REGULAR ARBITRATION PANEL

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

Before: Harry N. MacLean, Arbitrator

Appearances

For the Union: Christine Pruitt, National Business Agent

For the Postal Service: Nels Truelson, Labor Relations Specialist

Place of Hearing: Omaha, Nebraska

Date of Hearing: August 8, 2018

Date of Award: September 30, 2018

I. INTRODUCTION

This matter was heard on August 8, 2018. It involves the question of the appropriate remedy for an award issued by the Arbitrator on December 3, 2015, in which the Arbitrator held that the Service had violated Article 32 when it failed to give notice to the APWU of its intention to subcontract and to give due consideration to the five factors listed in Article 32.1 prior to subcontracting. To date, the Service has not issued a remedy for the violations.

The remedy was argued by the advocates at the hearing. No testimony was offered by either party. The parties submitted briefs on August 31, 2018.

II. FACTS

In July 1997, the Service entered into contract with New Breed (contractor) to operate a Mail Consolidation Center (MCC) in a building leased by the contractor and using machinery owned mainly by the contractor. The Service entered into a new contract with the contractor on March 27, 2013, for the same services at the MCC. The Union filed a grievance over this contract on January 26, 2014, arguing that the Service had not given notice to the Union and had not given due consideration to the five required factors prior to the subcontracting in violation of

Article 32.1.A and Article 31.1.B. A Step 2 denial was issued on March 10, 2014. The National Postal Mail Hander Union (NPMHU) intervened in the case and the matter proceeded to hearing on October 2, 2015.

On December 3, 2015, I issued an award which sustained the grievance. Specifically, I found that the Service violated Article 32.1.B by failing to give notice of contracting to the APWU and Article 32.1.A by failing to give consideration to the five factors required by that provision. Having found these violations, I turned to the question of remedy. The NPHU had intervened because it was concerned that a remedy in the case could result in the work being given to the clerks. The NPMHU argued that a regional arbitrator had no jurisdiction to decide the appropriate location of the work under the provisions of Regional Instruction 399, which sets up a specific dispute resolution process for work jurisdiction disputes.

In the last paragraph of the award, I wrote:

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

In the award section of the opinion, I wrote:

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

There have been several subsequent grievances since my initial award. In March 2016, the Union submitted a request for information on clock rings in order to present the data to the Dispute Resolution Committee. Management denied the information, and a grievance was filed over the denial. The parties agreed to hold the matter in abeyance pending the outcome of the present remedy case.

Approximately six months after my award, the Service undertook to "cure" the lack of consideration of the five factors required in Article 32.1.A by issuing a document which

purported to give consideration to the five factors. The Union did not receive a copy of the document until several months later. The Union filed a grievance over the continuing contracting of the work at the MCC and management's attempt to "cure" their contractual violation in the middle of the contract. This grievance was also placed in abeyance pending the outcome of the present case.

In December 2016, the Union filed a grievance alleging that the Service had failed to comply with the December 2015 award. This case was also placed in abeyance pending the outcome of the present case.

In April 2017 the APWU filed another grievance alleging that the Service had "renewed" the contract with New Breed without first notifying the Union or giving due consideration to the five factors as required by Article 32. The parties also agreed to place this grievance in abeyance.

Meanwhile, the RI 399 process was initiated. In February 2017 the APWU and the Mail Handlers entered into an agreement in which the forklift operator was assigned to the Mail Handlers and the rest of the work was assigned to the APWU. The Service failed to accept the agreement signed by the two parties. The matter went to an RI 399 arbitration hearing on December 12, 2017. On January 29, 2018, Arbitrator Landgren upheld the agreement for the assignment of the work entered into by the two unions.

Additionally, the Mail Handlers filed a grievance in May 2016 arguing that the Service violated Article 25 in not awarding the work at the MCC to the Mail Handlers. The matter went to arbitration, and in December 2017 Arbitrator Gallagher issued an award denying the grievance.

A few days prior to the hearing in the present case, the Service sent a letter to the Union stating that it plans to take over the operations at the MCC facility on November 17, 2018, and staff the facility with approximately 33 regular position and 28 non-career positions.

III. ANALYSIS AND CONCLUSION

The Service points out that in his December 3, 2015, the Arbitrator did not specifically cancel or declare void the contract between the Service and the contractor. The Union argues that in not specifically voiding the contract the Arbitrator was in effect giving the Service the opportunity to cure the defects in the issuance of the contract by giving due consideration to the five factors as required by Article 32.1.A, which, as noted above it, subsequently did. This argument is without merit. Certainly, it would have been better if the Arbitrator had specifically stated that the

contract was invalid. However, a review of the provisions of the award in the previous section clearly implies that the contract is cancelled. The award states that the remaining issue is how the work at the MCC should be assigned between the two Unions. This is only an issue if the contract is invalid. The Arbitrator's retention of jurisdiction to allocate the work between the two Unions after the RI-399 process is obviously based on the assumption that the contract giving the work to the contractor is no longer valid.

Turning to the issue of remedy, the Arbitrator would note at the outset of the discussion that the cases relied on by the parties for their various positions involved a loss of work to the bargaining unit as a result of improper contracting. The issue was how to compensate for loss of work previously performed by the bargaining unit. For example, in *Case No. E10T-4E-C 11388721*, the issue before Arbitrator Voss was the appropriate remedy after he had ordered the Service to discontinue the use of a subcontractor to maintain and repair neighborhood delivery and collection box units. After considerable discussion, Arbitrator Voss determined that the appropriate measure of damages in the case was the loss of overtime. He quoted Arbitrator Mittenthal in *Case No. H7C-NA-C 36* (1994), who wrote:

> It is generally accepted in labor arbitration that a damage award, arising from a violation of the collective bargaining agreement, should be limited to the amount necessary to make the injured employees whole. Those deprived of a contractual benefit are made whole for their loss. They receive compensatory damages to the extent required, no more no less.

In *Case No. E10V-1E-C 13252258* (Vaile, 2015) the dispute was over subcontracting out the work of motor vehicle and tractor trailer operators. The issue was how to compute the remedy for the improper contracting out. In *Case No. 190T-11 C94056229* (Stallworth, 1998), the Arbitrator found that the Service had improperly contracted out the removal, repainting and installation of air conditioning units, work which had previously been performed by members of the bargaining unit. The Arbitrator ordered the Service to compensate the employees for loss of overtime and all other benefits to which they would have been entitled but for the improper contracting out. In *Case No. 190V-1A C96020567* (Martin, 2000), the issue was the method for computing overtime for employees denied work when the Service contracted out spray painting in the VMF. In *Case No. E98T-1E-C* 00221329 (Suardi, 2006), the issue was the ordering of overtime for employees who had been denied overtime because the Service had improperly contracted out the painting of letter carrier boxes.

In our case, the facts are quite different. Here, the work in question had been performed by an outside contractor since 1997. As a result of the 2013 contract, employees did not lose any work. The work did not belong to the bargaining unit prior to the issuance of the contract. Thus, the loss in our case is the loss of new jobs, jobs that would have been created had the Service not improperly contracted out the work at the MCC in 2013. There are no employees "to be made whole." That, however, does not in and of itself preclude a monetary remedy, but it takes the case outside of the usual formulations.

The Union seeks an order directing the Service to pay the Union an amount of money equal to what the contractor's employees made during the contract period. Under the Union's calculations this amount is $15,000,000. The Service's calculation limits its liability to $2,706,393.60

In National Award *Case No. Q10C-4Q-C 15174956* (2017), Arbitrator Goldberg fashioned a remedy for the Service's failure to post and fill 362 administrative jobs as agreed to in a Memorandum of Understanding. The Union argued that the appropriate remedy was for the Service to pay the Union the estimated value of the 362 jobs. The value of each job would be the wages at Level 8, plus full benefits beginning on a specific date. Arbitrator Goldberg rejected this argument, finding that "the employees affected by the violation will be identifiable as soon as the remaining jobs are filled." In our case, there is no basis to conclude that employees in the bargaining unit would have or will bid into the 33 career and 28 non-career jobs which will be created when the Service takes over the functions at the MCC. There was no evidence as to the level of the positions, or any indication that the job openings would result in promotions for any current employees.

Arbitrator Goldberg also wrote that:

> To be sure, there are situations in which, even after a contract violation has occurred, there is no means of knowing which, if any, employees have been injured by the violation. In such situations, the arbitrator may issue a monetary award based on grounds other than making injured employees whole. See, for example, Mallinckrodt Chemical Works and Independent Union of Chemical Plant Workers, 50 LA 933 (Goldberg, 1967) (to protect union against injury to its reputation and standing among employees); U.S. Postal Service and APWU, Q94T-4Q-C 97031616 (Das, 2014) (to make the bargaining unit whole and provide a meaningful remedy for the employer's failure to comply with important provisions of the contract); U.S. Postal Service and APWU/NALC, H7C-NA-C 36, H7C-NA-C 132, HOC-NA-C 28 (Mittenthal, 1994) (to redress knowing and repeated violations of the contract over a 5-year period.)

Arbitrator Voss, *supra*, summarizes Arbitrator Goldberg's findings in In *Mallinckrodt Chemical Works*, 50 LA 933 (1967), as follows:

> Though not a Postal Service case, Arbitrator Goldberg in this award found that an award of damages was appropriate even though loss of overtime to particular employees or loss of jobs in the future was not susceptible of precise determination. In Mallincrodt he opined that the arguments in favor of an award of damages, in lieu of a showing of monetary loss to identifiable employees, may be justified because (i) there is a knowing breach of the agreement by the employer, (ii) an impermissible subcontract is an act against the union, which is the real party complainant, and (iii) even though the union is unable to show loss of earnings by specific employees an award of damages measured by the amount of wages that might have been earned had the work been properly assigned may be appropriate.

In our case, even though there are no identifiable employees who suffered harm as a result of the contracting out of the work, a monetary award is appropriate under the reasoning of *Mallincrodt*, which is to protect the union against injury to its reputation and standing among employees, and the reasoning of *U.S. Postal Service and APWU, Q94T-4Q-C 97031616* (Das, 2014), which is to provide a meaningful remedy for the employer's failure to comply with important provisions of the contract. The Arbitrator will adopt (iii) in the *Mallincrodt* award: an estimate of the amount of wages that might have been earned had the work been properly assigned.

In making this determination, one must decide two issues: (1) The appropriate period of time to use in calculating the remedy, and (2) The appropriate wage rate to use. The Service concedes in its brief that the beginning of the time period for the remedy should be the date of the beginning of the contract: April 1, 2013. In the Arbitrator's view, that initial remedy period ends on the day of the Arbitrator's initial decision, December 3, 2015. On that date, the Arbitrator referred the question of remedy to the Dispute Resolution Committee. Under the RI 399 process, a determination was to be made as how the work was to be allocated among the two Unions. Until that decision was made, the Service would not have been able to take over the operations and properly assign the work to the two Unions. The decision of the allocation of work between the Union was put in limbo pending the completion of the RI 399 process. The Service was in effect precluded from staffing a new postal operation to take over the functions performed in the MCC until the resolution of the issue by Arbitrator Landgren in his January 29, 2018, decision.

Additionally, the Service could not be expected to immediately take over the mail processing functions at the MCC. Because of the complexity of the operation and the need to properly staff the facility, the Arbitrator finds that a reasonable period of time would be six months. Thus, the second remedy period would run from July 29, 2018 until the facility is up and running as an operation of the Service.

A letter dated August 7, 2018, was introduced at the hearing. This letter indicated that the Service had reached at least a tentative agreement with the current operator to sublet the current facility. The letter indicated that the Service could begin operating the facility on November 17, 2018. If that is the case, the second remedy period would run from July 29 to November 17, 2018.

The next question involves the appropriate wage rate and the number of employees to use in calculating damages. The Union suggests the appropriate rate is the bid rates used by the contractor for its employees multiplied by the number of years elapsed in the contract. The total compensation at this point would be $9,582,539.20. The data shows that the employees worked approximately 57% more than was set forth in the bid. Under this approach, the amount would be $15,210,540.

The Service argues that the appropriate rate is the PSE pay rate as of April 1, 2013. The Service relies on the testimony of Local APWU President Phil Thomas at the first hearing in this case. The Arbitrator summarized his testimony as follows:

> Regarding the use of PSEs for the work, Thomas testified that the contract provides for exceptions from the limits on their use, which could have been used in this case. The negotiated wages for PSEs would have been $14.40 an hour as opposed to $26.24 an hour for the employees of the contractor.

The Service accepts a liability under this approach of $2,706,393.60.

Of the two suggested wage rates, the Arbitrator finds that the PSE rate to be the most reasonable. The rates paid by the contractor to its employees bears no necessary relationship to the wages rates paid by the Service. Again, we are not trying to compensate the Union based on the "value of the job" that was lost, as described by Arbitrator Goldberg. If that were the case, we would use a figure reflecting the wages rates for the various postal positions that would have been used to staff the MCC. We are instead trying to come up with a reasonable method to calculate damages to the Union for the initial and ongoing violation of Article 32 by the Service.

The evidence indicated that the contractor staffed the MCC with 41 employees. Assuming a 40-hour work week, this comes to 1640 hours per week. Using the $14.40 per hour, this comes to $23,616 per week. This figure should be multiplied by the number of weeks in the first and second remedy periods. The first period runs from April 1, 2013 to December 3, 2015. By the Arbitrator's rough calculation, this comes to 113 weeks. This figure multiplied by $23,616 comes to $2,668,608. The remedy for the second period runs from July 29, 2018, to whatever date the facility begins operations. Thus, the Arbitrator cannot provide a definitive figure at this time. Under the above method, the parties should calculate the damages for the second remedy period on the date the facility begins operations under the Service.

The Arbitrator would note that this calculation is based on *all of the hours* worked by contract employees during the two remedy periods. The NPMHU was a party to the initial proceeding. However, the NPMHU did not participate in the instant proceeding on remedy. It is not clear to the Arbitrator if the NPMHU's failure to participate is an indication that it seeks no portion of the remedy ordered, or if it was not notified of the hearing, of if there is some other reason. Accordingly, the Arbitrator will direct the Service to notify the NPMHU of the remedy proceeding and obtain from it a statement as to its position on the issue of remedy. If no reply is forthcoming in 30 days, the Arbitrator will assume that the NPMHU does not wish to participate. The Arbitrator will retain jurisdiction of this issue.

IV. AWARD

The Arbitrator determine that the appropriate remedy in this case should be calculated on an amount which is the sum of $23,616 per week for the number of weeks in the two remedy periods outlined in this award. The Arbitrator retains jurisdiction of this matter for the purpose of resolving any issues regarding the proper allocation of the award between the two Unions, as well as any issues which may arise concerning the calculation of the amounts to be paid under the findings set forth above or which may arise concerning the implementation of the remedy ordered herein.

Signed this 30th of September 2018.

Harry N. MacLean