

NATIONAL ARBITRATION  
BEFORE IMPARTIAL ARBITRATOR STEPHEN B. GOLDBERG

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In the Matter of Arbitration )

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between )

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UNITED STATES POSTAL SERVICE )

Case No. Q10V-4Q-C 14125953

)

Contracting Out of PVS Work

and )

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AMERICAN POSTAL WORKERS )

UNION, AFL-CIO )

)

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BEFORE: Stephen B. Goldberg, Arbitrator

APPEARANCES:

United States Postal Service: Julienne W. Bramesco Labor Counsel; Mark Lippelman, Labor Counsel; Todd C. Coffey, Labor Relations Specialist

American Postal Workers Union, AFL-CIO: Melinda K. Holmes, Attorney (Murphy Anderson, PLLC); Darryl J. Anderson, Attorney (O'Donnell, Schwartz & Anderson, P.C.)

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

Hearing Dates: October 7-8, 14-15, 2014

Date of Award: March 25, 2015

Relevant Contract Provisions: Article 32.1.B, MOU on Motor Vehicle Craft Jobs, MOU on Consideration of National Outsourcing Initiatives, MOU on Contracting or Insourcing of Contracted Services, Amended Work Rules Pilot MOU

Contract Year: 2010-2015

Type of Grievance: Contract Interpretation

## SUMMARY OF AWARD

1. The Postal Service may not contract out PVS work that would have a significant effect on the bargaining unit without first complying with the MVC Jobs MOU.
  
2. The Postal Service may not engage in the Article 32.1.B. consideration of contracting out PVS work that would have a significant impact on the bargaining unit without first complying with the MVC Jobs MOU.
  
3. The Postal Service violated Article 32.1.B and the MOU on Consideration of National Outsourcing Initiatives by failing to comply with the procedural requirements of those provisions in considering the contracting out of the PVS function.
  
4. The matter is hereby remanded to the parties for their implementation of the Award. In the event the parties cannot agree on the appropriate implementation of the Award, they may return to the Arbitrator for resolution.



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Stephen B. Goldberg, Arbitrator

March 25, 2015

## **I. SUMMARY OF RELEVANT EVIDENCE**

### **A. The Postal Service's Development of the Initial Comparative Report**

Some time in 2012, the Postal Service began considering the contracting out of all 162 Postal Vehicle Service (PVS) sites to Highway Contract Route (HCR) carriers.<sup>1</sup> The reason for doing so, according to Jennifer Stevenson, Manager of Surface Transportation Operations (STO), was that the Postal Service was in a difficult financial situation, and she was trying to cut \$1 billion from the STO budget.

On April 26, 2013, Patrick Devine, USPS Manager, Contract Administration, advised Cliff Guffey, APWU President, that the Postal Service was “considering subcontracting the highway movement of mail in approximately 162 Postal Vehicle Service (PVS) sites nation-wide”, and that such an action was deemed to have a significant effect on the bargaining unit.<sup>2</sup> On May 13, 2013, Mr. Guffey responded, in a letter to Doug Tulino, USPS Vice President Labor Relations, that such subcontracting would violate the Agreement and the MOU on Motor Vehicle Craft Jobs (MVC Jobs MOU or MOU). Mr. Guffey also made several information requests of the Postal Service, one of which was for “copies and the underlying data for any cost comparison that has been done”.

Consistent with its conclusion that the contracting out under consideration would have a significant effect on the bargaining unit, the Postal Service proceeded to develop the initial Comparative Analysis report referred to in Article 32.B.1. of the Agreement, and required by the SIAG Guidelines for Considering

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<sup>1</sup> The contracting out of work is sometimes referred to by the parties as “subcontracting” or “outsourcing”. I shall use the term “contracting out”, except when quoting from or referring to a document which uses one of the other terms.

<sup>2</sup> PVS is the Postal Service's Postal Vehicle Service, which is responsible for the highway movement of mail and equipment. There are approximately 8,000 PVS drivers, and it is undisputed that the 162 PVS sites that the Postal Service was considering contracting out constituted the entire PVS operation.

National Outsourcing Initiatives.<sup>3</sup> The consideration of contracting out of all PVS operations was brought before SIAG, where it was sponsored by Dave Williams, a Postal Service Vice President. Following approval by SIAG, the Postal Service entered into a contract with IBM on or about June 5, 2013, providing that:

. . . the contractor will be required to develop a Comparative Analysis between Highway Contract Route (HCR) suppliers and Postal Vehicle Services (PVS) to determine the most cost-effective means for the Postal Service to transport mail in the 162 current PVS markets.

IBM began its work for the Postal Service in July 2013, and delivered its initial comparative analysis to SIAG in April 2014. During this 10-month period, there was constant interaction between the IBM consulting team and the Postal Service. According to Jonathan James, the leader of the IBM team:

We had conversations with SIAG when we were developing methodology we wanted to use to make sure that this was in line with what the Postal Service finance group thought was an appropriate methodology and making sure that we were using the appropriate sources ...

One of my junior consultants sat down with . . . the chief SIAG postal employee, and they go tab by tab in each Excel model and go, like, kind of cell by cell to make sure that all the calculations are being done correctly. It's even – it's detailed to the point where if SIAG doesn't like, you know, what a subject header says, we change that, too. ...

Like, if we were using – we're making sure that we're using the right cost factors from finance, USPS finance, making sure our methodology for capturing labor costs is appropriate. So we would have those kinds of

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<sup>3</sup> SIAG (the Strategic Initiative Actions Group) is a cross-functional group within the Postal Service that is responsible for coordinating the processes involved in reviewing, approving, and monitoring proposed outsourcing initiatives. It is composed of representatives from Labor Relations, Law, Finance, Operations, Supply Management, Public Affairs and Communications, and is chaired by the Manager, Strategic Initiatives.

conversations with SIAG ... They're a stakeholder in the process, so we wanted to keep them engaged.

Some time in April 2014, IBM submitted a draft comparative analysis to SIAG. Subsequently, Ms. Stevenson received a letter from Shaun Mossman, Postal Service Director of Finance, the leader of the SIAG group, stating that the contracting out initiative had been approved by SIAG.

On August 27, 2014, the Postal Service sent to the Union what it labeled an "initial Draft Comparative Analysis", as well as a disc containing draft Excel spreadsheets and workbooks supporting the initial Draft Comparative Analysis.

### **B. The Union's Requests for Information and the Postal Service's Responses**

Beginning with Mr. Guffey's May 13, 2013, request for information, the Union made a series of requests for information about the development of the comparative analysis report. The Postal Service granted most of those requests and participated in meetings with the Union on July 29, 2013, and December 5, 2013. The Union requests which the Postal Service did not grant, and which are here in dispute, were these:

#### **1. Union requests for meetings with IBM consultants**

Some time prior to July 29, 2013, APWU requested that it be allowed to have regular meetings with the technicians on the IBM consulting team. The reason for this request, according to Phil Tabbita, APWU Manager of Negotiations Support and Special Projects, was that "IBM was building this model and they'd obviously need support from Postal Service technicians. We wanted to have myself and Kathryn Kobe [an economist who consults with APWU] or some technician from the motor vehicle craft meet on a fairly regular basis as they developed that model."

The Postal Service response to this request is set out in an August 12, 2013, letter from Labor Relations Specialist Todd Coffey to Michael Foster, Director of the APWU Motor Vehicle Division:

After careful consideration of your request, we ask that any inquiries in reference to our consultant's transaction of the analysis process be submitted to Headquarters, Labor Relations, specifically the APWU Contract Administration Unit. In turn, we promise to forward any Union input and/or correspondence through the appropriate channels.

According to Mr. Coffey, the message conveyed in this letter and in a contemporaneous voice mail he left for Mr. Tabbita was that the Postal Service would not allow a meeting between a Union representative and a member of the IBM consulting team unless a representative of Postal Service Labor Relations was present at that meeting.<sup>4</sup> The Union did not respond to this letter and did not request to meet with the IBM consultants and Postal Service Labor Relations.

According to Phil Tabbita, the Union had not requested meetings with IBM technicians in the absence of Postal Service representatives. Both Mr. Tabbita and Mr. Foster testified they interpreted Mr. Coffey's August 12 letter as denying the Union's request for meetings with the IBM consultants. The Postal Service never told the Union that it could meet with the consultants if a Postal Service representative was present, which is the reason the Union never requested such a meeting.

2. Union requests for copy of Postal Service contract with IBM and of IBM cost comparison template

On January 24, 2014, the Union requested that the Postal Service provide it with a copy of the IBM contract and a copy of the "template cost comparative analysis IBM is building for USPS – regardless of whether or not the template is complete".

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<sup>4</sup> The reason for the Postal Service's position, Mr. Coffey testified, was that it wanted to make sure that any communications by the IBM consultants comported with the Agreement, because the consultants were not experts in the Agreement. Additionally, the parties' practice was that all meetings between one party and a consultant for the other party were attended by a representative of the latter party.

On March 27, Patrick Devine responded to the Union's request for a copy of the IBM contract, by asking the Union to:

[P]lease explain the relevance of the requested information to the APWU's responsibilities which would make it necessary for collective bargaining or for the enforcement, administration, or interpretation of the CBA.

In response to the Union request for a copy of the IBM template for the PVS-HCR cost comparison, Mr. Devine responded:

Please be advised that a HCR-PVS cost comparative analysis template has not been formulated by IBM and there are no plans to do so. However, IBM is compiling data for the comparative analysis of PVS vs HCR. Once the initial analysis is available, the APWU will be advised.

On May 6, Mr. Foster responded to the Postal Service's March 27 letter. With respect to the Postal Service's assertions that IBM had not formulated a cost comparison template, Mr. Foster wrote:

Perhaps our use of the word "template" was misunderstood. You say that IBM is compiling data for the comparative analysis and when the draft is done, APWU will be advised. Typically, APWU will receive Excel workbooks and spreadsheets used to detail the Comparative Analysis. We called them "templates" because we anticipated that the workbooks and worksheets would be designed before all the required numbers for inputs were determined and refined. However, the design would allow us a good opportunity to critique the approach and provide some input – before all the numbers necessary to complete an analysis are determined. This is what "while developing the *initial* Comparative Analysis (CA) report" means. (Emphasis in original.)



. . . We are convinced that you have Excel workbooks that you could share at this time; but you are refusing to share them until the CA is carefully vetted and seasoned by several drafts and reviews. You are putting APWU in the position of waiting while the cement is drying.

In response to the Postal Service request that the Union explain the relevance of the IBM contract, Mr. Foster wrote:

The Union is requesting the IBM Contract because IBM is collecting data for the comparative analysis of PVS to HCR to assist in the consideration of subcontracting out the work of MVS employees, which will have a significant impact on the MVS Craft. The contract will describe the work, including the breadth and depth of the work to be done, and will provide a timetable for the work. This information is very relevant to our job of collective bargaining and to the enforcement, administration and interpretation of the National Agreement.

When the arbitration began in this matter, the Postal Service had still not provided the Union with a copy of its contract with IBM. On the second hearing day, Postal Service counsel asked Mr. Foster to explain the relevance of that contract. Mr. Foster responded:

The Union believes that we're entitled to all parts of the components that the Postal Service is utilizing when they're doing the 162 site conversations. And if they've entered into a contract with IBM, then the Union believes that we're entitled to see what the components are, what the mechanism is, and, with that contract, then we are able to determine if there's additional information that the Union needs or is seeking.

Later that day, counsel for the Postal Service provided the Union with a copy of the IBM contract.

## II. ISSUES PRESENTED

Three issues are to be decided. The parties' respective statements of the first issue are significantly different. I have determined that issue to be:

- A. May the Postal Service contract out PVS work that would have a significant effect on the bargaining unit without first complying with the MVC Jobs MOU?

The parties basically agreed on the second and third issues. Those issues are:

- B. May the Postal Service engage in the Article 32.1.B. consideration of contracting out PVS work that would have a significant impact on the bargaining unit without first complying with the MVC Jobs MOU?
- C. Did the Postal Service violate Article 32.1.B. and/or the MOU on Consideration of National Outsourcing Initiatives by failing to comply with the procedural requirements of those provisions in considering the contracting out of the PVS function?

## III. DISCUSSION

### **A. May the Postal Service Contract Out PVS Work That Would Have a Significant Impact on the Bargaining Unit Without First Complying With the Motor Vehicle Craft Jobs MOU?**

#### **1. The Union's Position**

The Union's central argument is that the Postal Service is precluded from contracting out PVS work that would have a significant effect on the bargaining unit without first complying with the Motor Vehicle Craft Jobs MOU, as interpreted in the context of the "grand bargain" embodied in the 2010 Agreement. The essence of the grand bargain, according to the Union, was that

the Union would provide the Postal Service with approximately \$3.7 billion in labor cost savings in exchange for the Postal Service's commitment to increase the amount of work in the bargaining unit. Contracting out PVS work that would have a significant effect on the bargaining unit, such as eliminating the entire PVS operation without complying with the MVC Jobs MOU, would, the Union asserts, eviscerate a central element of that MOU and would be fundamentally inconsistent with the Union's goal, understood and accepted by the Postal Service, of bargaining unit work increase.

Initially, the Union points out, the parties clearly understood that the quid pro quo for the Union's financial concessions was to be increased work for the bargaining unit. According to Phil Tabbita:

President Guffey made it clear that the concessions were . . . there for the taking, but . . . he wasn't going to sign any agreement without the Jobs MOUs and . . . the other aspects of the contract that gave us the opportunity to retain and bring work back into the bargaining unit. That was clearly the quid pro quo for getting these concessions.

Doug Tulino, Postal Service Vice President for Labor Relations, who testified in the POSTPlan<sup>5</sup> arbitration hearing, said essentially the same:

[I]n the context of the bargaining agreement that we made. . .the objective that APWU had was to gain work, obviously. That was the quid pro quo in the agreement.

The Union also relies on the following excerpt from the decision in POSTPlan:

It is . . . undisputed that the Union's central objective in the negotiations for the 2010 Agreement was work protection. The Union's approach to those negotiations took into account the difficult financial position of USPS by making concessions that resulted in approximately

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<sup>5</sup> Case No. Q11C-4Q-C 12243899 at pp. 10-11(Goldberg, 2014)

\$3.7 billion in savings to the Postal Service over the 5-year term of the Agreement. In exchange, the Union sought to protect existing bargaining unit work from being assigned outside the unit, and to regain bargaining unit work that had, over time, been assigned to outside contractors or to Postal Service employees who were not part of the bargaining unit.<sup>6</sup>

The primary contractual vehicle for increasing bargaining unit work was Craft Jobs Memoranda of Agreement for each of the major APWU crafts – Clerks, Maintenance, and Motor Vehicle Services. Each of these MOUs requires the Postal Service to (1) return to the craft a specified number of bargaining unit jobs; (2) perform an audit of the work engaged in by non-bargaining unit Executive and Administrative (EAS) employees, and return all bargaining unit work performed by them to the craft; and (3) provide a specified number of additional administrative and technical positions to the craft.

In addition, the Motor Vehicle Craft Jobs MOU provides:

The Motor Vehicle Craft will assume service on a minimum of 600 PVS routes currently contracted to HCR on the expiration of each supplier contract. Route service may be assigned to either career or non-career employees, as necessary. The Employer will designate the 600 PVS routes to be assigned to the Motor Vehicle Craft and no less than 25% of the duty assignments created will be assigned to career employees. In addition, the parties agree to review approximately 8,000 other existing Transportation Highway Contract Routes (HCR's). It is understood that in considering the conversion of such work the parties will use DOT work rules and an appropriate mix of bargaining unit costs as submitted by the APWU. In considering whether or not bargaining unit positions may be created the parties will follow the below described process:

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<sup>6</sup> *Ibid* at p. 11-12.

- a. The Postal Service will provide each individual HCR contract to the APWU upon ratification.
- b. The APWU will review the contracts and provide the Postal Service designee with specific route and trip information (including frequency, time of departure and arrival, annual mileage and equipment requirements) regarding where it believes opportunities exist to create bargaining unit duty assignments based on the work contained in the HCR contract.
- c. The APWU may initiate and obtain a cost comparison on segments (trips) of an HCR route: that is some, but not all, the routes covered by the contract. If the APWU fair comparison of a contract or a segment of a route shows that it would cost less to have the work performed by MVS employees, it will be assigned to MVS employees.
- d. The parties shall meet within 14 days of receiving the APWU's input as described in paragraph 2b above.
- e. The Postal Service will consider overall operational needs when creating the new assignments including fleet needs, maintenance capabilities, parking, route logistics, etc., but these factors will not be used to circumvent the Memo (Re: Contracting and Insourcing of Contracted Services).
- f. After proper and appropriate notice has been given to the HCR contractor such that termination of the contract does not cause or incur additional expense or cost to the Postal Service, any and all new assignments will be posted for bid to the existing

career workforce before [being] filled with new employees.<sup>7</sup>

The Union asserts that there is a fundamental inconsistency between the parties' agreement that the Union would make extensive financial concessions in exchange for increased bargaining unit work and the Postal Service contracting out the entire PVS operation without completing the Jobs MOU provision for a review of all HCR contracts to determine whether bargaining unit employees can perform the work at a cost equal to or less than the cost of contracting out.<sup>8</sup> The purpose of the contractually required review of all HCR contracts, according to the Union, was to return as much work as possible to the bargaining unit, subject only to the cost comparison contained in the MOU. A wholesale contracting out of the PVS function totally frustrates this purpose, as well as the basic understanding of the 2010 Agreement.

## 2. The Postal Service Position

The Postal Service asserts that it is free to contract out PVS work without complying with the MVC Jobs MOU, even if the contracting out will have a significant effect on the bargaining unit. It points out that that Article 32.1.B., which recognizes its right to contract out such work, was contained in the Agreement long before the 2010 negotiations, and that nothing in the MVC Jobs MOU requires compliance with that MOU as a condition precedent to the Postal Service exercising its Article 32.1.B. right to contract out. Nor did the 2010 negotiators add language to Article 32.1.B. indicating that contracting out pursuant to that Article was restricted by the MVC Jobs MOU. Accordingly, the Postal Service contends that the MVC Jobs MOU does not limit its Article 32.1.B.

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<sup>7</sup> The Maintenance Craft MOU also contains a provision for the review of currently contracted out work to see if that work can be assigned to the bargaining unit.

<sup>8</sup> It is unclear whether, in order to have work performed under an HCR contract returned to the bargaining unit, the Union must demonstrate that (1) it would cost less to have that work performed by the bargaining unit, or only (2) that the work can be performed by the bargaining unit at a cost equal to or less than the contract service. Compare Section 2.c. of the Jobs MOU with Section 2.e. of the Jobs MOU and the MOU on Contracting and Insourcing of Contracted Services. I do not here attempt to resolve that question.

right to contract out PVS work, even that contracting out which will have a significant impact on bargaining unit work.<sup>9</sup>

The Postal Service further asserts that its position that the MVC Jobs MOU did not limit its right to contract out PVS work is supported not only by the absence of any such limitation in Article 32 or the MVC Jobs MOU, but also by the fact that when the negotiators of the 2010 Agreement sought to impose constraints on Postal Service freedom to contract out, they knew how to do so. They did so in the MOU on Consideration of National Outsourcing Initiatives (MOU on National Outsourcing Initiatives), which requires that the Postal Service follow specified procedures in the consideration of such initiatives.<sup>10</sup> They also did

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<sup>9</sup> Article 32 provides:

**Section 1. General Principles**

- 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.

(See Memos, pages 369, 371, 372, 404 and 412)

- B. The Employer will give advance notification to the Union at the national level when subcontracting which will have a significant impact on bargaining unit work is being considered and will meet with the Union while developing the initial Comparative Analysis report. The Employer will consider the Union's views on costs and other factors, together with proposals to avoid subcontracting and proposals to minimize the impact of any subcontracting. A statement of the Union's views and proposals will be included in the initial Comparative Analysis and in any Decision Analysis Report relating to the subcontracting under consideration. No final decision on whether or not such work will be contracted out will be made until the matter is discussed with the Union.

<sup>10</sup> The MOU on Consideration of National Outsourcing Initiatives provides:

The parties agree that it is in their best interest to meet and discuss national outsourcing initiatives at an early stage of the process.

Once the Strategic Initiatives Action Group (SIAG) has determined that a proposed concept will involve significant impact on bargaining unit work and preparation begins on a memo detailing consideration of the five Article 32 factors, the Union will be provided notification. Union involvement at this early stage of the process is without prejudice to either party's position regarding the determination as to whether there is a potential significant impact on bargaining unit work.

so in the MOU on Contracting or Insourcing of Contracted Services, which bars the Postal Service from contracting out if the work can be performed by the bargaining unit at a cost equal to or less than that of contract service. They did not do so, however, in the MVC Jobs MOU, which is silent on the Postal Service freedom to contract out PVS work.

The Postal Service also points to the contrast between the MVC Jobs MOU, which is silent with respect to the contracting out of PVS work, and the explicit treatment of that issue in the Amended Work Rules Pilot MOU (Pilot MOU). The Pilot MOU was executed in 2009 and continued in effect under the 2010 Agreement. It provided that the parties would select facilities as pilot sites for an experiment to determine whether removing certain work rules would allow the Union to compete more effectively with outside contractors.<sup>11</sup> The Pilot MOU also provides that “No ‘mode conversion’ [contracting out of an entire PVS facility to HCR] will occur during the duration of the pilot”. This, too, the Postal Service asserts, demonstrates that when the parties wanted to place limits on the Postal Service freedom to contract out work currently performed by the bargaining unit, they knew how to do so – and did not do so in the MVC Jobs MOU.<sup>12</sup>

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Following receipt of notice, the Union will be afforded opportunities for briefings, meetings and information sharing as the concept is developed, costing models prepared, and a Comparative Analysis document drafted.

The above process also will be utilized when an existing contract for a national outsourcing initiative is expiring and consideration is being given to rebid the outsourcing of the work.

**The parties understand that the purpose of the Memorandum of Understanding is to allow the Union an opportunity to compete for the work internally at a point in time enough to influence any management decision. The Union may suggest less restrictive work rules, mixes of employee categories, lower wage rates that may improve the efficiency and lower the costs of an in-house operation.** (Emphasis in original.)

<sup>11</sup> See Case No. Q10V-4Q-C 123 24573 (PVS Amended Work Rules Pilot MOU) (Goldberg, 2013).

<sup>12</sup> The Postal Service made other arguments aimed at showing that the MVC Jobs MOU does not impose a total prohibition on the contracting out of PVS work. Inasmuch, however, as the Union does not here argue that the MVC Jobs MOU prohibits all contracting out of PVS work, but only that work which would have a significant effect



In sum, the Postal Service argues that its right to contract out PVS work, including such contracting out as will have a substantial effect on the bargaining unit, has long been recognized by Article 32.1.B., subject only to the requirement that it follow the Article 32.1.B. procedures and give due consideration to the five Article 32.A factors prior to contracting out. There is nothing in the MVC Jobs MOU or Article 32.1.B. that requires the Postal Service to comply with the MVC Jobs MOU before it may exercise its Article 32 rights.

### 3. Decision

The strongest Postal Service argument in support of its position is that the MVC Jobs MOU contains no explicit prohibition on the exercise of its right to contract out work currently performed by the bargaining unit, including such contracting out as would have a significant impact on the bargaining unit, without first complying with the terms of the MOU. Nor, the Postal Service notes, did the drafters of the 2010 Agreement amend Article 32 to impose such a prohibition.

Regardless of the silence of the MVC Jobs MOU on the issue, I find it unthinkable, in light of the parties' undisputed bargain to trade Union financial concessions for more bargaining unit work, that the parties would have agreed in the MVC Jobs MOU that the Union would have the opportunity to review all existing contracting out of highway driving work, with a view to returning to the bargaining unit all work that bargaining unit employees could do at no greater cost than the contractor, but would also have agreed that the Postal Service was free, prior to the completion of that review, to contract out such a substantial amount of highway driving work that it would have a significant effect on the bargaining unit. In simplest terms, I cannot imagine a scenario in which, at the close of the 2010 negotiations, the chief USPS negotiator would have said to his Union counterpart, "You know that despite the MVC Jobs MOU, we can contract out the entire PVS operation without first complying with that MOU", and the Union negotiator would have responded, "Sure, we understand that." It is far more likely that both parties assumed (or would have assumed if the possibility of

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on the bargaining unit until the MOU has been complied with, I shall not discuss the Postal Service contention that the MVC Jobs MOU does not bar all contracting out of PVS work.

the Postal Service contracting out all PVS work had been raised) that their agreement to review all existing HCR routes, with a view to returning work to PVS employees, implicitly barred any large-scale contracting out of PVS work.

Indeed, to interpret the MVC Jobs MOU as the Postal Service proposes would render the MVC Jobs MOU meaningless in this case, since it would enable the Postal Service to contract out all highway driving work currently performed by the bargaining unit at a time when it is contractually required to determine, in concert with the Union, if more highway driving work can be brought into the bargaining unit in a cost-effective manner.

Nor are the Postal Service's remaining arguments for a contrary interpretation of the MOU persuasive. The failure of the MVC Jobs MOU to impose explicit limitations on contracting out, such as are contained in the MOU on National Outsourcing Initiatives and the MOU on Contracting or Insourcing of Contracted Services, does not indicate that the parties intended the MVC Jobs MOU to impose no limits on contracting out. Rather, in the context of a National Agreement in which the Union's *quid pro quo* for the financial concessions it made to the Postal Service was job recapture, and an MVC Jobs MOU that assured the Union that it would have the opportunity, subject to cost constraints, to return all contracted out highway driving to the bargaining unit, it is more likely that it never occurred to the parties that the Postal Service could frustrate the jobs recapture purpose of the MVC Jobs MOU and the entire 2010 Agreement by contracting out all highway driving work being performed by bargaining unit employees, at least not without having complied with the Jobs MOU. . That, under all the circumstances, is a far more reasonable interpretation of the silence of the Jobs MOU with respect to the right of the Postal Service to engage in contracting out bargaining that would have a significant impact on the bargaining unit than is the Postal Service interpretation that the Jobs MOU left it free to contract out the entire PVS function.

Finally, the fact that the parties included an explicit prohibition on contracting out during the experimental period under the Pilot MOU does not show that that no limitations on contracting out were implied in the MVC Jobs

MOU. The Pilot MOU was focused on preventing contracting out; the MVC Jobs MOU was focused on the recapture of work that had previously been contracted out. In the former situation, the parties would be expected to deal explicitly with the circumstances under which contracting out would be prohibited. In a provision dealing with work recapture, such as the MVC Jobs MOU, the parties might assume, as I conclude they did here, that contracting out that would be inconsistent with their work recapture objective was implicitly barred, hence have failed to so state explicitly. That failure can hardly be interpreted as assent to contracting out that would undermine the work recapture effort that was the Union's primary goal in the 2010 negotiations.

Accordingly, I conclude that the Postal Service may not contract out PVS work that would have a significant impact on the bargaining unit without first complying with the MVC Jobs MOU.<sup>13</sup>

**B. May the Postal Service engage in the Article 32.1.B. consideration of contracting out PVS work that would have a significant impact on the bargaining unit without first complying with the MVC Jobs MOU?**

According to the Postal Service, there are three reasons why merely considering contracting out of PVS operations prior to compliance with the MVC Jobs MOU does not violate the Agreement:

First, nothing in the Agreement, including the MVS Jobs MOU itself, requires the parties to complete the steps required by the MVS Jobs MOU before considering the possibility of outsourcing PVS operations in the future. Second, a review of the entire 2010 National Agreement and its attendant circumstances demonstrates that the Postal Service clearly retained its ability to consider and execute outsourcing at the conclusion of the 2010 bargaining cycle. Third, to the

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<sup>13</sup> In reaching this conclusion, I do not rely or express any opinion on the Union's argument that the contracting out of all PVS work would violate the Postal Service's Jobs MOU commitment to return a minimum of 600 HCR routes to the bargaining unit without regard to the comparative costs of having those routes serviced by PVS or HCR. That argument, if accepted, would bar the Postal Service from the contracting out of all PVS operations even after complying with the Jobs MOU. As such, it goes beyond the issues presented by this case and addressed by the parties.

extent outsourcing is limited by the 2010 National Agreement, it is only limited when the Union shows that in-house operations are equal in cost or less costly than outsourcing. Since it is impossible for the Postal Service to know how the economic balance tilts without performing a comparative analysis, the mere act of conducting such a review, even in the context of Article 32.1.B., cannot be a violation of the National Agreement.

The first two of these arguments are not persuasive. Not only would engaging in the Article 32.1.B. development of an initial Comparative Analysis report constitute a substantial waste of Postal Service time and money if undertaken at a time when it was contractually barred from contracting out, but it would impose an equally great burden on the Union, which might feel compelled to engage in an Article 32.1.B. consideration of contracting out if begun by the Postal Service for fear of forfeiting contract rights against contracting out if it did not do so. Indeed, that is to some extent what occurred in this case, in which the Union, although contesting the Postal Service right to contract out the entire PVS operation prior to complying with the MOU, sought to participate in the comparative analysis begun by the Postal Service in order to protect its Article 32.1.B. rights in the event it did not prevail on its argument that the Postal Service was barred from contracting out the entire PVS operation by virtue of the MOU.

The Postal Service's second argument – which is essentially that the MVC Jobs MOU imposes no limitation on the Postal Service's Article 32.1.B. right to contract out – has already been discussed and rejected. It would serve no purpose to repeat here the reasons for that rejection.

The Postal Service's third argument is also unpersuasive. To be sure, the Postal Service cannot determine whether the cost of retaining work in house is less to or equal than the cost of contracting out without engaging in a comparative analysis, but I have concluded that the MVC Jobs MOU bars the Postal Service from contracting out PVS work that would have a significant effect on the bargaining unit, regardless of comparative costs, without first complying

with the MVC Jobs MOU. Hence, the Postal Service has no legitimate basis, until it has complied with the MVC Jobs MOU, for conducting a comparative analysis.

In sum, the Postal Service may not engage in the Article 32.1.B. consideration of contracting out PVS work that would have a significant impact on the bargaining unit without first complying with the MVC Jobs MOU.<sup>14</sup>

**C. Did the Postal Service violate Article 32.1.B and/or the MOU on Consideration of National Outsourcing Initiatives by failing to comply with the procedural requirements of those provisions in considering the contracting out of the PVS function?<sup>15</sup>**

**1. The Union's Position**

The Union's position is that the Postal Service failed to comply with those portions of Article 32.1.B. and the MOU on National Outsourcing Initiatives which provide that the Union should have early involvement in the consideration of contracting out that will have a substantial effect on the bargaining unit. It points out that in the decision of the Interest Arbitration Panel that awarded the 2001 Agreement, the Panel stated:

While USPS asserts that [under the then-existing version of Article 32.1.B.] the Union's views are given full

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<sup>14</sup> The Postal Service also asserts, in support of its alleged right to consider contracting out, even when it is barred by the MVC Jobs MOU from engaging in contracting out, that "It is logical and reasonable for parties to restrict actions and to draft contract language that reflects that restriction, but it is something entirely different to suggest that the parties intended to restrict their thoughts. . . It is hard to believe that the Postal Service would have intended to have its thoughts restricted on a matter as crucial as its labor costs" (Brief, pp. 15-16).

If the Postal Service sought only to think about contracting out, even when barred from doing so, this argument might have merit. In fact, however, the Postal Service seeks the right to conduct an Article 32.1.B. process at a time when it may not contract out, and that, for the reasons set out above, it may not do.

<sup>15</sup> The parties agreed that even if I were to conclude, as I have, that the Postal Service was without contractual authority to conduct an Article 32.1.B. proceeding in this matter, I should nonetheless decide whether in doing so the Postal Service violated the procedural requirements of Article 32.1.B. and /or the MOU on National Outsourcing Initiatives.

consideration at the time they are expressed, that assertion assigns insufficient weight to the reality that once a number of top management officers have approved a plan, even if that approval is labeled 'tentative', management is likely to react defensively to any contrary opinion expressed by the Union. . . . If the command of the existing Article 32 that 'No final decision on whether work is to be contracted out will be made until the matter has been discussed with the Union' is to be meaningfully implemented, the Union's views must be heard earlier in the decision-making process than they are at present.

It was in order to provide meaningful implementation of the Union's right to be consulted prior to a Postal Service decision on contracting out, the Union asserts, that the Interest Arbitration Panel added to the then-existing Article 32.1.B. the requirement that the Postal Service "meet with the Union while developing the initial Comparative Analysis report".

The Union also asserts that the goal of the 2001 changes in Article 32.1.B – to insure early Union involvement and meaningful participation in the decision-making process – was reaffirmed and the procedures necessary to implement that goal were clarified by the 2010 MOU on National Outsourcing Initiatives, which provides, in relevant part:

Once the Strategic Initiatives Action Group (SIAG) has determined that a proposed concept will involve significant impact on bargaining unit work and preparation begins on a memo detailing consideration of the five Article 32 factors, the Union will be provided notification. . .

Following receipt of notice, the Union will be afforded opportunities for briefings, meetings and information sharing as the concept is developed, costing models prepared, and a Comparative Analysis document drafted. . .

**The parties understand that the purpose of the Memorandum of Understanding is to allow the Union an opportunity to compete for the work internally at a point in time enough to influence any management decision. . . (Emphasis in original.)**

According to the Union, the Postal Service, by its actions in the Article 32.1.B. proceedings, effectively denied the Union a meaningful opportunity to have input in the development of the initial Comparative Analysis, thus violating the procedural requirements of both Article 32.1.B. and the MOU on National Outsourcing Initiatives. In support of its argument, the Union asserts that the Postal Service (1) denied its request for Union technicians to have the opportunity for direct interaction with IBM technicians; (2) denied the Union's January 2014 request for a copy of the contract between IBM and the Postal Service until October 2014, after the arbitration hearing had begun; (3) denied the Union's request, also made in January 2014, for a copy of the template of the cost comparison analysis IBM was preparing for the Postal Service "whether or not the template is complete". Taken together, the Union contends, this conduct by the Postal Service denied the Union its right under the Agreement to meaningfully participate in the Postal Service consideration of whether to contract out all PVS operations.

## 2. The Postal Service Position

The Postal Service position is that the Article 32 proceedings regarding its consideration of contracting out all PVS work are ongoing and incomplete, and that its actions to date have constituted good faith compliance with the provisions of Article 32.1.B. and the MOU on National Outsourcing Initiatives. It provided the Union with advance notice that it was considering the contracting out of all PVS operations, has scheduled meetings with the Union to discuss the contracting out initiative, provided the Union with data, and granted nearly all Union information requests, denying such requests only when it had a legitimate

reason to do so. It denied the Union's initial request for a copy of the its contract with IBM only until the Union demonstrated that it had a legitimate reason for requesting the contract, after which that request was granted. Similarly, it denied the Union's request for *ex parte* meetings with the IBM consultants, but offered the Union the opportunity to meet with those consultants in the presence of Postal Service representatives.

With respect to the Union's complaint about the Postal Service refusal to provide IBM's template for the PVS- HCR comparative cost analysis in January 2014, the Postal Service asserts that at that time IBM had not completed even a draft template, and was only in the preliminary stages of doing so. Neither Article 32.1.B. nor the MOU on National Outsourcing Initiatives required it to provide the Union with preliminary work of this kind.

According to the Postal Service, the core of the Union complaint with respect to the time it received the template and the accompanying Draft Comparative Analysis is misplaced. Article 32.1.B. entitles the Union to early involvement in the Postal Service's contemplation of contracting out work, but it does not define "early involvement". It requires only that the Postal Service (1) provide the Union with advance notification when contracting out is being considered; (2) meet with the Union while developing the initial Comparative Analysis; (3) state the Union's views and proposals in the initial Comparative Analysis; and (4) make no final decision on contracting out until the matter is discussed with the Union. According to the Postal Service, it has complied with the first two requirements. As for requirement (3), it has thus far developed only a draft Initial Comparative Analysis; when the Union provides it with comments and proposals on that draft, those will be included in the final Initial Comparative Report. And, as to requirement (4), no final decision on contracting out has yet been made.

The Postal Service concludes:



The point of bringing the Union into outsourcing decisions early under Article 32.1.B. and the MOU on Consideration of National Outsourcing Initiatives is to give it an opportunity to comment and bid for the work before the Postal Service makes a decision. . . The Union may argue that they could have had input into the creation of the Postal Service's spreadsheets themselves, but they cannot say that they were not given advance notice, or that they have not had a chance for input before a final decision is made. (Brief, pp. 26-27.)

### 3. Decision

#### a. The Union's request for a copy of the IBM contract

The Postal Service did not grant the Union's January 2014 request for a copy of its consulting contract with IBM. Instead, Mr. Devine, in March 2014, wrote Mr. Foster, asking the Union to explain the relevance of the IBM contract that would "make it necessary for collective bargaining or for the enforcement, administration, or interpretation of the CBA".<sup>16</sup>

Mr. Foster responded on May 6, 2014, writing:

The Union is requesting the IBM Contract because IBM is collecting data for the comparative analysis of PVS to HCR to assist in the consideration of subcontracting out the work of MVS employees, which will have a significant impact on the MVS Craft. The contract will describe the work, including the breadth and depth of the work to be done, and will provide a timetable for the work. This information is very relevant to our job of collective bargaining and to the enforcement, administration and interpretation of the National Agreement.

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<sup>16</sup> Article 31.3 of the Agreement requires the Postal Service to make available to the Union all information that satisfies the standard set out in the quoted language.

Despite Mr. Foster's response, the Postal Service had not provided the Union with a copy of the IBM contract at the time the arbitration hearing began in October 2014. On the second day of that hearing, October 8, 2014, Postal Service counsel asked Mr. Foster to explain the relevance of the IBM contract. Mr. Foster responded:

The Union believes that we're entitled to all parts of the components that the Postal Service is utilizing when they're doing the 162 site conversations. And if they've entered into a contract with IBM, then the Union believes that we're entitled to see what the components are, what the mechanism is, and, with that contract, then we are able to determine if there's additional information that the Union needs or is seeking.

Shortly thereafter, the Postal Service provided the Union with a copy of the IBM contract.

Mr. Foster's response to counsel's question about the relevance of the IBM contract was, if anything, less specific than his May 2014 response to Mr. Devine's letter. The Postal Service thus cannot contend that it did not understand the relevance of the Union's request in May 2014, but did understand it in October 2014. Nor may the Postal Service successfully contend that providing the Union with the contract at the arbitration hearing satisfied the early information sharing requirement of the MOU on National Outsourcing Initiatives. Under these circumstances, I conclude that the Postal Service's refusal to provide the Union with a copy of the IBM contract in May 2014 did not constitute good faith compliance with the Agreement. To the contrary, it violated the information-sharing provisions of the MOU on National Outsourcing Initiatives.<sup>17</sup>

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<sup>17</sup> Inasmuch as the parties have limited the scope of the Arbitrator's contractual consideration of the Postal Service's conduct in the Article 32.1.B. proceeding to its compliance with the procedural requirements of Article 32.1.B. and the MOU on National Outsourcing Initiatives, I express no opinion on whether the Postal Service's May 2014 refusal to provide the Union with a copy of the IBM contract also violated Article 31.3.

b. The Union's request for meetings with the IBM consultants

The Postal Service asserts that it acted for entirely justifiable reasons in denying the Union's request for meetings between Union technicians and IBM technicians in the absence of representatives from Postal Service Labor Relations. Phil Tabbita, who made the request at the parties' July 29, 2013, meeting denied that the Union had ever requested *ex parte* meetings, and there is no evidence in the record that would contradict Mr. Tabbita's testimony. The Postal Service, however, contends that Todd Coffey, the Postal Service representative at the July 29 meeting, understood the Union to be requesting *ex parte* meetings. In support of that contention, the Postal Service relies on Mr. Coffey's August 12 letter to Mr. Foster, which stated:

After careful consideration of your request, we ask that any inquiries in reference to our consultant's transaction of the analysis process be submitted to Headquarters, Labor Relations, specifically the APWU Contract Administration Unit. In turn, we promise to forward any Union input and/or correspondence through the appropriate channels.

This letter does not, however, state or imply that it was triggered by a Union request for *ex parte* meetings, or that Union technicians could meet with IBM technicians as long as Postal Service Labor Relations representatives were present. Rather, it states that all questions to the IBM consultants were to be submitted to Labor Relations, and that Labor Relations personnel would serve as intermediaries in transmitting such questions to the IBM consultants.

The Postal Service contends that if the Union had no objection to meeting with IBM technicians in the presence of Postal Service representatives, it would, after receiving the August 12 letter, have requested such meetings. The absence of such requests, the Postal Service suggests, indicates that the Union was interested solely in *ex parte* meetings. Mr. Tabbita and Mr. Foster testified, however, that in light of the language contained in the August 12 letter, they understood the Postal Service to have barred all direct interaction between Union technicians and IBM technicians.

I, too, interpret Mr. Coffey's August 12, 2014, letter, to deny the Union all direct access to IBM technicians during the period IBM was developing the draft Initial Comparative Report. I further conclude that in doing so the Postal Service violated the information-sharing provisions of the MOU on National Outsourcing Initiatives.

c. The Union's request for a copy of the IBM cost comparison template

The Postal Service defense of its denial of the Union's January 2014 request for IBM's template for the PVS- HCR comparative cost analysis rests primarily on the grounds that at that time IBM had not completed even a draft template, but was in the preliminary stages of doing so. Indeed, the Postal Service points out, IBM did not deliver a draft comparative analysis (including the template it used to make cost comparisons) to SIAG until April 2014.

Nothing in Article 32.1.B. or the MOU on National Outsourcing Initiatives, the Postal Service asserts, provides the Union with the early access it seeks. It states (as previously set out on p. 25):

The point of bringing the Union into outsourcing decisions early under Article 32.1.B. and the MOU on Consideration of National Outsourcing Initiatives is to give it an opportunity to comment and bid for the work before the Postal Service makes a decision. . . The Union may argue that they could have had input into the creation of the Postal Service's spreadsheets themselves, but they cannot say that they were not given advance notice, or that they have not had a chance for input before a final decision is made.

The first answer to the Postal Service argument that it was under no obligation to share with the Union the IBM cost comparison template in whatever form it existed in January 2014 is that it ignores that portion of the MOU on National Outsourcing Initiatives which provides that:

Following receipt of notice, the Union will be afforded opportunity for briefings, meetings, and information sharing as the concept is developed, *costing models prepared*, and a Comparative Analysis drafted. (Emphasis supplied.)

The Postal Service cannot argue that it complied with the MOU provision which requires information sharing “as . . . costing models are prepared”, inasmuch as it refused the Union’s request to see IBM’s costing template on the grounds that it was not completed.<sup>18</sup> Accordingly, I find that the Postal Service denial of this request violated the MOU on National Outsourcing Initiatives.

The Postal Service view of the Union’s role in the preparation of a Comparative Analysis report is also inconsistent with the underlying purpose of Article 32.1.B. Contrary to the language from the Postal Service brief, the point of the 2001 additions to Article 32.1.B., which sought to bring the Union into outsourcing decisions earlier than had been the Postal Service practice, was not merely to provide the Union with an opportunity for input before a final decision was made whether or not to contract out, but to provide it with an opportunity for meaningful input at the decision-forming stage. As the 2001 Interest Arbitration Panel stated in granting the Union’s request for additions to Article 32.1.B:

If the command of the existing Article 32 that ‘No final decision on whether work is to be contracted out will be made until the matter has been discussed with the Union’ is to be meaningfully implemented, the Union’s views must be heard earlier in the decision-making process than they are at present. (Emphasis added.)

The template for a cost comparison analysis determines which factors (or, as they are sometimes called “inputs”) will be considered in determining whether

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<sup>18</sup> The terms “costing model” and “costing template” are synonymous. See Merriam-Webster Online Dictionary ([www.merriam-webster.com/dictionary](http://www.merriam-webster.com/dictionary)), which defines “template” as “something that establishes or serves as a pattern”, and defines “model” as “a pattern of something to be made”.

a decision to contract out furthers the interests of the Postal Service.. The design of the template may thus have a significant impact on whether or not contracting out will take place.

The Postal Service, as is evident from the testimony of Jonathan James, the leader of the IBM consulting team, had ample opportunity for input into the design of the cost comparison template during the July 2013 – April 2014 period in which IBM was engaged in the design process. Thus, if the Union is to have meaningful input into the decision forming process, it must also have the opportunity for input into the design of the template on which that decision will be based. As Mr. Foster wrote to Mr. Devine in response to the Postal Service denial of the Union request for the IBM template:

Perhaps our use of the word “template” was misunderstood. You say that IBM is compiling data for the comparative analysis and when the draft is done, APWU will be advised. Typically, APWU will receive Excel workbooks and spreadsheets used to detail the Comparative Analysis. We called them “templates” because we anticipated that the workbooks and worksheets would be designed before all the required numbers for inputs were determined and refined. *However, the design would allow us a good opportunity to critique the approach and provide some input – before all the numbers necessary to complete an analysis are determined. . . (Emphasis supplied.)*

By denying the Union’s request for IBM’s template for the PVS- HCR comparative cost analysis, the Postal Service denied the Union the meaningful input into the contracting out decision that is required by Article 32.1.B.<sup>19</sup>

#### d. Summary and Conclusion

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<sup>19</sup> The Postal Service asserts that by subjecting IBM’s draft template to internal Postal Service verification and SIAG consideration before sharing it with the Union in August 2014, it was following the SIAG guidelines. The SIAG guidelines, however, were not negotiated with the Union, but were internally promulgated by the Postal Service. Although they are in many respects consistent with the National Agreement, to the extent they are not so consistent, the National Agreement must be followed. Hence, the Postal Service’s refusal to provide the Union with the IBM template cannot be defended by reference to the SIAG guidelines.

The Postal Service failed to comply with the procedural requirements of Article 32.1.B. and the MOU on National Outsourcing Initiatives by denying the Union's requests for a copy of the IBM contract and the IBM costing template, as well as by denying the Union's request for meetings between Union technicians and technicians on the IBM consulting team.

#### **IV. AWARD**

1. The Postal Service may not contract out PVS work that would have a significant effect on the bargaining unit without first complying with the MVC Jobs MOU.
2. The Postal Service may not engage in the Article 32.1.B. consideration of contracting out PVS work that would have a significant impact on the bargaining unit without first complying with the MVC Jobs MOU.
3. The Postal Service violated Article 32.1.B. and the MOU on Consideration of National Outsourcing Initiatives by failing to comply with the procedural requirements of those provisions in considering the contracting out of the PVS function.
4. The matter is hereby remanded to the parties for implementation of the Award. In the event the parties cannot agree on the appropriate implementation of the Award, they may return to the Arbitrator for resolution.<sup>20</sup>

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<sup>20</sup> The Union requested the Arbitrator to reserve jurisdiction to decide, if necessary: (1) how to apply the parties' agreement on a fair comparison of all reasonable costs, and (2) whether the Postal Service has complied with its obligation under Article 31.3 to provide the Union with necessary information. The Postal Service has not joined in that request and I shall not rule on it at this time. The Union may, if it wishes, renew that request at a later date, and I will entertain it, as well as any objections that the Postal Service may have.



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Stephen B. Goldberg, Arbitrator

March 25, 2015