

NATIONAL ARBITRATION

BEFORE IMPARTIAL ARBITRATOR STEPHEN B. GOLDBERG

In the Matter of Arbitration Between)
)
UNITED STATES POSTAL SERVICE)
)
and)
)
AMERICAN POSTAL WORKERS)
UNION, AFL-CIO)

Case No. Q00T-4Q-C 175320
(APPS Installation)

BEFORE: Stephen B. Goldberg, Arbitrator

APPEARANCES:

United States Postal Service: Kevin B. Rachel, Labor Counsel; Isabelle G. Dorlan, Law Department; Terry LeFevre, Labor Relations Specialist

American Postal Workers Union, AFL-CIO: Darryl J. Anderson, Attorney (O'Donnell, Schwartz & Anderson, PC)

Place of Hearing: United States Postal Service, 475 L'Enfant Plaza, SW, Washington, D.C.

Hearing Dates: July 6-7, 2017

Date of Award: November 7, 2017

Relevant Contract Provisions: Article 32.1. A, Article 32.1.B, Article 19

Contract Year: 2000-2003

Type of Grievance: Contract Interpretation

SUMMARY OF AWARD

The work of installing the APPS systems was not bargaining unit work. Hence, the Postal Service did not violate Article 32.1.A or Article 32.1.B in allowing Lockheed to perform that work, rather than assigning it to Maintenance Craft employees.¹



Stephen B. Goldberg, Arbitrator

November 7, 2017

¹ The Union's 15-Day Statement asserted that the Postal Service had also acted contrary to Article 535.111 of the Administrative Support Manual in failing to assign the installation of the APPS systems to Postal Service personnel, and had thus violated Article 19. Article 535.111, however, deals only with the maintenance of postal equipment, not with the installation of such equipment. Hence, Article 535.111 is not applicable to this case.

I. SUMMARY OF RELEVANT EVIDENCE

A. Introduction

Some time in 1999, the Postal Service issued an RFP for bidders to supply a new package processing system, which was subsequently named the Automatic Package Processing System (APPS). The APPS was designed as a partial replacement and substantial upgrade for the Small Parcel and Bundle Sorter (SPBS). In October 2001, the Postal Service issued a Statement of Work (SOW) describing in detail what would be required of the supplier. Section A of the SOW provides in relevant part:

The USPS currently processes small packages and mail bundles manually using linear roller conveyor sorters or small parcel and bundle sorters (SPBS). The SPBS is a linear sorter and therefore does not allow product re-circulation. Human operators at induction stations must manually key address information from parcels and bundles picked from the in-feed system. The induction station conveyors then place mail pieces on the individual cross-belt carriers on the sorter. Net throughput obtained on these machines range from 2,500 to 6,000 parcels per run-hour. . .

It is the intent of the Postal Service to purchase seventy-five (75) APPS and all associated support as detailed in this SOW to replace the existing Small Parcel and Bundle Sorters (SPBS). . . . The APPS will have enhanced features over the existing system such as singulation, camera tunnel with Optical Character Reader / Bar Code Reader / Video Coding System (OCR/BCR/VCS) and a carousel type sorter. This system will be compatible with the Information Platform and give in-route tracking of

Delivery Confirmation Code. With these advanced features, as well as induction's systems at both ends of the machine, the net throughput of the machine should exceed 9,500 packages per hour. . . . The footprint of a single induction system with an expected net throughput of 5,500 packages per hour is expected to be the same as the current SPBS.²

The SOW was incorporated into the APPS contract, which was awarded to Lockheed Martin (Lockheed) on September 20, 2002. Pursuant to the contract, Lockheed was to supply the Postal Service with 74 APPS systems at a total cost in excess of \$300 million, approximately \$4 million per APPS system.

B. Evidence Relied Upon by the Postal Service

The Postal Service relied primarily on the testimony of Scott Bombaugh, who, at the time of the development and deployment of the APPS, was the manager of the bulk mail systems group within the material handling organization, with responsibility for package sorting equipment. The other principal Postal Service witness was J. Otis Smith, who in the relevant time frame was manager of the package sorting and customer service systems team in the technology acquisition management group. All evidence referred to below is based on the testimony of Mr. Bombaugh, unless otherwise stated.

The Postal Service contract with Lockheed was a "firm, fixed price" contract, pursuant to which Lockheed was to deliver the APPS in accordance with the Statement of Work for a fixed price. The Postal Service Purchasing Manual provides that such a contract establishes a price that will not be adjusted based on performance costs. It places full responsibility on the supplier for all costs and the resulting profit and loss.

According to Mr. Smith, the Postal Service used a firm-fixed-price contract for all major mechanization automation equipment, because, he testified:

² These throughput requirements were incorporated into the supply contract, as were sort accuracy requirements of 98.5% in the Ultra-High Accuracy Mode and 98% in the High Throughput Mode.

[T]hey're very complex systems. . . [W]e're not actually buying a piece of equipment off the shelf. We're buying a performance system. And in order to make sure that we protect the Postal Service's interests, we're saying to the contractor . . . it needs to perform at this . . . many pieces per hour with this type of error rate . . . Deliver that system and make it work at our facility. We will pay you if you can demonstrate that you can deliver a system that can do that.

Each APPS system was first tested at the Lockheed plant, then assembled at the Postal Service site at which it was to be used. Once on site, the APPS system was assembled, and went through a "burn-in" period running live mail, during which the APPS would be inspected and performance gaps corrected. At the end of the burn-in period, the Postal Service Test and Evaluation Team, a part of Engineering Systems, performed a formal acceptance test. The Test and Evaluation Team measured both throughput and accuracy against the requirements of the SOW. Satisfying these requirements, Mr. Bombaugh testified, was necessary for Lockheed to receive a sign-off and acceptance by the Postal Service of each individual APPS system.

Assembly and installation of the APPS systems took about 12 weeks at each facility. In addition to aligning and bolting mechanical modules together, there was a significant amount of wiring, integration, and trouble-shooting that was required. Approximately 14 installers were used, although not the same installers over the entire 12 weeks. The skill sets needed for installation of the APPS system changed as the process went on, so different Lockheed crews were used – initially those with mechanical skills, followed by crews with electrical skills, and finally crews with integration and trouble-shooting skills. Lockheed used about 100 trained employees for this work, with crews travelling from site to site. Towards the end of the deployment, turnover among Lockheed employees led it to engage some local supplemental employees.

It was important for the Postal Service to get the APPS up and running as quickly as possible. Many APPS systems were located at sites where an SPBS had to be shut down and disassembled to make room for the APPS. Until the APPS was functioning, mail processing operations would be severely disrupted,

with mail volumes being off-loaded to other sites and/or being worked manually. According to Mr. Smith, it would not have been feasible for Postal Service mechanics to install the APPS systems as speedily as was necessary, and at the same time to fulfill their day to day function of maintaining Postal Service equipment.

Deployment of the APPS systems throughout the Postal Service, which began in 2004, was not a simple matter. Seventy-four systems were to be set up, each involving the delivery of 28 trailers of equipment shipped from a variety of manufacturers, with Lockheed responsible for final assembly of the equipment, and its integration into a fully functioning system. Each system was complex, incorporating a number of different subsystems and functionalities that were assembled in different configurations.

Deployment did not go smoothly. The initial systems did not meet the proficiency requirements called for by the SOW, and the Postal Service considered cancelling the contract. It decided, however, that the systems already installed were functioning sufficiently to be placed into service on a conditional basis. Accordingly, the Postal Service established interim criteria for conditional acceptance.³ After conditional acceptance, the Postal Service assigned the maintenance of the conditionally accepted APPS systems to Postal Service maintenance employees. The conditionally accepted machines would not, however, be fully accepted and paid for by the Postal Service until they met the criteria established by the contract.

In view of the failure of the initial APPS systems to meet the SOW requirements, Lockheed was required to develop and install a retrofit kit that would enable them to do so. That kit was ultimately retrofitted on the first 49 APPS, and incorporated into the remaining 25 APPS as they were installed. Final acceptance of all APPS systems took place in 2006.

Mr. Bombaugh testified that his experience with suppliers on different jobs over the years had taught him the difficulty of holding a supplier accountable for the failure of a machine to meet contractually required functional specifications if some portion of the work on that machine was not under the supplier's control.

³ The interim criteria were a net throughput of 8,900 packages per hour for a dual induction system, and 4,500 packages per hour for a single induction system.

Based on that experience, and the many problems the Postal Service encountered in holding Lockheed accountable under the warranty to fulfill the performance specifications of the SOW, Mr. Bombaugh concluded it would have been very difficult to hold Lockheed accountable if it not been Lockheed employees who performed the final assembly, installation, and integration of the APPS system.

Finally, Mr. Bombaugh testified that he was unaware of any major mail processing equipment having been installed by Postal Service personnel in the past. To the contrary, supplier employees had installed the Small Parcel Bundle Sorter, the Flat Sequencing System, and the Small Package Sorting System. Similarly, Mr. Smith testified that Postal Service employees had never been used to install major mail processing systems. Terry LeFevre, who had been maintenance manager at the Colorado Springs facility from 2002-2005, testified that all major equipment that came to that facility was installed by vendor employees. Among such equipment was a CIOSS machine, an RBCS system, and the FSM 100.⁴

C. Evidence Relied on by the Union

1. *The contract gives the Postal Service title to the machines as they are built, but the contractor is to do the installation.*

Section F of the contract between the Postal Service and Lockheed provides:

d. Title

1. Immediately upon the date of this contract, title to all parts; materials; inventory; work in process; special tooling, ... and other similar manufacturing aids ... will be vested in the Postal Service. Title to all similar property afterwards acquired or produced by the supplier and allocated or properly chargeable to this contract as aforesaid will be vested in the Postal Service upon said acquisition, production or allocation.

⁴ According to APWU Assistant Maintenance Craft Director Terry Martinez, in 2009 the Union “challenged” the installation of the Flat Sorting System and the Small Package Sorting System by supplier employees.

2. Notwithstanding that title to property is in the Postal Service through the operation of this clause, the handling and disposition of such property will be determined by the applicable provisions of this contract...
 - e. Risk of Loss. Except to the extent that the Postal Service otherwise expressly assumes the risk of loss of property, title to which is vested in the Postal Service by this clause... the supplier must bear the risk of loss...
2. *The SOW provides that the contractor will install the machines but it does not assign a separate cost to that work.*

Section 5 of the Statement of Work assigns the responsibilities of the parties for installation. The Postal Service is required to prepare the site and to provide electricity, but is not otherwise required to help with the installation. Postal Service witness J. Otis Smith testified that the contract between the Postal Service and Lockheed does not separately state the cost of labor for the installation of the machines. Mr. Smith acknowledged that the Postal Service could have asked Lockheed to separately state the cost of labor in the contract, but did not do so.

3. *The supplier's warranty did not depend on who installed the machines.*

The Warranty provision of the contract (Section 4.7) stated:

The contractor shall award all systems delivered to be free from defects in material and workmanship and to conform with the specifications and all of the requirements of the contract for a period of three months after installation and acceptance of the final base quantity system is complete.

As soon as an APPS system was conditionally accepted by the Postal Service, maintenance of that system was turned over to the Postal Service. Mr. Smith admitted, however, that even after Postal Service employees were responsible for the maintenance of conditionally accepted systems, the Lockheed

warranty on those systems remained in effect until three months after the last system had been accepted.

4. *The contractor was required to train postal maintenance personnel to install APPS machines, and to provide, by the FAT test, a manual on how to install APPS machines.*

The Statement of Work provided, in Section F.7.1.3 that:

During the installation of each system, the supplier shall schedule a minimum of four (4), or maximum of eight (8) hours to demonstrate and provide the local site's USPS maintenance personnel the latest instructions regarding alignments and adjustments of major components and sub-assemblies

The supplier shall develop an installation manual covering the full installation of the system. The manual at a minimum will include the space, power, air, phone etc. requirements, the assembly of all hardware, the wiring, the software installation, alignments, adjustments, and vindication connections. The supplier will provide this manual to the NTSC. The NTSC will have unrestricted right to copy and use this manual. [Emphasis added by Union.]

Lockheed was required to provide the APPS Installation Manual to the Postal Service by the date of the First Acceptance Test (FAT test), conducted in November 2003.⁵ Lockheed was also required to develop and provide to the Postal Service a Maintenance Handbook to support servicing, field replacement and field repair of APPS Field Replaceable Units and Field Repairable Assemblies. In addition, Lockheed was responsible for developing maintenance training courses, validating those courses, and providing training for Postal Service Electronic Technicians and Mail Processing Equipment Mechanics.

⁵ According to Mr. Bombaugh, the Postal Service typically requires a machine supplier to provide it with an installation manual when deployment has been completed. The installation manual should include all the lessons learned during deployment. Its purpose is to enable Postal Service employees to support the machine in the future in the event the supplier is no longer available, and the Postal Service needs to disassemble and reassemble the machine without the supplier's assistance.

5. *Maintenance employees were ready, willing, able, and available to install APPS.*

a. Maintenance Craft Job Descriptions

The job descriptions of several Maintenance Craft employees include either the work of machine installation or duties that would enable those employees to perform such installation. Among these job descriptions are:

Electronic Technician (P7-11); Occupation Code 0856-0006:

Functional Purpose

Independently performs a full range of diagnostic, preventive maintenance, alignment and calibration, and overhaul tasks on both hardware and software on variety of mail processing, customer service, and building equipment systems, applying advanced technical knowledge to solve complex problems.

Duties and Responsibilities include

1. Performs complex testing, diagnosis, maintenance, alignments and calibration, overhaul, and revision, of electronically operated or controlled equipment or systems; may be required to perform maintenance of associated electromechanical equipment systems.
6. Participates in the installation, removal, modification, assembly, and/or disassembly of systems and equipment.

Electronic Technician (P7-11), Occupation Code: 0856-0021

Functional Purpose

Carries out all phases of maintenance, troubleshooting, and testing of electronic circuitry used in equipment and

systems requiring a knowledge of solid state electronics, instructs and provides technical support on complex systems and nondenominational (hardware/software) or intermittent problems.

Electronic Technician (P7-10), Occupation Code: 0856-0020

Functional Purpose

Independently performs a full range of diagnostic, preventive maintenance, alignment and calibration, and overhaul tasks, on both hardware and software on a variety of mail processing, customer service, and building equipment and systems, applying advanced technical knowledge to solve complex problems.

Duties and Responsibilities include

1. Performs complex testing, diagnosis, maintenance, alignment and calibration, overhaul, and revision, of electronically operated or controlled equipment or systems; may be required to perform maintenance of associated electromechanical equipment and systems.
2. Observes the operation of systems and equipment, and applies various testing and diagnostic methods and procedures to locate and correct malfunctions and/or failures and ensures maximum system performance.
6. Participates in the installation, removal, modification, assembly, and/or disassembly of systems and equipment.

Maintenance Mechanic MPE (P7-09), Occupation Code: 5350-0001

Functional Purpose

Performs involve trouble-shooting and complex maintenance work throughout the system of mail processing equipment; performs preventive maintenance

inspections of mail processing equipment, building and building equipment.

Duties and Responsibilities include:

1. Performs the more difficult testing, diagnosis, maintenance, adjustment and revision work, requiring a thorough knowledge of the mechanical electrical, electronic, pneumatic, or hydraulic control operating mechanisms of the equipment. For example, performs troubleshooting and repair of complex interlocking and supervisory group control panels, keying circuits, memory storage circuits, readout of feedback circuits, and associated mechanical and electrical components throughout the installation; locates and corrects malfunctions in scanning, triggering and other electromechanical and electronic circuits.

According to Maintenance Craft Director Steve Raymer, the employees who fill the above positions, together with Building Equipment Mechanics (7F); Maintenance Electricians (7G); and Maintenance Mechanics (7H), constitute a workforce that is fully capable of installing mail processing equipment. Mr. Raymer further testified that the Postal Service "employ[s] a number of different levels of highly qualified craft personnel who are skilled and capable of accomplishing virtually any project assigned to them."

6. Postal Facilities Were Sufficiently Staffed to Install APPS.

Scott Nielsen, who had been a Maintenance Mechanic in Kansas City for approximately 13 years, and an Electronic Technician there since 2006, observed the installation of the APPS in Kansas City. He testified that the work involved required no special tools, was very similar to the work he had done on other postal equipment, and that he could have done the work. He has received a lot of specialized training on postal equipment that would have been applicable to the work of installing the APPS machine. He testified that "it's nothing groundbreaking that we haven't seen before."

Mr. Nielsen was asked whether, in the time frame that the APPS was

installed in the Kansas City BMC, the maintenance staff could have performed that installation. He responded:

[Y]es, I feel like we could have done the installation. In fact, I would have preferred that our staff had done the installation, because whenever you install a piece of equipment like that your – your knowledge of it is just increased even more in the inner workings of it, how it's put together. . . I think it would have been advantageous for the post office and everybody if we would have been involved, actually.

Mr. Neilson's testimony was confirmed by that of Steve Raymer, an expert in staffing.⁶ According to Mr. Raymer, the Kansas City BMC was staffed in a manner that would have permitted them to do the APPS installation work in that facility. Mr. Raymer also testified that the staffing pattern in the Kansas City BMC was fairly typical in the Postal Service.

7. Required MOTSC staffing.

Prior to 1993, the Postal Service maintained in each area of the country a Maintenance Overhaul Technical Service Center (MOTSC) which housed Overhaul Specialists (PS-08). The Functional Purpose of the Overhaul Specialist (PS-08), was:

Fulfills difficult phases of repair, testing, analyzing, modifying, overhauling and troubleshooting of complex automatic and semi-automatic mechanical, electrical and electronic equipment. Serves as an expert in the repair, adjustment, overhaul and/or rebuilding of complex electro-mechanical and electronic equipment, components and assemblies.

⁶ When Mr. Raymer was trained by the Postal Service to perform staffing analysis, he received a perfect score on his final examination, only the second person to have done so. Since then he has been providing training in staffing to Union officers throughout the country.

The Overhaul Specialist's Duties and Responsibilities included:

1. Overhauls and/or rebuilds mechanical, electrical, electronic equipment
6. Travels and/or drives a motor vehicle to respective offices, incident to the transfer of the Quitman, on-the-scene repairs, or modifications of automatic semi-automatic mechanical, electrical and electronic equipment.
7. Installs overhauled equipment on-site. Makes field adjustments, modifications, performs acceptance and run-and tests, and fine-tuned overhauled equipment before turning over to on-site mechanics.

According to Assistant Maintenance Craft Director Terry Martinez, Overhaul Specialists were dispatched wherever they were needed within their area to help overhaul or move a piece of equipment.

When the Postal Service discontinued the use of MOTSCs, the APWU objected, leading to a settlement agreement, which provided in part:

As previously stated in the October 21 correspondence from Anthony J. Vegliante, overhaul of equipment previously done by the MOTSCs will become the responsibility of each individual office.

According to Mr. Raymer, the effect of the MOTSC settlement on the work of installing the APPS should have been:

[W]e're supposed to be staffed for these contingencies . . . because that was the agreement we made back with the Maintenance Overhaul Technical Support Center teams that we used to have travel around the country to do this kind of work. . . [This] is our work. There's no doubt about it. To be denied the opportunity . . . obviously restrains the size, scope and composition of the bargaining unit artificially.

8. Recent Experience Moving an APPS Machine.

According to Mr. Martinez, an APPS was recently moved from the Jacksonville, FL, P&DC to the Jacksonville NDC. Maintenance employees from the P&DC first went to the NDC, where they worked for 5 weeks to dismantle equipment in order to make room for the APPS. Next, maintenance employees from the NDC went to the P&DC to dismantle the APPS, and move it to the NDC for installation, a process that took about 3 1/2 weeks. A total of eleven maintenance employees from the two facilities performed this work. In addition to these maintenance employees, two maintenance employees came from Texas to help with the project. An ET-11 from the MTSC assisted with camera alignment. The entire process took 8 ½ weeks, and involved 14 maintenance employees.

II. DISCUSSION

It is the Union position that the installation of the APPS system was bargaining unit work, and that by contracting with Lockheed to do that work, the Postal Service violated Articles 32.1. A and 32.1. B of the Agreement. In support of its assertion that installing the APPS system was bargaining unit work, the Union asserts that that Maintenance Craft employees had performed such work in the past, and were ready, willing, and able to do so with respect to the APPS. It cites the testimony of Maintenance Craft Director Steve Raymer that the Electronic Technicians and the Maintenance Mechanics, assisted by Building Equipment Mechanics, Maintenance Mechanics, and Maintenance Electricians, were fully capable of installing the APPS system. Additionally, ET Scott Neilsen testified that the work involved in installing the APPS was similar to other work that he had done. In his words, “It’s nothing groundbreaking that we haven’t seen before”.

The Union also relies on the testimony of Mr. Neilsen that the Kansas City BMC was staffed in a manner that would have permitted bargaining unit employees to perform the APPS installation, and the testimony of Mr. Raymer that the staffing pattern in Kansas City was typical of the Postal Service. Additionally, the Union points to the testimony of Assistant Maintenance Craft Director Terry Martinez that Maintenance Craft Employees had recently dismantled, moved, and reassembled an APPS system in Jacksonville, FL.

Finally, the Union points out that Lockheed was required, pursuant to its contract with the Postal Service, to provide the Postal Service with the APPS Installation Manual no later than the date of the First Acceptance Test (FAT test). Under these circumstances, the Union asserts, the installation of the APPS systems was bargaining unit work that could and should have been assigned to Maintenance Craft employees. By allowing Lockheed to perform that work, the Postal Service violated Articles 32.1.A and 32.1.B of the Agreement.

The Postal Service challenges the ability of Maintenance Craft employees to install the APPS system as promptly as was required. Its primary argument, however, is that installing the APPS system did not constitute bargaining unit work under Article 32. Hence, the Postal Service did not violate Article 32 in contracting out that work. In support of that argument, the Postal Service relies on Arbitrator Carlton Snow's Decision and Award in Case No. A-C-N -6922 (1990), a Decision and Award that the Postal Service characterizes as "seminal".

In the cite case, the issue before Arbitrator Snow was what constituted clerk craft "bargaining unit work" under Article 1.6, hence could not be performed by supervisors, except in defined circumstances. In seeking to define the ambiguous phrase "bargaining unit work", nowhere defined in the Agreement, Arbitrator Snow engaged in a comprehensive examination and analysis of (1) the parties' intent in using that phrase, as shown by bargaining history, (2) the relevance of position descriptions, and (3) the practice of the parties in applying the Article 1.6 prohibition on supervisors performing clerk craft bargaining unit work. His conclusions were that:

- (1) Nothing in the bargaining history establishes a common understanding by the parties as to the meaning of bargaining unit work as that phrase is used in Article 6.1.
- (2) Position descriptions may determine craft jurisdiction over a position, but do not determine what is bargaining unit work. (This conclusion, according to Arbitrator Snow, was based on both logic and bargaining history.)
- (3) The practice of the parties in applying ambiguous contract language, if it has become accepted by the parties, may serve to provide meaning to that

language.

The Union seeks to distinguish Arbitrator Snow's decision from the instant case on the ground that his decision dealt with the definition of bargaining unit work in Article 1.6, while the instant case arises under Article 32. The distinction is not persuasive. Although the case before Arbitrator Snow arose under Article 1.6, and the instant case arises under Article 32, the analytical approach used by Arbitrator Snow to determine the meaning of bargaining unit work under Article 1.6 is equally applicable to determining the meaning of that phrase under Article 32.

Applying Arbitrator Snow's approach to the instant case, it is apparent that there is no more bargaining history to shed light on the meaning of bargaining unit work under Article 32 than there was under Article 1.6. Nor is there any history warranting a more significant role for position descriptions in defining bargaining unit work for maintenance craft employees than for clerk craft employees.⁷ Accordingly, in this case, as in the case before Arbitrator Snow, the meaning of the ambiguous phrase "bargaining unit work" must be sought in how the parties have applied that phrase in their dealings with each other. Have the parties, in practice, developed a sufficiently consistent interpretation of what constitutes bargaining unit work in the context of installing new machinery that the arbitrator would be warranted in finding that their practice constitutes a mutual understanding of whether or not such installation is bargaining unit work?

In dealing with this question in the case before him, Arbitrator Snow quoted Arbitrator Sylvester Garrett, who wrote:

Custom or practice is not something which arises simply because a given course of conduct has been pursued by management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as

⁷ The Union asserts that Arbitrator Das, in Case No. Q94T-4Q-C 97031616 (2010), assigned greater weight to position descriptions in determining whether work fell within the definition of "bargaining unit work" than had Arbitrator Snow. In support of that assertion, the Union relies on the following statement of Arbitrator Das, who concluded that AOI work was bargaining unit work " . . . [A]s discussed below, at least some of the AOI work was within the scope of duties performed by the bargaining unit." In the discussion following the quoted language, however, Arbitrator Das does not refer to work described in position descriptions, but to work actually performed by bargaining unit employees. The two are not the same; the latter deals with practice, not position descriptions. In brief, Arbitrator Das, similar to Arbitrator Snow, focused on the practice of the parties, not position descriptions, in determining what constitutes bargaining unit work.

normal reaction to a recurring type situation. It must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be accepted in the sense of both parties having agreed to it, but rather that it must be accepted in the sense of being regarded by the men as the normal and proper response to the underlying circumstances presented. (See, United Steel Corp., 2 Steelworkers Arbitration Bulletin 1187 (1953), emphasis in the original).

Arbitrator Snow also relied upon Arbitrator Richard Mittenthal, who made clear, in what Arbitrator Snow referred to as the definitive work on past practice,⁸ that “an activity rises to the level of a past practice where it has (1) clarity and consistency; (2) longevity and repetition; and (3) acceptability”.

In the instant case, as the Postal Service asserts, it can hardly be disputed that the clear, consistent and repeated practice of the Postal Service has been to contract with the supplier of major mail processing equipment for the supplier to install that equipment, rather than to treat such installation as bargaining unit work which must be assigned to maintenance craft employees. The Postal Service states (Brief, p. 17):

The evidence is unrefuted that this bargaining unit has never performed the work of installing/assembling new mail processing systems. All three postal witnesses, each with long experience in working with the development and deployment of major mail processing systems, testified that they were not aware of postal maintenance employees ever performing the work of installing/assembling any of those systems.. They specifically testified that mail processing equipment and systems such as the Automated Flat Sorting Machine and small Parcel and Bundle Sorter (SPBS) were not installed by postal personnel.

⁸ Mittenthal, “Past Practice and the Administration of Collective Bargaining Agreements”, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators (BNA 1961)

Furthermore, the Postal Service points out, the Union has accepted the Postal Service's right to contract out the installation of major mail processing systems. To be sure, Union witness Terry Martinez testified that the Union had regularly challenged the Postal Service's right to contract out such work. The Union, however, presented no documentary evidence in support of Mr. Martinez' testimony – no arbitrator's decisions, no grievances, no Step 4 interpretive disputes, not even a letter of protest. Under these circumstances, I have no real choice but to credit the testimony of the Postal Service witnesses that the accepted past practice has been for the Postal Service to contract out the installation of major mail processing systems.

The Union asserts, however, that that the relevant past practice is not that dealing with the installation of major mail processing machinery, but that dealing with the repair and maintenance of such machinery. It is undisputed that Maintenance Craft employees have maintained major mail processing equipment in the past, and that they began to maintain the APPS systems as soon as they were accepted by the Postal Service from Lockheed, even if that acceptance was on a conditional basis. Maintenance Craft employees have also disassembled and reassembled an APPS system that was being moved from one Postal Service facility to another. According to the Union, "There is no more reason to deny maintenance employees the right to install a newly-acquired machine simply because it is newly-acquired than there [would be] to deny them the right to install a machine that is being moved from one place to another."⁹

There is, however, a powerful reason to distinguish between assigning maintenance employees to perform maintenance work on existing machinery, while declining to assign them to work on new machines, even if the skills required may be similar or the same. As Mr. Bombaugh testified, if new machinery is covered by a supplier's warranty, and the installation of that machinery is assigned to employees of the buyer, the risk of disputes arising out of the application of that warranty increases significantly. This is particularly the case with the installation of a complex new system such as the APPS. If an element of the system does not function to the buyer's satisfaction, and the buyer's employees have installed that system, it is all too likely that the seller will decline to honor the warranty, claiming that the failure was due to faulty installation by the buyer's employees, rather than

⁹ Brief, p. 26

to a manufacturing defect. Although the dispute may ultimately be resolved in favor of the buyer, a purchaser of complex systems has a legitimate interest in minimizing the likelihood of such disputes, which may be both time-consuming and costly. This desire to minimize the risk of warranty disputes with suppliers of complex systems provides an ample justification for the Postal Service's willingness to allow Maintenance Craft employees to perform complex repair and maintenance of major mail processing equipment, while at the same time insisting that such systems be initially installed by the supplier.

The Union's argument that Lockheed did not condition its warranty on the APPS being installed by Lockheed employees is irrelevant. Whether or not the contract contained such a condition, the Postal Service ran the risk that allowing its employees to perform the installation would lead to disputes about the reason for a system flaw, and it had a legitimate interest in avoiding that risk. Furthermore, the Union's past acceptance of the Postal Service practice of contracting out this type of installation permitted the Postal Service to continue that practice.

The Union's acceptance of a past practice permitting the Postal Service to contract out the installation of major package processing equipment also renders irrelevant the Union's assertion that Maintenance Craft employees had the skills and availability necessary to perform the installation of the APPS systems. Whether or not they possessed such skills, the Union had accepted the Postal Service's right to contract out such work.

In sum, the evidence demonstrates the existence of a past practice by which the Postal Service was free to contract out the installation of major mail processing equipment without objection by the Union. Accordingly, I conclude that the Postal Service did not violate Article 32 by failing to assign the installation of the APPS systems to the Maintenance Craft.

III. AWARD

The work of installing the APPS systems was not bargaining unit work. Hence, the Postal Service did not violate Article 32.1.A or Article 32.1.B in allowing Lockheed to perform that work, rather than assigning it to Maintenance Craft employees.¹⁰



Stephen B. Goldberg, Arbitrator

November 7, 2017

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