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Subject: FW: Article 32 – Substantial Material Errors in Article 32 Worksheet (Plant Equipmen
Date: Mon, Feb 25, 2013 7:30 am

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Sent: 2/25/2013 5:23 AM
To: gkloepfer@apwu.org
Subject: Article 32 – Substantial Material Errors in Article 32 Worksheet (Plant Equipmen

MAINTENANCE@WORK

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Article 32 – Substantial Material Errors in Article 32 Worksheet(Plant Equipment)

This is a summary of Regular Panel Arbitrator **Kathrn Durham** in case **G06T-1G-C-10235947** regarding the Postal Service's decision to subcontract the removal of the Ventilation Filtration System. The arbitrator sustained the Union's grievance, she found a number of material errors contained in the Article 32.1.A worksheet compelled a finding that Management violated Article 32 of the National Agreement when it decided to contract the removal of the VFS unit without giving due consideration to the five factors set forth in Article 32.1.A.

The Union challenged the Postal Service's Article 32 consideration and submitted a written response stating its objections. Included with its objection was the assertion that bargaining unit employees could perform the work. The Union noted Management may only subcontract bargaining unit work after "giv[ing] due consideration to public interest, cost, efficiency, availability of equipment, and qualification of employees," as set forth in Article 32.1.A. It also submitted the 1981 National award of Arbitrator Richard Mittenthal, which held that Management must give good faith "due consideration" to each of those five factors, rather than evaluating them in a "cursory fashion." (Case Number H8C-NA-C-25). The Union took issue with Management's 32.1.A analysis, specifically noting management relied on erroneous assumptions and information in making the decision to contract out the VFS removal. First, as set forth in Mr. Lohr's March 16, 2010 response, it points out that Management's cost analysis erroneously relied on hourly rates for maintenance employees that included the cost of benefits applied on an hourly basis. Benefits, it argues, are a fixed cost and should not be figured into hourly rates for overtime pay. The Union also contended that Management's cost analysis erroneously assumed the work would require 4 employees 24 hours each, despite Mr. Lohr's urging that two employees could do the job in 16 hours. The third party contractor, it argues, performed the work using 2 employees for a total of 32 hours each, which is substantially less than Management's estimate of man-hours. The Union next took issue with Management's analysis

regarding availability of equipment. The third party contractor had to rent a large fork lift to perform the work, just as management's Article 32,1.A analysis stated the bargaining unit would have to do. Third, the Union maintained that Management's analysis of qualification of employees - which is the only part of the analysis that mentions safety as a consideration - was premised on the erroneous assumption that the VFS structure to be removed weighed 5,000 pounds. In fact, the record shows that the VFS weighed half that amount.

The arbitrator sustained the Union's grievance; in so doing she properly ruled:

> It seems, then, that while "due consideration" is not a defined term, Arbitrator Mittethal has set forth the following factors that an arbitrator should consider in evaluating a claim under Article 32.1.A: whether Management ignored any or all of the five factors; whether Management's consideration of the five factors was "cursory"; and whether Management's analysis was based on calculations or assumptions that are proved to have been incorrect (with the understanding that some incorrectness is acceptable, but greater incorrectness implies lack of due Consideration. Ignoring all factors would involve a lack of "due consideration." Examining them in a cursory fashion might constitute "consideration" but certainty not the "due consideration" contemplated by Paragraph A. . . Here, it is clear that Management conducted a 32.1.A analysis in a sincere, deliberate fashion. Management gave considerable thought to each of the five factors. Her analysis was clearly not cursory. **However, the Union correctly asserts that Management's analysis incorporated a number of significant errors . . . management's cost analysis relied improperly on inflated hourly rates for maintenance personnel. The Union was correct that the hourly rates should not have included any consideration of benefits, which are a fixed cost regardless of what work bargaining unit employees are assigned to do or whether they are assigned overtime. . .** There is no basis for the arbitrator in this case to disagree with Management's ultimate decision. **However, Arbitrator Mittenthal cautioned that incorrectness can suggest lack of due consideration. A minor error or two would not necessarily require a finding of a violation of Article 32. Here, however, there are many errors, and they are significant. Most significantly, Management's primary concern, safety of postal employees, was premised on an error regarding the weight of the VFS. This level of incorrectness more than suggests an improper process.** The appropriate remedy is the maintenance employees should be compensated for the overtime hours that they could have worked if the VFS removal had been assigned to their craft.

Gary Kloepfer
Assistant Director
Maintenance Division
American Postal Workers Union, AFL-CIO

REGULAR ARBITRATION
BETWEEN

UNITED STATES POSTAL SERVICE	)	CLASS ACTION
and	)	G06T-1G-C 10235947
	)	M10LK11
AMERICAN POSTAL WORKERS UNION, AFL-CIO	)	LAKELAND, FL P&DC

Before: Kathryn Durham, JDPC, ARBITRATOR

Appearances:
For the USPS: Joe Homolash, Labor Relations Specialist
For the APWU: John Gearhard, National Business Agent

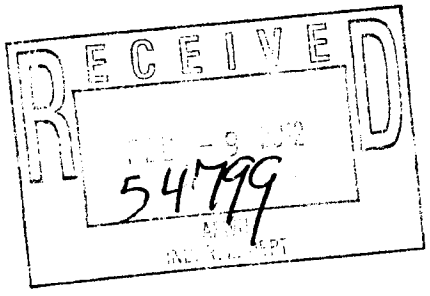
Date of Hearing: September 9, 2011
Briefs Postmarked: October 21, 2011
Date of Decision: November 30, 2011
Location of Hearing: Lakeland, FL
Contract Term: 2006-11

AWARD SUMMARY

The grievance is sustained. The number of material errors contained in the Article 32.1.A worksheet compel a finding that Management violated Article 32 of the National Agreement when it decided to contract the removal of the VFS unit from the Lakeland P&DC without giving due consideration to the five factors set forth in Article 32.1.A.

Kathryn Durham

Kathryn Durham, JDPC



I. ISSUE

Did Management violate Article 32 of the National Agreement when it subcontracted the removal of the Ventilation Filtration System in the Lakeland P&DC, and if so what shall be the appropriate remedy?

II. RELEVANT CONTRACT PROVISIONS

Article 3
Management Rights

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

A. To direct employees of the Employer in the performance of official duties;

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

C. To maintain the efficiency of the operations entrusted to it;

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

Article 32
Subcontracting

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

III. FACTS/POSITIONS OF THE PARTIES

In late 2009, the Postal Service decided to dismantle and remove the Ventilation Filtration System ("VFS") in the Lakeland P&DC. The VFS was a 9x18-foot, box-like structure that sat in the middle of the workroom floor on a 7-foot tall platform. Before the dismantling work was to take place, all of the wiring and ducts had been disconnected. The work involved disassembling the VFS structure, lowering it to the floor, and moving it outside onto a loading dock for shipping.

Once Management decided to remove the VFS, Plant Manager Switzer approached Bob Lohr, Maintenance Craft Director at the Lakeland P&DC, for

input as to whether the work should be contracted out as opposed to assigned to the Maintenance craft. Mr. Lohr responded in writing to SMO David Styer on December 22, 2009, urging that maintenance personnel could perform the work at issue. He specifically stated that he estimated it would take 2 maintenance employees 16 hours to dismantle the VFS and prepare it for shipping. He acknowledged that the work would require renting a large forklift.

Lily Huynh, Lakeland P&DC Maintenance Manager, performed an Article 32 Review on March 16, 2010, in order to decide whether to assign the VFS removal work to the maintenance craft or to subcontract it to a third party. The Article 32 Review assessed the five factors set forth in Article 32.1 as follows:

A) **Public Interest:** There is the opportunity to create goodwill by using outside vendors to perform work in this case. Subcontracting the project avoids the negative impact to the maintenance staff's ability to complete routine maintenance and address performance issues critical to mail service. It would be in the public's interest to do this as quickly and efficiently as possible in order to ensure continued uninterrupted mail service to our customers.

B) **Cost:** In order to meet schedules, the use of postal maintenance technicians would involve overtime payments. Based on the installation information, it takes three to four people to complete this task. The removal is estimated to take two (2) Mail Processing Equipment Mechanics and two (2) Maintenance Mechanics approximately 24 hours each to remove and package the VFS system. This equates to 48 hours at $51.59 for the MPSs (48 X $51.59 = $2,444.32) and 48 hours at $48.20 for the MM (48 X $48.20 = $2,313.60). The total labor costs are $2,444.32 plus $2,313.60 = $4,757.92. The Vendor estimated labor costs for this project is approximately $5.964.00. The approximate cost for renting a forklift large enough to handle this project will be $1,605.00. The representative at the rental company suggests that a job requiring this type of forklift, possibly be done by a certified contractor. He stated "lifting something with that amount of weight at that height could turn over quickly."

C) **Efficiency:** Contracting of the work provides the skills and experience along with necessary equipment and training needed to perform this project in a safe, timely manner with no impact on current operations and the Lakeland P&DC.

D) **Availability of Equipment:** The Lakeland P&DC Maintenance Dept would have to rent the necessary equipment to remove and pack for shipping of the VFS equipment.

E) **Qualifications of Employees:** The VFS move is not considered a routine maintenance activity. The USPS maintenance employees are qualified to perform this work. The in-house bargaining unit maintenance employees are skilled in the maintenance of MPE. Our local employees were not trained for the safe de-installation procedures of a large, heavy piece of equipment such as the VFS. The vendor has qualified, skilled and experienced employees who perform this type of relocation as a regular function of their jobs and can perform this in a safe and efficient manner.

After consulting with Plant Manager Dan Switzer, Ms. Huynh decided to subcontract the work.

Upon receiving Ms. Huynh's Article 32 Review, Maintenance Craft Director Bob Lohr responded in writing to dispute her analysis. He re-asserted his belief that bargaining unit employees could perform the work, and set out his own analysis of the Article 32.1 factors as follows:

A) Public Interest: I feel that it is much more important to maintain the morale of the postal employees who would feel cheated if you contracted out their work. In this day and age the postal service has greatly reduced the amount of overtime that is made available to its employees contracting out work that they should be doing is a slap in the face. There would not be negative impact on the normal performance of the maintenance employees routine maintenance work assignments since this would be done on overtime and without this project work the employees would not be here anyway. Failure to contract would not adversely affect the public opinion since the public has no idea this work is being done in the first place.

B) Cost: The pay rates you have used in your calculations do not accurately reflect the cost to the USPS for their services. You cite a pay rate of $51.59 per hour for MPE mechanics and $48.20 for maintenance mechanics. I think that your rate might possibly include a charge for all benefits which the USPS is already paying for whether the employees perform this removal or not. More accurate figures would be the current overtime rate for level 7 MM's at a maximum of $39.12 per hour and level 9 MPE's at a maximum of $41.14 per hour. I also feel that it would only take 2 employees approximately 16 hours to perform this removal. These figures then provide a more accurate cost comparison of:

2 Level 9 MPE's @ $41.14 per hour X 16 hours each = $1316.48

Even if it took them 3 days the cost would only be $1974.72

This is far less than the contractor price of $5964.00 for a savings of between $3990.00 and $4648.00. It makes no sense what so ever to spend about $4000.00 to take work away from our employees.

C) Efficiency: Completion of this project by current maintenance employees on overtime would have no impact on the normal operations of the maintenance department of the Lakeland P&DC. Any disruption to the mail operations would be the same as those incurred by a contractor. If you are thinking of the timeline for completion your predecessor should have done this job back in December when you knew it needed to be done and there was no rush.

D) Availability of Equipment: Yes, the Lakeland P&DC would have to rent a fork lift of sufficient size to perform this work but a contractor would also be renting one and then passing along the cost to the USPS or if they owned one and were willing to ship it here they would bill the USPS for its use.

E) You have proposed having 4 employees perform this work and I feel that having 4 employees working on a piece of equipment that is only approximately 18 X 9 feet would be a hazardous working environment. The employees would be tripping over each other. I know it was before you got here, but we do have employees who are experienced in removing large, heavy pieces of equipment. We only used 4 employees when we removed and shipped the 2 LSM machines and those were in excess of 70 feet x 6 feet and were two tiers high having a total hight [sic] of approximately 10-11 feet which is a similar hight [sic] to the VFS. We also have experience moving equipment such as the 775 and 881 Flat sorters around this building and we recently removed the OCR and the LMLM.

Management went ahead with its decision to contract out the VFS removal. In the end, it paid a third party vendor, The Siebold Company Inc., $18,749.00 to disassemble and remove the VFS. Despite the Union's request for an itemized statement of the costs of the removal, the only documentation Management provided was the total contract award.

The Union filed a grievance, alleging violation of Article 32.

Union Position

The Union notes that Management may only subcontract bargaining unit work after "giv[ing] due consideration to public interest, cost, efficiency, availability of equipment, and qualification of employees," as set forth in Article 32.1.A. It also

submits the 1981 National award of Arbitrator Richard Mittenthal, which held that Management must give good faith "due consideration" to each of those five factors, rather than evaluating them in a "cursory fashion." Case No. H8C-NA-C 25.

The Union takes issue with Management's 32.1.A analysis, specifically noting that Ms. Huynh and Mr. Switzer relied on erroneous assumptions and information in making the decision to contract out the VFS removal. First, as set forth in Mr. Lohr's March 16, 2010 response, it points out that Management's cost analysis erroneously relied on hourly rates for maintenance employees that included the cost of benefits applied on an hourly basis. Benefits, it argues, are a fixed cost and should not be figured into hourly rates for overtime pay.

The Union also contends that Management's cost analysis erroneously assumed the work would require 4 employees 24 hours each, despite Mr. Lohr's urging that two employees could do the job in 16 hours. The third party contractor, it argues, performed the work using 2 employees for a total of 32 hours each, which is substantially less than Management's estimate of man-hours.

The Union next takes issue with Management's analysis regarding availability of equipment. The third party contractor had to rent a large fork lift to perform the work, just as Ms. Huynh's 32.1.A analysis stated the bargaining unit would have to do.

Third, the Union maintains that Management's analysis of qualification of employees – which is the only part of the analysis that mentions safety as a consideration – was premised on the erroneous assumption that the VFS structure to be removed weighed 5,000 pounds. In fact, the record shows that the VFS weighed half that amount.

In addition to these specific erroneous assumptions, the Union again argues, as Maintenance Craft Director Lohr did in his response, that Management ignored the fact that maintenance craft employees had experience moving large, heavy equipment, and were qualified to do the VFS removal. Management, it contends, did not present any evidence to prove that maintenance personnel were unqualified to perform the work.

As a remedy, the Union requests a cease-and-desist order and monetary damages in the form of either (a) payment to the senior ODL ET-10 and the senior MPE 09 at Lakeland P&DC 16 hours of overtime pay each; or (b) payment to the local Union in the amount of the award that was paid to the Siebold Company on the contract, minus the cost of fork lift rental and shipping.

Management Position

Management argues that the Union has failed to satisfy its burden of proof. It

contends that, while Article 32 requires it to "give due consideration" to the enumerated factors, numerous National level decisions have held that Management is never obligated to decide against subcontracting, regardless of the outcome of such "due consideration" – its obligation is limited to the appropriate consideration of the factors.

In the end, Management urges, Article 3 gives it the exclusive right to "determine the methods, means, and personnel" by which the work of the Postal Service is conducted. It is entitled to contract out work even when it would be cost-effective to assign it to the bargaining unit.

Here, Management claims, the evidence shows that it gave due consideration to the Article 32.1.A factors. After such consideration, Ms. Huynh determined that it was both safer and more cost effective to hire professional contractors to do the work. Specifically, according to Ms. Huynh and Mr. Switzer, the safety of postal employees was of primary concern, due to the size and weight of the equipment, and the fact that it had to be lifted and lowered in order to be removed.

The fact that it was more expensive to contract out the work, Management contends, is not the determinative factor. Instead, it argues that safety of all employees at the Lakeland P&DC was its primary concern.

Management points to Mr. Switzer's testimony that he did not believe that maintenance craft employees at the P&DC had the relevant experience to remove the VFS, because they have never removed a VFS unit before. Other equipment, it argues, does not compare to the VFS, which is heavy and awkward and sits on an elevated platform. The Union did not substantiate that maintenance employees had the requisite skills and experience to do the work at issue.

Management also contends that local maintenance employees could not have put their work on hold in order to perform the VFS removal without interrupting postal operations. It maintains that the removal of the VFS was time-sensitive, and needed to be done immediately and quickly.

Finally, as stated in the 32.1.A analysis, using a third party contractor allowed Management to take advantage of the contractor's insurance, in case any injuries or damage occurred. Due to the size and weight of the VFS unit, the risk of injury or damage was high, and Management would have had to absorb those costs if removal by bargaining unit employees resulted in any accidents.

IV. FINDINGS

Management correctly points out that, when deciding whether to subcontract, it is the *process* of analyzing the five 32.1.A factors that is contractually required, not any particular outcome. Article 32 requires that Management employ a process

that gives "due consideration" to the five factors. As Arbitrator Richard Mittenthal held:

> Unfortunately, the words "due consideration" are not defined in the National Agreement. Their significance, however, seems clear. They mean that the Postal Service must take into account the five factors mentioned in Paragraph A in determining whether or not to contract out surface transportation work. To ignore these factors or to examine them in a cursory fashion in making its decision would be improper.[1] To consider other factors, not found in Paragraph A, would be equally improper. The Postal Service must, in short, make a good faith attempt to evaluate the need for contracting out in terms of the contractual factors. Anything less would fall short of "due consideration."
>
> Thus, the Postal Service's obligation relates more to the process by which it arrives at a decision than to the decision itself. An incorrect decision does not necessarily mean a violation of Paragraph A. Incorrectness does suggest, to some extent at least, a lack of "due consideration." But this implication may be overcome by Management showing that it did in fact give "due consideration" to the several factors in reaching its decision.[2] 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.

Case No. A8-NA-0481 (1981).

It seems, then, that while "due consideration" is not a defined term, Arbitrator Mittethal has set forth the following factors that an arbitrator should consider in evaluating a claim under Article 32.1.A: whether Management ignored any or all of the five factors; whether Management's consideration of the five factors was "cursory"; and whether Management's analysis was based on calculations or assumptions that are proved to have been incorrect (with the understanding that some incorrectness is acceptable, but greater incorrectness implies lack of due

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[1] 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.

[2] Conversely, a correct decision does not preclude finding a violation of Paragraph A where the proofs reveal a lack of "due consideration."

consideration).

According to Arbitrator Mittenthal, the arbitrator is not to second-guess Management's ultimate decision. A "correct" decision can still fail Article 32.1.A if Management did not follow the correct process in reaching that decision. An "incorrect" decision is permissible, so long as Management gave "due consideration" to the five factors during the process.

Here, it is clear that Management conducted a 32.1.A analysis in a sincere, deliberate fashion. Ms. Huynh gave considerable thought to each of the five factors. Her analysis was clearly not cursory.

However, the Union correctly asserts that Management's analysis incorporated a number of significant errors.

Cost Analysis: First, Ms. Huynh's cost analysis relied improperly on inflated hourly rates for maintenance personnel. Mr. Lohr is correct that the hourly rates should not have included any consideration of benefits, which are a fixed cost regardless of what work bargaining unit employees are assigned to do or whether they are assigned overtime.

Second, Management's cost analysis also assumed that the VFS removal would require 4 maintenance employees to work 24 hours each. Ms. Huynh testified that this was her estimation, but how she decided on those figures is entirely unsubstantiated by the record. Certainly Mr. Lohr – whose input and expertise Management specifically requested on this point – did not support her assumptions.

A third discrepancy in the cost analysis pertains to Ms. Huynh's representation of the estimated labor costs for a third party to perform the work. The 32.1.A Review says that the third party labor costs would be $5,964.00. However, the proposal sent to Ms. Huynh by The Siebold Company just two days after she performed the 32.1.A Review shows a total bid for the removal of $11,821.32. Management represented that this proposal included about $1,600 for fork lift rental, but did not have evidence of any other non-labor costs that would have been included. It did not account for the remaining $4,257.32 discrepancy between the "estimated labor costs" cited by Ms. Huynh and the vendor's overall proposal.

Fourth, the cost analysis mentions that the representative of the rental company Ms. Huynh spoke to regarding a fork lift suggested hiring a certified contractor based on the weight of the equipment being moved. However, the Step B decision, written by Mr. Switzer, makes it clear that the rental agent gave that advice based on the representation that the equipment weighed 5,000 pounds, not 2,500 pounds as Management concedes is the correct figure.

Available Equipment: Fifth, the 32.1.A Review mentions that doing the work in-house would require renting "necessary equipment." Other than a fork lift, there is no evidence of what other equipment would have needed to be rented. Management acknowledged that the third party was also including fork lift rental as part of its proposal.

Qualification of Employees: Finally, and most importantly, Management's safety concern was premised, at least in part, on the erroneous assumption that the VFS unit weight 5,000 pounds, when in fact it weighed 2,500 pounds. Mr. Switzer admitted that error at the hearing, but urged that his concern about safety would not have changed based on the difference in his estimation of weight. He stated that 2,500 pounds is still too large and heavy for maintenance personnel to perform the work safely. The record is clear, however, that Mr. Switzer's point was never raised prior to arbitration. Thus, it is inadmissible new argument.

Management stresses that concern about safety was the primary reason it chose to contract the work to a third party. There is no reason to doubt the sincerity of its position. Moreover, it is impossible for the undersigned to second-guess the validity of the safety concern. Whether maintenance employees could have safely removed the VFS unit is hypothetical, and is not something that can be proved or disproved. That is why an Article 32 analysis does not hinge on the arbitrator agreeing or disagreeing with Management's decision, but rather on the process it used to reach that decision.

There is no basis for the arbitrator in this case to disagree with Management's ultimate decision. However, Arbitrator Mittenthal cautioned that incorrectness can suggest lack of due consideration. A minor error or two would not necessarily require a finding of a violation of Article 32. Here, however, there are many errors, and they are significant. Most significantly, Management's primary concern, safety of postal employees, was premised on an error regarding the weight of the VFS. This level of incorrectness more than suggests an improper process.

This is a very close case. Management's Article 32.1.A review was not cursory or in performed in bad faith. All five factors were given consideration. However, the factors cannot be deemed to have been considered duly, because of the various material errors. These limited and specific facts compel a conclusion that Management failed to comply with the requirements of Section 32.1.A.

The appropriate remedy is that the Lakeland P&DC maintenance employees should be compensated for the overtime hours that they could have worked if the VFS removal had been assigned to their craft. According to the Union's projections, it should have taken two maintenance employees 16 hours each to perform the work. All 16 hours should be calculated as overtime, based on Management's representation that the maintenance employees at the Lakeland P&DC were all working 40 hours per week on regular assignments at that time.

V. AWARD

The grievance is sustained. Management violated Article 32 of the National Agreement when it subcontracted the removal of the VFS unit from the Lakeland P&DC without giving due consideration to the five factors set forth in Article 32.1.A.

Management is thus ordered to pay to the Union 16 hours of overtime pay for two Level 9 MPEs at the rate of $41.14 per hour. The Union is to identify the employees who would have been eligible to perform the work and distribute the award accordingly.

Kathryn Durham

Kathryn Durham, JDPC, Arbitrator