REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	**GRIEVANT:** Class Action
between	**POST OFFICE:** West Palm Beach
UNITED STATES POSTAL SERVICE	
and	**USPS Case No.:** H06T-1H-C 08374323
AMERICAN POSTAL WORKERS UNION, AFL-CIO	**APWU Case No.:** 30608068

BEFORE: Andrew M. Strongin, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Susan Haywood, Labor Relations Specialist

For the Union: Larry Nienow, National Arbitration Advocate

Place of Hearing: 3200 Summit Blvd, West Palm Beach, FL 33416

Date of Hearing: March 18, 2010

Date Record Closed: March 18, 2010

Date of Award: May 10, 2010

Relevant Contract Provision: Article 32

Contract Year: 2006

Type of Grievance: Contract

Award Summary:

The Service admits that it failed to give due consideration to the five factors of Article 32.1.A of the National Agreement, and that a make-whole award is appropriate. Given the Service's repeated and continuous failure to provide relevant remedial information to the Union up to and including the date of hearing, and the lack of evidence that such information can be provided at this late juncture, the remedy shall be measured by the only currently available evidence, which is the Maintenance Manager's estimate of the subcontractor's labor cost, as contained in his belated Article 32 analysis.

Andrew M. Strongin, Arbitrator

This grievance protests the subcontracting of the disassembly, transport, and installation of a Low Cost Tray Sorter from Cincinnati, Ohio to the West Palm Beach P&DC in 2008. The Union contends that the work was subcontracted without the prerequisite "due consideration" of the five factors of Article 32.1.A of the National Agreement, and asks that all affected employees be made whole.

The subcontract was awarded effective August 21, 2008, and the Service did not conduct its Article 32 "due consideration" until September 24, 2008, one month after the subcontract's effective date. Maintenance Manager Kenneth R. Goodrich, who conducted the Article 32 analysis, reportedly advises that he was not aware of the equipment relocation until after the subcontract was awarded, and, consequently, that he performed his analysis after the subcontract was awarded. The Service thus admits that, "there is no question that the Postal Service violated the National Agreement in that management failed to give due consideration to the Article 32 elements prior to making the decision to subcontract." Postal Service Opening Statement (emphasis in original). The parties stipulate, therefore, that the only issue to be decided in this proceeding is that of appropriate make-whole remedy for the admitted violation.

In requesting a make-whole remedy, the Union emphasizes that it timely sought from the Service, but even to date has not been provided, information relevant to the cost of the subcontract and the number of hours worked by the subcontractor's employees. Based on the Service's failure to provide the requested information, the Union argues that the appropriate measure for a make-whole remedy is the only evidence that exists in the record, which is the Service's own estimate of the labor cost as set forth in Goodrich's belated Article 32

analysis, or the lump sum of $91,580.00, to be divided between all affected employees.

The Service acknowledges that a make-whole monetary remedy is appropriate, but argues that affected employees are not entitled to be paid for more than 60 hours per service week in the time period they were available to perform the disputed work, which is the most that they would have been entitled to work under the Agreement. The Service argues, too, that the subcontractor ultimately performed the work in significantly less time than the Maintenance Manager estimated, so that payment of the amount sought by the Union would constitute a windfall.

Ordinarily, a make-whole remedy in a subcontracting case would turn not upon the estimated labor cost of a subcontract, but instead on some measure of actual damages. Arbitrators differ over the question whether such actual damages should be measured, for example, by the subcontractor's labor cost or by the number of hours devoted by the subcontractor to bargaining unit work, whether at straight time or overtime rates. In cases where evidence of actual damage is not available or is difficult to discern, it is not uncommon for questions of remedy to be returned to the parties for settlement. *See, e.g.*, Case No. H7C-NA-C 36 (Mittenthal 1993) ("It may not be easy to construct a money remedy or to identify the injured employees. But the parties have been confronted in the past by remedy problems every bit as complicated as this one and they have been able through hard work and imagination to fine a mutually acceptable solution.").

This case, however, is not an ordinary case. The Union requested cost information relating to the disputed subcontract in September and October 2008. In its October 8, 2008, grievance, the Union again requested relevant information, and sought a remedy measured either by the "appropriate overtime rate for all

hours worked by the contractor," or "if no hours are available pay the APWU designated employees the price of the contract." The Union repeated those information and remedial requests in its Step 2 grievance dated October 9, 2008. To date, the Union has not yet been supplied with the information it requested, notwithstanding the fact that the Service knew the Union to be concerned about an inability to establish the hours worked by the subcontractor's employees for purposes of computing an appropriate make-whole award. At hearing, which convened on March 18, 2010, nearly 18 months after the filing of the Step 1 grievance and the Union's initial request for information relevant to establishing a sound basis for a make-whole remedy, the Service still was not able to produce any cost information other than the Maintenance Manager's estimate of the labor cost ($91,580.00), and the appreciably higher total cost of the contract ($178,300.00). The Service's advocate did assert that the subcontractor ultimately performed the work more quickly than Goodrich estimated in his Article 32 analysis, but there is no evidence to support that assertion. Upon questioning of the advocates by the Arbitrator, it appears that the parties agree that the information the Union has been seeking will be difficult to obtain, if it can be obtained at all, and that they have not been able to reach a mutually agreeable resolution to the problem.

Appropriate respect for the proper functioning of the grievance procedure generally, and the process for requesting and providing relevant information specifically, counsels in favor of an award of the estimated labor costs ($91,580.00) to be divided among all affected employees. The Service's desire to limit the amount of the make-whole award is understandable, but the Service cites no contractual authority or arbitral precedent for limiting the award to the difference between the hours worked by bargaining unit employees during the time of the subcontracting, and the total hours they could have been required or allowed

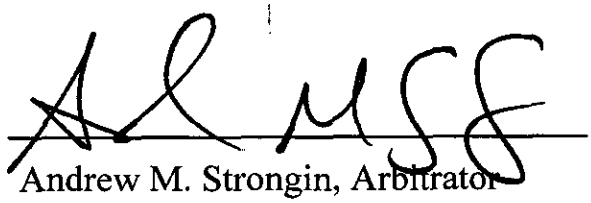
to work under the Agreement at that time. The Arbitrator rejects as inadequate that proposed measure of damages. Full employment of available employees generally is not a defense to subcontracting violations under the parties' Agreement and related arbitral precedent with which the Arbitrator is familiar, and it bears noting that such a limitation on a make-whole remedy would permit the Service to violate Article 32.1 with virtual impunity in any facility where employees are fully occupied.

The typical measure for subcontracting violations, as noted, is actual damages. The best evidence of actual damages, in light of the Union's particular remedial request, would be an accounting of the actual hours devoted by the subcontractor's employees to the disputed work. That information presumably was available to the Service, but was not made available to the Union despite repeated requests dating back almost 18 months. If the Service attempted to obtain that information, there is no evidence in this record either to prove it, or that it could be obtained now, at this late juncture. So far as this record shows, the Service has been content to rely on the labor cost estimate of the Maintenance Manager, rather than to concern itself with the Union's request for potentially more accurate information that ultimately might have proved less costly to the Service, and despite the clear requirements of Article 31.3 of the Agreement, which requires the Service, upon request, to furnish to the Union all relevant information necessary for the enforcement of the Agreement. There is no reason to conclude, on this record, that the missing evidence will be forthcoming now, and it is to be observed that the parties already have had almost 18 months to attempt to settle what the Service now confesses was a violation of Article 32.1.A. To date, the parties have not been able to fashion a mutually acceptable remedy for the violation, leaving the Arbitrator to conclude that a remand will be unlikely to result in a mutually

acceptable resolution. Accordingly, the Arbitrator concludes that a remand will be unhelpful to the parties' efforts finally to resolve this matter.

DECISION

The grievance is sustained. Grievants shall be made whole for their losses, measured by an award of $91,580.00 to be divided among all affected employees. The Arbitrator retains jurisdiction to resolve any questions that may arise over application or interpretation of the remedial provisions of this Award.



Andrew M. Strongin, Arbitrator

Takoma Park, Maryland