351184--18CWG14
AMERICAN POSTAL WORKERS UNION, AFL-CIO	§	

BEFORE: Irene Donna Thomas, Arbitrator

APPEARANCES:

For the United States Postal Service: Carl A. Bozeman, Labor Relations Specialist, 1801 Brook Road; Richmond, VA 23232–9401.

Witnesses: none

For the APWU: Ken Prinz, National Business Agent, Motor Vehicle Division, Eastern Region, 1401 Liberty Place, Sicklerville, NJ 08081

Witnesses: Sylvia Grooms, President, Local 199
Jerome Crosby, Director of Industrial Relations, Richmond Area Local 199
Marcus Tolliver, Tractor Trailer Operator
William M. Goodall, Craft Director MVS

Place of hearing: 5801 Technology Blvd; Sandston, VA 23150

Date of hearing: July 8, 2016

Date post-hearing briefs received:

Union: August 5, 2016
Employer: August 17, 2016 (rec'd notice that Agency not submitting post-hearing brief)

Date of award: September 12, 2016

Relevant Contract Article(s):

Contract Year: 2010 - 2015

AWARD SUMMARY

The grievance is sustained. The employer violated the national agreement when it first abolished motor vehicle driver positions when the majority of the work assigned to those positions continued to be performed, then purportedly amended that notice of abolishment to require re-posting of all motor vehicle driver positions, without notice to the union and without having a dialogue with the union at least 25 days in advance, and the employer violated the national agreement in the manner in which it "posted" and filled the now available positions. The employer also violated the national agreement by failing to post the names of the "successful bidders" for the positions. Therefore, this arbitrator directs the Postal Service to rescind the duty assignments that were offered to motor vehicle drivers between October 7, 2014 and October 16, 2014, to return the affected motor vehicle operators to their former duty assignments, to pay all affected motor vehicle operators out-of-schedule premium pay from the first day they began the new assignment until the date of payment; and the employer is directed to make all affected motor vehicle drivers whole. This arbitrator retains jurisdiction of this matter in the event that any issue arises concerning the implementation and compliance with this Opinion and Award.

Irene Donna Thomas, Arbitrator

INTRODUCTION

Pursuant to the grievance-arbitration procedures between the United States Postal Service and the American Postal Workers Union, AFL-CIO, the undersigned arbitrator was selected to hear and decide the dispute described herein and to render a final and binding Opinion and Award. The union filed this grievance alleging that the employer violated the national agreement when it abolished and/or re-posted motor vehicle driver jobs and improperly filled the available positions.

This arbitration proceeding held on July 8, 2016 at which time both parties were given an opportunity to offer the testimony of sworn witnesses, to make arguments and to submit documentary evidence in support of their respective positions. The employer's application to submit closing briefs was granted. The arbitrator requested that the employer provide citations, etc. (see below) to support the contention that notice to a union official in his capacity as an employee is sufficient for official notice to the union of employer proposed action. Briefs were to be postmarked not later than August 8, 2016. The union submitted its post-hearing brief on August 5, 2016. The employer did not submit a brief by August 8, 2016. This arbitrator received notice on August 17, 2016 that the employer would "rest on the merits" of its case and, therefore, would not be submitting a post-hearing brief. The sworn testimony, submissions, and the parties' arguments were carefully considered in rendering the following Opinion and Award.

ISSUE

The union stated the issue as "did the Postal Service violate the collective bargaining agreement, Article 39, and LMOU Item 21? If so, what shall the remedy be?"

The employer stated the issue as "Were motor vehicle positions properly posted in accordance with applicable contractual provisions? If not, what shall the remedy be?"

After careful consideration of the parties' arguments and the evidence submitted, I determine that the issue to be decided is whether the employer violated the national agreement and Item 21 of the Local Memorandum of Understanding (LMOU) in the manner in which it abolished, re-posted and filed motor vehicle driver positions between August 2014 and October 2014? If so, what should the remedy be?

THE MATERIAL FACTS

The undisputed facts[1] show that on August 22, 2014, the employer notified 28 employees, all motor vehicle drivers, that the assignments they hold will be abolished effective close of business on September 19, 2014 (pp20 wk 2). The following employees received notice of the abolishments:

William M. Goodall	David L. Bryant	Otho B. Mcmanus
James R. Williams	Marcus M. Tolliver, Jr.	Jack Barnes
John H. Barre	Jeffrey S. Blount	Joel E. Brogden
Stephen Bruno	Stanley O. Dykes	Dorian A. Evans

[1]The undisputed facts are drawn from the documentary evidence presented, as well as the uncontradicted testimony of the union's witnesses, to the extent that the testimony was consistent with the evidence and deemed credible. The employer did not offer witness testimony.

Julian M. Hayes	Everette A. Patterson	Nathan J. Tate
Raymond D. Thomas	Sean L. Randolph	Marvin N. Woodley
Michael P. Adams	Cavin T. Bigger	Daniel M. Booker
Junious O. Brooks	Melvin L. Brown	George L. Lowry
Antonio O. Grace	Robert Gray, Jr.	Howard C. Randolph
Robert E. Saum, Jr.		

Mr. Goodall, in addition to being a Postal Service employee, also served the Local APWU Craft Director for the Motor Vehicle Service. According to the employer, the abolishments were

> ....necessary as your position is no longer authorized as a result of the realignment of routes in the PVS section.

These employees were further informed that unless they were awarded another position through the bidding process, they would become an unassigned regular employee effective September 20, 2014.

By letter dated August 22, 2014, Ms. Sylvia Grooms, President, APWU, Richmond VA Local 199, notified the employer that it was the union's position that the abolishment of Motor Vehicle Operator and Tractor Trailer Operator positions was a violation of Article 39 of the national agreement. According to her testimony, the union's concern was that major changes were taking place with motor vehicle operators and the employer failed to give the union 25 days advance notice of the abolishments and the reasons for them. Ms. Grooms also testified that the employer denied the union an opportunity to provide input before the decisions to abolish or re-post positions was finalized. The union also

challenged the abolishments because the vast majority, if not all, of the work remained to be performed.

By letter dated September 25, 2014, the employer attempted to rescind the abolishment letters and to now give the employees notice that their positions would be reposted. The letter, "Abolishment of Position Notice–AMENDMENT" read: "[t]his letter is to notify you that the notice of abolishment of your position dated August 22, 2014 is hereby amended to a Notice of Reposting of your position. In accordance with Article 39.2.A.3, your position will be reposted by October 5, 2014." The employer's explanation for the reason that the positions would be reposted was identical to the reason provided when they abolished the positions: "[t]he action is necessary as your position is being adjusted as a result of the realignment of routes in the PVS section." Among others, Mr. Goodall received the amended letter on September 29, 2014, about 10 days after the positions were technically abolished according to the notice provide to the drivers under the employer's letter dated August 22, 2014.

On October 7, 2014, the employer posted Tractor Trailer Operator positions and also posted Motor Vehicle Operator positions. The positions posted noted minor changes. For instance, "old" Run 309 was the same as newly posted Run 356. Similarly, "old" run 323 remained the same but was posted as new Run 359. Old Run 324 stayed the same; but it was newly posted as Run 363.

Beginning on October 9, 2014, the employer began calling employees into the office, by seniority, to pick desired, open routes. After the selection, that route was removed from the pool of open positions. Thus, no other employee was permitted to bid on the chosen position. At the end of this "canvassing" process, 10 residual vacancies remained. Management went to the then unassigned drivers, by seniority, who were asked to chose the job they wanted. If the residual vacancy was a less than 40 hour job, but was chosen by a full-time, 40 hours, regular employee, the job became a 40 hour position. There were at least four drivers in this category. As a result of this abolishment / amendment, canvassing process, bargaining unit employees had schedule changes, scheduled days off changed, tour and hours changed. At the end of this process, the employer did not post a list of the successful bidders for the jobs.

As a result of these actions, on November 2, 2014, the union filed a grievance asserting violations of Article 39 of the national agreement and Item 21 of the Local Memorandum of Understanding. The parties met at Step 1 where the employer denied the grievance. On November 21, 2014, the union appealed this grievance to Step 2. For its remedy, the union requested that the employer "[r]escind all duty assignments that took place from October 7, 2014 thru October 16, 2014, and pay all drivers out of schedule pay and make all drivers whole."

By letter dated February 16, 2015, Cheryl Lovelace, a former Labor Relations

Specialist and Step 2 designee in this case, denied the grievance. In general, Ms. Lovelace justified denying the grievance on the grounds that the union "has provided no specific language that management violated any of the Articles nor did it supply the information to back up their allegations." Ms. Lovelace continued, "[t]he union was given the opportunity to get the grievance back to further develop it which would have given him an additional thirty days. But the MVS Craft Director refused. In a contract violation case the burden of proof lies on the shoulders of the Union. The Union has failed to carry its burden to show how the employees were harmed." By letter dated February 23, 2015, Mr. Jerome Crosby, the Director of Industrial Relations, issued "additions and corrections" to the Step 2 decision. Among other things, Mr. Crosby challenged Ms. Lovelace's claim that the union had not presented documentation or statements from PVS drivers to prove that they were canvassed or coerced or to prove that any listed job had been removed from the cycle after a driver selected it. On February 24, 2015, the union appealed the grievance to Step 3. By letter dated April 29, 2015, the employer, by Rodney D. Thomas, Area Labor Relations Specialist, denied the grievance at Step 3. After incorporating the employer's Step 2 arguments into his Step 3 decisiion, Mr. Thomas also essentially denied the grievance based upon a contention that the union failed to support their position with the appropriate documentation and failed to advise "management of the who, what, where, when, and how [the contract was] violated." The employer further argued:

> If the union does not prove to management where the violation is with documentation, is management supposed to support the unions case for them, No. The union has not provided any documentation to support their arguments. Management states in their Step 2 denial that the union has not provided any statements to support any of their allegations. What is ironic about this grievance is the Step 2 designee states no statements were provided but when I get the grievance at Step 3, there are multiple statements in the file. If the union had these statements earlier in the grievance process, why did they not get into the file at Step 1 and/or Step 2?....[2]

By letter dated May 5, 2015, National Business Agent Kenneth Prinz submitted additions and corrections to the Step 3 decision. Mr. Prinz rejected the employer's incorporation of its Step 2 arguments. Also, Mr. Prinz pointed out that the national agreement permits the parties to provide documentation at Step 3 "to facilitate resolution at Step 3." On May 11, 2015, the union demanded arbitration.

DISCUSSION AND ANALYSIS

In a contract grievance, as opposed to a disciplinary grievance, the union bears the burden of proving to the arbitrator–the trier of fact--that the employer violated the collective bargaining agreement. The union will meet this burden if it proves its claim by a preponderance of the evidence. After careful consideration of the national agreement,

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[2]At the arbitration hearing, the employer objected to the union's introduction of employee statements asserting that they were not "part of his file." But, Mr. Thomas, the employer's Step 3 representative, laid that theory to rest. He fully admitted that when he received the file at Step 3, the employee statements were included. This arbitrator will not speculate as to what happened to the statements between Step 3 and receipt of the file by the arbitration advocate. But, the employer's Step 3 decision supports the union's position that these documents had been provided to the employer during the grievance-arbitration procedure.

the JCIM, the sworn testimony, the documentary evidence and the parties' arguments, I conclude that this grievance should be sustained.

First, the union argues that the employer violated Item 21 of the LMOU because it did not give the Local President, Sylvia Grooms, 25 days advance notice that, among other things, numerous duty assignments will be posted or re-posted before drivers bid on the positions. The employer, through its cross-examination of Ms. Grooms, implied that because the language of Item 21 (LMOU) does not explicitly say that the "President" will be notified in advance of posting numerous duty assignments, etc., notice to any union official will suffice. Thus, the employer implicitly argued that when it gave notice to employee William M. Goodall that *his* job would be abolished as of September 19, 2014, the *union* knew or should have known that all motor vehicle driver positions would be abolished.[3] The question, therefore, is whether notice of employer action to an employee in his role as an employee, is legitimate notice to the union when required under the collective bargaining agreement (or LMOU) simply because the employee also happens to be a union official. I say no.

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[3]At the arbitration hearing the employer supported this implied argument by introducing the notice, letter of abolishment of position, dated August 22, 2014, that was provided to Mr. Goodall. Although this arbitrator was skeptical about this theory, she gave the employer's advocate an opportunity to submit arbitral cases, citations, case law, Step 4 decisions or any other proof that it is an accepted practice in postal labor relations that notice to an employee, who also serves as a union official is legitimate notice to the union within the meaning of the national agreement and the Local MOU. The employer's advocate did not submit the requested citation, nor did the employer submit a post-hearing brief in support of its position.

While it is *possible* for the union to waive the right to receive contractual notice of proposed action by permitting employees who also happen to be union representatives to receive notices on the union's behalf, I will not infer such a waiver lightly. The burden of proving such a waiver occurred is on the employer. Here, there is no basis for imputing employee Goodall's knowledge to the union. First, the employer did not point this arbitrator to express language in the collective bargaining agreement that would permit the inference that knowledge of proposed action to Goodall is knowledge to the union. There is no evidence to show that Mr. Goodall had been authorized to act as the Local Union's agent with respect to notice of position abolishments, the posting of non-traditional full-time assignments, the re-posting of duty assignments or any other matter required to be discussed with "the Local Union." Indeed, the collective bargaining agreement rejects this inference. Article 17.1 provides that stewards "may be designated for the purpose of investigating, presenting and adjusting grievances." To be officially designated to serve, the union must certify to the employer, in writing, the steward/official so designated. Article 17.2.A, B. Union officials, including shop stewards, thus, do not possess authority to process grievances or to sign settlement agreements unless authorized by the Local Union, *in writing*. Under these negotiated procedures, serving an employee with notice of intended employer action, even if the employee is a union official, simply cannot serve as "notice to the union" where there is no evidence that before the employer handed the

documents to the employee/union official, the appropriate union official had already authorized the employee to act on behalf of the union. Under the parties' collective bargaining agreement, the employer cannot claim confusion about whether certain elected local union officials possess the required authority to act on the local union's behalf. This arbitrator takes notice of the challenges the employer has raised during arbitration proceedings asserting that grievances are void and invalid where the union official filing the grievance was not authorized to do so. Here, Ms. Grooms, the Local Union President, did not certify William Goodall as a steward/officer for the purpose of investigating, processing or adjusting this grievance until October 14, 2014 – about two months after Mr. Goodall received his first abolishment letter. Thus, even if Mr. Goodall received the required notice, he would not have been contractually authorized to do anything about it.

Similarly, the employer did not introduce evidence to show that a waiver of notice to the local union (i.e., serving any union official notice or documents rather than providing notification to the Local Union President) may be implied from the parties' bargaining history, past practice or a combination of both. Indeed, there is no evidence that the union held Mr. Goodall out as possessing authority to act as the union's agent in the absence of the required, contractual certification. There is no evidence that the union acquiesced in a past practice (i.e., through an established practice or custom, an established condition of

employment, a longstanding practice occurring with regularity and frequency over an extended period of time so that the employer could reasonably view that providing notice to a shop steward or some other union official would reasonably equate to the contractually required notice to the union.). *Union* notice within the meaning of the parties' contract occurs when the contractually designated union official, including local union officials, receive the required contractual notification. *See, e.g., In Re Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 355 (2003)(holding that there is no basis for imputing knowledge to the union of notice given to a shop steward to the union where there was no evidence to show that the steward had been authorized to act as the Union's agent with respect to the receipt of notice), *see also, California Portland Cement Co.*, 330 NLRB 144 (1999)(holding that the employer did not have a reasonable basis for believing that a shop steward had authority to act as the union's agent with respect to receipt of notice of proposed unilateral changes where there was no contractual basis for attributing such authority to the shop steward and where the union did not hold the shop steward out as possessing such authority).

In any event, the notice to Goodall on August 22, 2014 was too late. The LMOU required 25 days *advance notice.* Because the employee notices were handed out on August 22, 2014, the lastest date by which the employer could have notified the union and engaged in a dialogue about the abolishments was July 28, 2014. Handing employee Goodall a

Notice of Abolishment on August 22, 2014 would have been a contract violation–even if he had authority to speak for the union. In sum, therefore, I find that the employer violated Item 21 of the LMOU when it did not give the Local Union President 25 days advance notice that management had determined that the MVS section would be impacted and that numerous duty assignments will be posted or re-posted.

Significantly, Item 21 of the LMOU explains why the advance notice is required: it is "essential for meaningful Union dialogues with management." The requirement for a meaningful Union dialogue with management 25 days *before* management has determined to impact a section or to post or re-post numerous duty assignments is a condition precedent to the employer's final decision to disrupt the bargaining unit by impacting sections and by posting or re-posting numerous duty assignment, among other things. The necessary implication, and requirement, of Item 21.1 of the LMOU, then, is that the employer will give open-mined, bonafide consideration to the union's input. This arbitrator refuses to view the "Union dialogue with management" requirement as a meaningless exercise, in which the closed-mined employer goes through the motions of seeking union input as a sham prerequisite to announcing a preconceived result. It is presumed that skilled, knowledgeable individuals for both parties negotiated the contract language involved in this case. It is presumed, therefore, that the parties intended the "Union dialogue with management" language to have some effect and a particular

purpose. The employer did not explain the justification asserted in the abolishment and amended letters and the union did not have an opportunity to explore the claim with information requests or by questioning management officials during a dialogue. Under Item 21.1, therefore, management's action is void if it made a final determination to impact sections of the bargaining unit and to post or re-post numerous duty assignments before it had the contractually required dialogue with the union.

The union's next argument is that management should not have abolished the positions in the first place. Mr. Goodall testified that if the employer is abolishing jobs, this means that the majority of the work should not be performed. In his September 3, 2014 information request to the employer, Mr. Goodall requested information about "[w]hat are the stops or places or work that will no longer be performed due to abolishment of MVS assignments." The employer did not provide this evidence to the union.[4] In this case, there is no evidence that the employer determined to reduce the number of occupied duty assignments. Indeed, the union argued, uncontested, that for several runs, only the Run # changed. For instance, Run 309 became Run 356 with no changes. Run 323 became run 359 with no changes in the duty assignment. Run 324 became Run 363 with no changes in the duty assignment. Run 332 became Run 362 with no changes in the duty assignment.

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[4]After receiving a response to his Request for Information, Mr. Goodall wrote: "Information ask[ed] for is incomplete. Wasn't given stop or places or work that will no longer be performed due to abolishment of MVS assignments."

Run 330 was a full-time regular duty assignment, but without explanation, the employer made this a NTFT run. *See* Pat McGee Manager Fleet Operations – Memorandum dated October 1, 1993 ("The following procedures must be used to abolish duty assignments when no longer warranted: document the lack of need for the assignment; notify the individual in the duty assignment as well as the local union offiical of the plans and reason to abolish the assignment; and give the effective date. On the effective date, *the majority of work in the duty assignment should disappear and the employee becomes an unassigned regular subject to terms of the collective bargaining agreement."); see also* JCIM, Article 39.1.C.8 ("Example of valid Reason for Abolishment: On the effective date of the abolishment, the majority of the work assigned to that duty assignment would no longer be performed."). Run 118 was posted for bid with only a 45 minute change in the starting time and posted as Run 150. *See* Article 39.2.A.4 ("No assignment will be posted because of change in starting time unless the change exceeds two hours."). The union also asserted, unchallenged, that Run 263 was posted with a starting time of 3:15 a.m. for the entire seven days. But, after the bidding took place, the starting times were changed to 1:00 a.m. on Saturday, 3:15 a.m. from Wednesday through Friday, and 4:00 a.m. on Sundays.[5]

The union asserted that management's intent and action was to "double the number of "Non Traditional Full-Time Duty (NTFT) assignment[s] from six (6) to twelve (12)." The

[5]The union argued that the 1:00 a.m. time is a tour 1 time for a tour 2 run, which really begins at 4:00 a.m.

Memorandum of Understanding (MOU) between the USPS and the APWU re "Non-Traditional Full-Time (NTFT) Duty Assignments" provides, among other things, that "[v]acant traditional FTR duty assignments can be posted as non-traditional full-time assignments, after notice to [the] Local Union President and opportunity for input, where operationally necessary. For MVS duty assignments, this notice will also be provided to the local MVS Craft Director." In this case, it is undisputed that the employer posted traditional FTR duty assignments as NTFT (less than 40 hour) positions without seeking input from the Local Union President or the MVS Craft Director. As explained, *supra*, the union's input is a condition precedent to the traditional FTR positions being posted as NTFT positions. In the absence of evidence showing that the employer gave the union an opportunity to provide the required input, I find that the employer violated the national agreement and the Local MOU Item 21 by posting NTFT positions without having a dialogue with the union before doing so.

Next, the union attacked the manner in which the positions were abolished, posted and, also, selected. It is undisputed that the employer abolished 28 positions. Under the national agreement, an abolishment only occurs when the employer determines to reduce the number of occupied duty assignments in an established section and/or installation. The national agreement, Article 39.2.A.2-4 addresses the circumstances under which a duty assignment may be reposted: Article 39.2.A.2 (off days); Article 39.2.A.3 (sufficient change

of duties or assignments); and 39.2.A.4 change in starting time (subject to Article 30 negotiations). These conditions are not present in this case.

Even if this arbitrator were to exclude the abolishment letter from the analysis, assume (without deciding) that the employer's stated reason for the re-posted positions was legitimate and focus on the re-posted positions only, another contract violation is exposed: the employer utilized an improper method for filling the re-posted positions.[6] Under the national agreement, after a position has been posted, drivers are entitled to bid for all posted jobs during the applicable period on a standard bid form, Form 1717, or otherwise in writing. It is undisputed that this process did not occur nor were the affected drivers given an opportunity to bid on every available job.

According to first-hand, union witnesses, Marcus Tolliver, Tractor Trailer Operator, and William Goodall, the following procedure was utilized for selecting new positions after the abolishments took place. The employees were called into the MVS office by a

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[6]In response to the employer's contention that it took this action due to the realignment of routes in the PVS section, the union contended that the local union never, at any time, requested an annual bid. The union further argued based on a Step 4 decision (Q10C4QC14256865) that management could not force the permitted annual bidding process by virtue of a "Zero Base audit." As argued by the union, without contradiction by the employer, the parties agreed that in accordance with article 39.2.A.6 and the Joint Contract Interpretation manual regarding the annual bid process, the union is the sole party to request that all Full-Time Regular Motor Vehicle Operation assignments be posted. Although the employer's excuse, that the action was necessary because the drivers' position were "no longer authorized as a result of the realignment of routes in the PVS section," sounds suspiciously like the employer re-posted the positions due to a Zero Base audit, I do not rely on this argument to find a contract violation in this case because it is unclear to me that a Zero Base audit is what the employer meant as I was not provided with evidence concerning the purpose, scope and the results of a Zero Base audit.

supervisor and were told to select a position from what was left "in the book." Mr. Tolliver testified that when he went into the MVS office, he saw an assignment still in the book. He chose that position. But, the supervisor informed him that that position had been selected by someone who was absent that day. So, he looked into the book and selected a different position. Mr. Tolliver was not provided with more than one Form 1717, Bid for Preferred Assignment, to apply for all jobs in which he had an interest nor was he given an opportunity to otherwise bid on additional positions in writing. After he selected a position from the book, he was handed one Form 1717 to fill out for that job (position # 71170707).

Similarly, Mr. Goodall testified that the supervisor called drivers into the MVS Office by seniority. The drivers were to look at all the routes and then pick the route he wanted. After a driver selected a route, it was removed from the "pool" so no one else could bid on it. This is NOT the posting procedure outlined in the national agreement, Article 39.2.A nor is it the contractual method for identifying the successful bidder as required by Article 39.2.E. Under 39.2.E, within 10 days after the closing date for the position, "the installation head *shall* post a notice stating the successful bidder and his seniority date." (emphasis added). According to the undisputed testimony of Mr. Tolliver and Mr. Goodall, the required posting of the successful bidder never happened.

Moreover, the undisputed record shows that not all affected drivers were given an

opportunity to bid or vie for every available position. Mr. Goodall credibly testified that he was "left out" of the canvassing process, "period." Also, Mr. Tolliver testified that after his initial selection of a position, he later realized that he was not working a 40-hour run. Ultimately, the employer changed the run to now reflect 40 hours, but the fact is that this is not the position that Mr. Tolliver bid on. Other affected drivers, with more seniority, may have been interested in and bid for that position with the increased number of hours involved. Also, employee Raymond Thomas approached Mr. Tolliver (a shop steward) complaining that a junior employee, Joe Brooks, was working a job that he wanted to bid on. When Thomas was led to the assignment book, the job Brooks was later awarded was less than 40 hours. Because Mr. Thomas wanted to maintain his 40 hour run schedule, he selected a different position. He was not told that he could select the position and that management would increase the number of hours for him. Then, Mr. Brooks came along, picked the less than 40 hour run and management adjusted the number of hours worked on the run to 40. Also, Mr. Tolliver testified that two additional drivers Robert C. Arrigoni and Thaddeus V. Tennessee were among those who selected residual vacancies that were less than 40-hours; but they were made 40 hour positions after these employees selected the job – without them being posted for bid to all drivers.[7]

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[7]Union Exhibit #1, does not indicate that Arrigoni and Tennessee received abolishment letters. But, Union Exhibit #5 (pp. 3, 31) shows that these employees were handed an amended abolishment of position notice.

In sum, the entire abolishing, posting and bidding process was corrupt. Additionally, the employer did not present any justifiable evidence in the grievance procedure or at arbitration to challenge the union's prima facie showing that the posting and re-posting of driver duty assignments served a purpose other than to impermissibly increase the number of NTFT duty assignments.

The record shows that the employer simply ignored the clear and unambiguous language of the national agreement and the LMOU Item 21 when abolishing, posting and filling motor vehicle driver positions. The employer failed to give the union the required advanced notice, the employer failed to give the union an opportunity to provide contractually mandated input, the employer improperly abolished positions that were not changed, the employer abolished duty assignments where the majority of the work assigned to that duty assignment continued to be performed after the abolishment, the employer denied employees an opportunity to bid on all jobs that were available but, rather, canvassed employees for their preference, and the employer changed positions from those with a run less than 40 hours to a FTR, 40 hour, run, without posting or even recanvassing employees after the change. The contract violations in this case are significant. The large *number* of contract violations involved in this action indicates that the employer engaged in a calculated attempt to undermine the union's presence and its officials in the workplace. The employer's actions impermissibly set the stage for further

attempts to ignore, bypass or undermine the union and to ignore and undermine explicit contract language when abolishing and/or re-posting positions. In a contract where the parties agreed that the employer will not engage in unilateral action, Article 5, this is unacceptable.

Finally, it bears noting that the union argued that the employer posted the "new" duty assignments for nine days instead of the contractually mandated 10 days. The evidence shows that the employer posted the positions on October 7, 2014. The closing date for the postings was October 16, 2014. In the absence of evidence from the union (who bore the burden of proof), to show that a different method of calculating days should be applied, I disagree that the employer ended the posting period too early. From and including October 7, 2014 through and including October 16, 2014 is ten (10) days. Employees could bid on the positions on October 7 and on October 16. Therefore, I hold that the employer did not violate the national agreement, in particular Article 39.2.C by posting the duty assignments for this period.[8]

As for the appropriate remedy, the union made an express make-whole remedy: the union requested that the duty assignments posted from October 7 - 16, 2014 be "rescinded" and that all drivers receive out of schedule pay and to be made whole. Article 19 of the

[8]For instance, the period could be calculated by starting day one on October 8, 2014. But, because employees were eligible to bid for the position on October 7, 2014, I conclude, in the absence of evidence to the contrary, that the national agreement contemplated that the "first day" would be the day that employees are entitled to bid for the position and the "last day" is the final day that employees are entitled to bid for the position, here, October 16, 2014.

national agreement incorporates the employer's handbooks and manuals into the collective bargaining agreement, so long as those documents are not inconsistent with the national agreement. One such Manual is the Employee and Labor Relations Manual. Section 434.6 of the ELM concerns "Out of Schedule Premium." Section 434.611 provides:

> Out-of-schedule premium is paid to eligible full-time bargaining unit employees for time worked outside of and instead of their regularly scheduled workday or workweek when employees work on a temporary schedule at the request of management.

After careful consideration of the circumstances surrounding this case, I find that out of schedule premium pay is entirely appropriate for all motor vehicle drivers adversely affected by the employer's unilateral decision to abolish and then re-post motor vehicle driver positions.

As a threshold matter, it cannot be disputed that payment of out-of-schedule pay corresponds to the harm suffered. The *employer* promulgated this rule recognizing that when an employee, at management's request, works outside of his regularly scheduled workday or workweek, that employee is entitled to out-of-schedule premium. The question, then, is whether the motor vehicle drivers involved in this matter worked outside of their regularly scheduled workday or workweek *at management's request.* I find that they did.

Under the terms of the national agreement and the Local Memorandum of Understanding, the employer's ability to significantly impact the bargaining unit by

abolishing or even re-posting jobs is limited. For instance, the employer cannot abolish positions unless "the majority of the work assigned to that duty assignment would no longer be performed." JCIM, Article 39.1.C.8. This language, undoubtedly, was intended to maintain the integrity of the bargaining unit. Also, the employer cannot simply re-post an employee's position unless certain changes have been proposed, i.e., off days, change of duties or assignment, or certain changes in starting times.

In this case, the employer unilaterally and intentionally abolished positions, re-posted positions and improperly filled positions in violation of edicts laid down in the national agreement and the LMOU. To add insult to injury, the employer failed to discuss the matter with local union officials as required by the LMOU. This conduct, particularly the unilateral action, in this arbitrator's opinion, meets the requirement for "at the request of management" as required for payment of out-of-schedule premium. It is undisputed that the employees involved worked outside of and instead of their regularly scheduled workday and/or workweek after being directed to select a different position "from the book." Management did not explain the reason nor the urgency for ignoring the union and the contractually negotiated procedures for abolishing and/or posting and re-posting positions. Instead, the employer's Step 2 and 3 designees simply claimed that the union failed to *prove* to the employer that a contract violation occurred.

For instance, in response to the union's argument that the positions were not

properly posted, the employer's Step 2 designee responded: "where are the statements from the drivers that the jobs were posted in unofficial locations with pertinent information covered up." In response to the union's allegation that drivers were "coerced" to bid on vacant jobs, the employer stated, "[a]gain where are the statements from a driver that was coerced?" The Step 2 designee further stated that the union did not "supply the information to back up their allegations."

The employer's Step 3 designee took it one step further. In response to the Step 3 meeting, the employer's advocate asked theoretical questions: "Did the union not provide this information to management, did the union have these statements written and back dated, or did the union pull these grievances from another similar grievance. It is peculiar that the statements show up at Step 3 but not at the earlier Steps of the grievance procedure where management could have addressed them."[9] The employer's Step 3 designee also questioned whether the union met its burden or proof:

> "[a] careful examination of all the evidence and arguments in the case at bar clearly demonstrates that the union has not met their burden. They have failed to support their position with the appropriate documentation and advised management of the who, what, where, when, and how violated. If the union does not *prove to management* where the violation is with documentation, is management supposed to support the unions case for them, No. The union has not provided any documentation to support their arguments."

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[9]The undisputed evidence shows that the union submitted the employee statements as early as Step 1 of the grievance procedure.

The employer's response at Steps 2 and 3 demonstrate a recurring theme: instead of presenting evidence and exchanging positions at Steps 2 and 3, as required by the national agreement,[10] the employer's representatives assume the role of trier of fact. Of course, the roles of advocate and trier of fact are different. The role of an advocate is to establish by evidence the requisite degree of belief (i.e., preponderance of the evidence) about a relevant fact. The role of the trier of fact is to make determinations of fact. The parties did not anticipate that the employer representatives would sit back at grievance Step meetings and act as triers of fact by making a determination about the facts. The parties chose arbitration as the method to be used to determine whether certain facts have been proved. The explicit language of the national agreement shows that the parties anticipated that their representatives would fully participate in the grievance process with an eye toward *resolving* the dispute through the *exchange* of evidence and arguments. *See* note 9, *supra.* Why is this discussion relevant? In this case, even when confronted with knowledge of the union's requested remedy, the employer never offered a whit of evidence to disprove the

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[10]*See, e.g., JCIM,* Article 15.2.Step 2(c): "*Both* parties are required to state in detail the evidence and contract provisions relied upon to support their positions."; Article 15.2.Step 3(b) and (c): "Each party's Step 2 representative shall be responsible for making certain that all relevant facts and contentions have been developed and considered. Where either party believes the facts and contentions were not adequately addressed or documented at Step 2, the party's representatives shall clearly identify those additional facts and/or contentions for consideration and provide any additional relevant documentation to facilitate discussion and possible resolution at Step 3. In addition, where the parties' representatives mutually agree that relevant facts or contentions were not adequately developed at Step 2, they may jointly remand the grievance to the Step 2 level for full development of the facts and further consideration."

union's theory – that out-of-schedule premium pay is an appropriate remedy because the motor vehicle drivers were working different jobs *at management's request.*

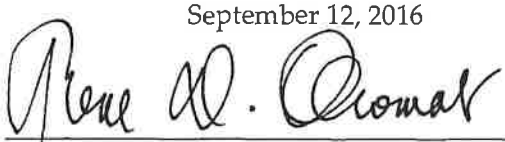
In sum, because the evidence submitted by the union *prima facie* supports several contract violations, because the employer has not submitted evidence to show or to imply that its conduct was authorized by the national agreement, and because the employer's unilateral action resulted in the motor vehicle drivers working temporarily outside of and instead of their regularly scheduled workday or workweek at management's request, I must find that the union has shown that the requirements for payment of out-of-schedule premium payments have been met. Accordingly,

AWARD

The grievance is sustained. The employer violated the national agreement when it first abolished motor vehicle driver positions when the majority of the work assigned to those positions continued to be performed, then purportedly amended that notice of abolishment to require re-posting of all motor vehicle driver positions, without notice to the union and without having a dialogue with the union at least 25 days in advance, and the employer violated the national agreement in the manner in which it "posted" and filled the now available positions. The employer also violated the national agreement by failing to post the names of the "successful bidders" for the positions. Therefore, this arbitrator directs the Postal Service to rescind the duty assignments that were offered to motor vehicle drivers between October 7, 2014 and October 16, 2014, to return the affected motor vehicle operators to their former duty assignments, to pay all affected motor vehicle

operators out-of-schedule premium pay from the first day they began the new assignment until the date of payment; and the employer is directed to make all affected motor vehicle drivers whole. This arbitrator retains jurisdiction of this matter in the event that any issue arises concerning the implementation and compliance with this Opinion and Award.

Dated: Brooklyn, New York
September 12, 2016



Irene Donna Thomas, Arbitrator