

REGULAR REGIONAL ARBITRATION PANEL

In the Matter of the Arbitration)	Grievant: Class Action
)	
between)	Post Office: Des Moines IA P&DC
)	
UNITED STATES POSTAL SERVICE)	Case No. E94T-1E-C 97066487
and)	
AMERICAN POSTAL WORKERS)	Local Griev.: 779612245
UNION, AFL-CIO)	

Before: George T. Roumell, Jr., Arbitrator

Appearances:

For the U.S. Postal Service: Leigh Scott,
Labor Relations Specialist, Western Area

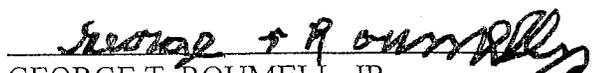
For the Union: Donald L. Foley, Nat'l. Business Agent,
Maintenance Division
APWU Advocate

Place of Hearing: Des Moines, IA Main Post Office
1165 Second Avenue

Date of Hearing: March 18, 2004
Date of Award: May 12, 2004
Relevant Contract Provision(s): Article 15, 19 and 32
Contract Year: 1994-97
Type of Grievance: Contract

AWARD:

1. The grievance is granted.
2. The adversely affected members of the bargaining unit, namely, the 11 BEMs and two electricians employed in January 1997 in Des Moines shall be compensated at straight time rates in effect in their respective classifications in January 1997 for the time that the contractor's employees devoted to retrofit the fixtures involved.
3. The parties are directed to compute this time.
4. The Arbitrator will keep jurisdiction of this matter for one hundred twenty (120) days to resolve any disputes as to the calculation of the remedy set forth in this Award.


GEORGE T. ROUMELL, JR.
Arbitrator

ARBITRATION OPINION AND AWARD

Issues Presented

Management Version: Did Management violate Articles 19 and 32 of the National Agreement when Management subcontracted the modification and replacement of fluorescent light fixtures in various city stations within the Des Moines, Iowa Processing and Distribution Center? If so, what is the appropriate remedy?

Union Version: Did the Service violate the terms of the National Agreement by the manner in which it determined to subcontract for the performance of certain electrical work in Des Moines stations? And if so, what shall the remedy be?

Background

In November, 1996 at Des Moines P&DC, there were 11 maintenance craft employees classified as BEM's, with six working Tour 2, two working Tour 1, and three working Tour 3. In addition, there were two electricians working Tour 2.

Around November, 1996, the Service made a decision to upgrade light fixtures at the City Carrier Station serviced by the Des Moines, IA P&DC. The aim of the upgrade was to save energy costs. At the time, David Mallett was manager of maintenance for the Des Moines P&DC. Jon Arnold was the maintenance craft director for Des Moines. The carrier stations involved were:

- Beaverdale Station
- East 14th Street Station
- Metro Carrier Annex
- Morgan Street Carrier Annex
- South Des Moines Station
- Urbandale Training Center
- West Des Moines station
- West Suburban Annex
- Urbandale Station

On November 26, 1996, Mr. Mallett wrote to Jon Arnold, as follows:

Date: November 26, 1996
Subject: Light replacement City Stations
To: Jon Arnold

We are currently in the process of light fixture upgrade at the city carrier stations. This will involve the replacement of some fluorescent light fixtures with metal halide light fixtures, adding light fixtures and modification of existing light fixtures to energy saving ballasts and bulbs.

I have estimated a cost of \$102.14 per light fixture for postal maintenance employees to modify the light fixtures (see attachment). I have received information from offices in this area that have had contractors upgrade fixtures recently. Averaging the costs for the 9 offices the average cost of the upgrade is \$40.57.

Postal maintenance will install new metal halide lights at Urbandale station work room floor and West Suburban Station work room floor. Postal maintenance personnel will install the metal halide lights removed from West Suburban Station into the Beaverdale Station. The upgrade of the remaining fluorescent lights at these stations will be contracted out.

The upgrade of all light fixtures at West Des Moines Station will be contracted out and the upgrade of fluorescent lights at South Des Moines Station will be contracted out.
(Emphasis supplied by Arbitrator)

As the emphasized portion of the above letter indicates, some of the work involved would be performed by postal employees, namely, the BEM's and electricians. The bulk of the work was to be subcontracted out. As the second paragraph of the letter indicates, Mr. Mallett had done a cost estimate. Attached to the letter were two documents. The first was Mr. Mallett's cost estimate to do the work planned to be subcontracted out, namely:

Minutes

1	Remove Grid
1	Remove Bulbs
1	Remove reflector
3	Remove ballast
5	Install ballast
5	Install ends to ballast
15	Modification to fixture to accommodate new ends
1	Reinstall reflector
1	Install bulbs
1	Reinstall Grid

34 total minute to modify light fixtures

120 Minutes travel time (60 minutes each way) (includes loading and loading at plant equipment, materials)

90 Minutes per day for cleanup at station and disposal of parts

30 minutes per day breaks

This would allow the modification of 7 fixtures per day.

Parts Costs for upgrade of lights

\$25.00 ballast

\$7.60 bulbs (4)

\$25.00 modification kit for ends to hold bulbs

Total labor cost per light fixture \$31.22

Total materials \$88.82

Support personnel cost (15%) \$13.32

Total cost for postal maintenance personnel \$102.14

There was also a chart attached to this letter which was entitled "Sample of Lighting Projects Completed in Hawkeye District," in reference to retrofitting of existing and mix of new and retrofit. The chart was as follows:

Sample of Lighting Projects Completed in Hawkeye District

<u>Location</u>	<u>Fixtures</u>	<u>Project Cost</u>	<u>per Fixture</u>	<u>Retrofit of Existing</u>	<u>Mix of New & Retrofit</u>
Creston	211	\$8,956.00	\$42.45	X	
Ames	374	\$24,999.00	\$66.84		X
Marshalltown	230	\$12,996.00	\$56.50		X
Carroll	334	\$17,088.00	\$51.16	X	
Davenport					
(NW Station)	260	\$9,934.00	\$38.21	X	
Moline	423	\$24,026.00	\$56.80		X
Vinton	55	\$1,890.00	\$34.36		X
Waverly	69	\$2,604.00	\$37.74	X	
Burlington	522	\$32,695.00	\$62.63		X
Fort Madison	186	\$6,251.00	\$33.61	X	
Ottawa	403	\$16,464.00	\$40.85	X	
LeMars	277	\$8,990.00	\$32.45	X	
Clear Lake	154	\$8,855.00	\$57.50		X
Spirit Lake	95	\$4,646.00	\$48.91	X	
Winterset	75	\$2,984.00	\$39.79	X	
	3668	\$183,378.00	\$49.99		

Note: The 'number o fixtures' is the finished number of fixtures with ballast where possible fixtures are tandem wired I.E. two four lamp fixtures, one 4 lamp ballast
Example: Winterset actually has 115 fixtures but ballast were reduced to 75

Underneath the chart was the following statement in Mr. Mallett's handwriting:

Average of cost per fixture on lights that needed retrofit only - \$40.57

A third sheet entitled, "hourly rates for computing maintenance labor costs" was attached to Mr. Mallett's letter, which indicated in part:

Level	94 Rate	95 Rate (3.49%)
		* * *
7	26.40	27.32
8	27.06	28.00
9	28.28	29.27

* * *

Subsequently, on December 6, 1996, Mr. Mallett wrote to Mr. Arnold a letter similar to the letter of September 26, 1996 on the subject of "light replacement City Stations." In addition to advising of the costs and the work to be subcontracted out and the work to be done by postal employees, there was a different first paragraph and last paragraph, which read:

Please note 4 additional offices have been added to this letter from the previous letter.

* * *

The upgrade of all light fixtures at West Des Moines Station, **East 14th Street Station, Metro Station, Morgan Street Station and the Urbandale Training Center** will be contracted out and the upgrade of fluorescent lights at South Des Moines Station will be contracted out.
(Emphasis in original)

In response, on December 9, 1996, Jon Arnold sent a written "request for information & documents relative to processing a grievance" to David Mallett, which read:

I request the actual scope of work for light replacement at the city stations. Is this work metal halide lamps, fluorescent lamps, or a combination of both. Please provide the full cost comparison as I do not understand how the other contractors completed this work for less than our cost for parts.

On December 10, 1996, Mr. Mallett denied the request, writing:

Contract/solicitation not available at this time. When one is written copy will be provided. Fluorescent lamps will be changed by contractor metal halide USPS personnel. Cost comparison already provided.

Mr. Mallett's denial statement was correct because it was not until December 11, 1996 that Patrick Broderick, Administrative Service Office Des Moines, Iowa, of the Hawkeye District wrote to Mr. Mallett enclosing the specification documents for the project, as follows:

I have attached the lighting and electrical specification we have been using for retrofit projects. Also a scope of work for each of the stations.

Thought you might want to have someone review. We will be sending out the solicitation next week. If you see items you want changed let me know.

You will receive a copy of the solicitation also.

On December 10, 1996, Mr. Arnold met with his immediate supervisor in a Step 1 grievance meeting protesting the "subcontracting/lamp replacement" issue. On December 23, 1996, the supervisor, Randy Meier, denied the grievance.

Mr. Arnold thereupon filed a Step 2 appeal. In paragraph 11, he listed the articles and sections involved as "ASM 535.111; National 19."

As to the "detailed statement of facts/contentions," Mr. Arnold wrote:

On 11/20/96, the union received notification that light replacement at stations would be partially subcontracted from Dave Mallett, Manager Maintenance. The union contends that insufficient, faulty, or inadequate information has been provided and therefore any cost comparison provided at this point must be fatally flawed. As initial support for this claim, the union points out that the provided cost for parts for the work mentioned is in excess of the average cost per fixture installed for the mentioned subcontractors. Further documentation requested may introduce more contentions.

The "corrective action requested" was:

As resolution to this grievance, the union requests that all contract work provided for in Mr. Mallett's notification be placed on hold immediately until further and more complete information is available to the union. The union will have the right to grieve any work actually performed if the grievance is initiated within 14 days of the work being performed.

As indicated in the appeal which is date-stamped as having been received by Labor Relations on December 23, 1996, the work at issue had not yet been commenced by any contractor.

Mr. Arnold testified that at the time he filed the Step 2 grievance, he was concentrating on the cost of the parts in an effort to persuade Mr. Mallett to not subcontract the work but, instead, to assign it to the BEM's and to electricians. For this reason, Mr. Arnold explained that at the time of the Step 2 appeal and, for that matter, at the first step meeting, he did not discuss labor costs. The Step 2 grievance was discussed between Mr. Arnold and Mr. Mallett on March 4, 1997. The record suggest that by this time the work had been contracted out and the contractors were performing the work, except for the work indicated by Mr. Mallett in his letters that was assigned to postal employees.

The Step 2 denial by Mr. Mallett is quoted below because it brings into focus both the factual and contractual dispute between the parties:

The subject step 2 grievance was discussed with you on 3/04/97, in accordance with Article 15, Section 2 of the National Agreement.

The facts as management understands them are as follows: On 11/26/96 a letter was provided to the APWU with the Postal Service's intent to contract out the retrofit of fluorescent lights at various city stations. It was determined to be cost effective to replace certain lights by postal employees and the remainder of the lights were to be contracted.

The Union makes the following contentions: cost comparisons provided to the APWU were not accurate. The work in fact could be performed by postal employees more cost effective than the contractors could perform the work.

Based on the facts and arguments presented by the union, I find that management has not, as alleged in this grievance, breached the terms and conditions of the National Agreement.

It is management's position that: we are in compliance with the National Agreement, Article 32, in that giving due consideration in contracting out this work. It is evident in that due consideration was given in the fact that postal personnel did perform portions of the work.

The APWU contends that the cost comparison is incorrect. I asked to have the APWU supply me with a cost comparison that they felt was correct. To date I have only received a parts list with costs. The more

important cost, labor costs, was never provided by the APWU.

The APWU contends that there is no such item as a conversion kit as stated in the cost comparison for \$25.00. I did point out that this was left off the total cost was still much lower to contract out. That in fact the determining cost was labor and not parts.

Inasmuch as the union has failed to establish a contractual violation, this grievance is denied.

As the denial suggests, Mr. Arnold, on behalf of the APWU, discussed the cost analysis prepared by Mr. Mallett and outlined to Mr. Arnold beginning with Mr. Mallett's September 26, 1996 letter to Mr. Arnold. Initially, there was concern within the Service that 8 foot fixtures would have to be modified to 4 foot fixtures. Thus, the cost of \$25.00 per unit for modification kits for ends to hold bulbs was contained in the cost analysis prepared by Mr. Mallett. This was not necessary. In his March 12, 1997 denial, Mr. Mallett acknowledged same but suggested that, even if the \$25.00 was taken off the cost of material, it would still bring the cost down to \$63.82 for material. This alleged cost for material became a source of dispute between Mr. Mallett and Mr. Arnold.

Mr. Arnold also questioned the travel time of 120 minutes per day and the 90 minutes per day for cleanup, along with the 15 minutes allotted for modification of fixtures to "accommodate new ends," as set forth in Mr. Mallett's cost analysis. Mr. Arnold did not challenge the other minutes in the analysis but suggested that, based upon his review, the travel time would be substantially reduced because Mr. Arnold claimed that no station was more than 20 minutes away from the main facility; and that 16 fixtures per day could be installed by postal craft employees.

Throughout his testimony, Mr. Arnold insisted that not only was the cost estimate on labor inaccurate, for the reasons as stated, but the fixtures cost was inaccurate as well.

By January 16, 1997, which was seemingly before the work actually began (although the record is unclear on this point), Mr. Arnold had received the following quotation from an electrical supply house in Des Moines, IA whom the Service was using at the time:

Here is the information requested for the nine post office retrofits.

Quant.	Description	Cost	Extension	
2820	FO32/741		\$1.50	\$4,230.00
478	REL-1P32-RH-TP		\$14.61	\$6,983.58
395	REL-2P32-RH-TP		\$14.61	\$5,770.95
166	REL-3P32-RH-TP		\$16.83	\$2,793.78
315	REL-4P32-RH-TP		\$16.83	\$5,301.45
7	SB-232-120-GEB	2 lamp t8 wrap	\$37.77	\$264.39
3	TWL-70S-TB-LPI	70 watt high pressure sodium w/lamp	\$102.22	\$306.66
45	TSB-232-120-1/4 GEB	8' tandem fixture	\$58.88	<u>\$2,649.60</u>
		TOTAL COST		\$28,300.41

*Lamps included in above total

Thank you for the opportunity to quote your lighting needs. If there are any questions or concerns over this quote, feel free to give me a call.

This quote is for the exclusive use of Adventure Lighting. None of this work may be used or duplicated without our consent. If our consent is given, a design fee will be charged.

This quote was shared with Mr. Mallett. Mr. Arnold suggested that, at the time, Mr. Mallett "had his mind made up" to subcontract. Mr. Arnold pointed out that, even with a 20% cushion for miscellaneous parts, the cost for the fixtures was in the range of \$14.61. In his testimony, Mr. Arnold contrasted this with the \$63.82 figure. Mr. Arnold noted that the ballast cost listed by Mr. Mallett was \$25.00, or a difference of about \$10.39. Mr. Arnold also pointed out that as far as bulbs were concerned, the price used by Mr. Mallett of \$7.60 was close to the \$7.00 quoted by the electrical supply house, and thus Arnold did not dispute the \$7.60 figure.

When the \$25.00 for modification kit was deducted and what seemed to be the \$10.39 or thereabouts higher price for the ballasts, Mr. Arnold suggested that Mr. Mallett's cost analysis brought the cost for materials down to around \$53.43. Actually, as the testimony developed, as will be noted, Mr. Arnold even questioned this materials figure. Mr. Arnold explained that his emphasis on the materials cost in his conversations with Mr. Mallett was to encourage Mr. Mallett to not subcontract the work out.

Mr. Mallett's explanation as to his estimate of the cost of the materials was that he was

relying on Service procurement personnel to supply him with the cost of materials.

As matters turned out, Mr. Arnold prepared a lengthy "additions and corrections" in his third step appeal, wherein he concluded that as to estimated materials cost and by having Service employees do the work, it would be \$5.00 cheaper per fixture to have postal employees perform this work which, at 1428 fixtures, would provide a cost saving of \$7,140 using Postal employees.

It is unusual in an arbitration opinion to set forth verbatim additions and corrections for, if they are relevant, usually an arbitrator would summarize same. Because the additions and corrections here reveal a detailed description of Mr. Arnold's view on the costs, which he confirmed in his testimony before the Arbitrator, this Arbitrator has set forth below the additions and corrections Mr. Arnold provided on March 28, 1997:

It is apparent from reading the Step 2 denial, that management failed to understand the position of the union from the beginning. Further, it appears that there was absolutely no information which could have been provided to management which would have in any manner changed the initial determination to contract this work out.

I will point out at this time that there will be grievances forthcoming based on the actual work being performed by subcontractors. A copy of this grievance will accompany each appeal.

The union's original contention was that Mr. Mallett used entirely meaningless figures in his cost comparison dated 11/26/96 (not received at the time) and also in his letter dated 12/6/96. His cost of \$102.14 per fixture for postal maintenance employees to modify the light fixtures is an elaborate work of fiction with absolutely no basis in the work which was actually to be performed under the contracts. Mr. Mallett informed me that this particular estimate was a worst case scenario of an eight foot fixture which must be modified to accommodate four four foot T-7 fluorescent tubes. He said that he called a local company to receive the cost for the parts that would be required for this retrofit and that is where his cost basis for parts is from.

The union's major problem with this cost comparison is that it has nothing to do with the work which was specified in the contract solicitations. There was absolutely no retrofit of eight foot fixtures specified anywhere. All mention of eight foot fixtures in the solicitation require that the original fixture be removed and a new fixture be hung as a replacement. It takes no genius to figure out that if you base your cost comparison on bad information, that the cost comparison will be useless. Mr. Mallett's figure of \$102.14 per fixture multiplied by the approximately 1428 fixtures included in the contract solicitation would

produce a total cost of \$145,856 for this project. Looking at the 'sample of lighting projects completed in Hawkeye District' spreadsheet provided by Mr. Mallett with his cost comparison, this is almost the entire total for all offices in the district which have been modified so far. That sheet shows a total of 3668 fixtures modified at a total cost of \$183,378. Like I said, it doesn't take a genius to see that there is something wrong with Mr. Mallett's cost comparison.

Upon noticing that the cost for parts alone on Mr. Mallett's comparison was far in excess of the average cost per fixture installed, the union initiated this grievance. My first stop was at Adventure Lighting where I spoke with a very helpful lighting salesperson. I explained what the project was that was being proposed and told her that I would like to get a material cost based on the entire contract to base my arguments on. I explained that if I could get an actual cost for parts, that I might be able to get Mr. Mallett to listen to further arguments for letting postal employees perform this work. She willingly provided me with this parts cost giving a quote of \$28,300 for the majority of items that would be required for this work. The union will add an additional 20% for parts that were not included and miscellaneous items required for installation. This will provide for \$33,960 as a basis for all parts required for this work. Dividing this by 1428 fixtures will give an average cost per fixture for parts of \$23.78. The union will point out that these are real numbers culled from the contract solicitations and a real company that actually sells items at the cost quoted.

One more step that the union must add to this calculation at this point in the Electric Company rebate. The contract solicitation clearly states the contractor must provide, '... a list indicating type and number of lamps replaced or retrofitted. This information must be sufficient to complete the applicable power company's rebate form.' The union called the power company to find out the rebate schedule for the work which was being performed. Upon receipt of this information, I constructed a spreadsheet to calculate the approximate total rebate. This calculation provides a total rebate of \$6991. If this number is subtracted from the above total and the average cost per fixture is recalculated, $(33960 - 6991 = 26969; 26969 / 1428 = \$18.89)$ a final average cost per fixture of \$18.89 for parts is achieved. If we use this number and Mr. Mallett's unreal labor cost of \$31.22 per fixture, an average cost per fixture of \$50.11 is achieved. Back to the Hawkeye District spreadsheet, adding the average cost per fixture of the Mix of New and Retrofit facilities $(66.84 + 56.50 + 56.8 + 34.36 + 62.63 + 57.50 = 334.63)$ then divide by the number of facilities $(334.63 / 6 = 55.77)$ provides for an average cost per fixture of \$55.77. Therefore, using Mr. Mallett's own labor figures, it would be over \$5.00 cheaper per fixture to have postal employees perform the work. At 1428 fixtures, that would provide for a cost savings of \$7140.

All of the above information is based upon documentation which was provided to Mr. Mallett. Even with this information, Mr. Mallett insists that his cost comparison is valid and that his determination to subcontract this work was proper. I fail to understand this. The following is the union's analysis of Mr. Mallett's cost comparison.

The one item that the union must make clear is that there is no fixture modification required in the contract solicitation. Therefore Mr. Mallett's addition of 15 minutes per fixture for 'modification to fixture to accommodate new ends' must be removed from his time estimate. Therefore, his original 34 minutes per fixture minus the 15 minutes for the modification results in 19 minutes per fixture for this mod. The union does not wish to dispute the rest of his time per fixture estimate figures. Mr. Mallett includes 120 minutes per day for travel, loading and unloading. With no facility more than 20 minutes away, the union does not believe this is an accurate number. On the first day of work, the union could see using a lot of time initially transporting the materials to the work facility, but it would be far easier to have the lighting supplier deliver the materials to the proper facility. On the last day of work, the union can also see using a fair amount of time for cleanup. However, the union at this point will estimate no more than 60 minutes per day for travel, loading and unloading. Mr. Mallett's figure of 90 minutes per day for cleanup and disposal also seems a little unreasonable. The union will estimate 60 minutes per day. The union does not disagree with the 30 minutes per day breaks and will add in another 20 minutes for wash up (10 before lunch and 10 before going home).

60 minutes for travel
60 minutes for cleanup
50 minutes for breaks and wash-up
170 minutes non productive time

60 minutes X 8 hours = 480 minutes
480 minutes - 170 minutes = 310 productive minutes
310 minutes divided by 19 minutes/fixture = approx. 16 fixtures per day per person.

(BEMs) Level 7 at postal comparison rate is \$17.32/hour straight time
(Electricians) Level 6 at postal comparison rate is \$26.02/hour straight time

$\$27.32 \times 8 = \218.56 $\$218.56 / 16 \text{ fixtures} = \$13.66 \text{ per fixture}$
 $\$26.02 \times 8 = \208.16 $\$208.16 / 16 \text{ fixtures} = \$13.01 \text{ per fixture}$

As is demonstrated above, the labor cost for this project is actually well below the cost for material. Using the PS 7 scale times 1428 fixtures provides for a total labor cost of \$19,507. Compare this to a total

material cost before rebate of \$33,960 and it is easy to understand that his project cost is determined much more by the cost of the hardware than it is by the labor to install it.

The union will point out that there was no cost comparison provided to management at Step 2 because all the information provided was for the purpose of getting management to bargain on their determination to subcontract. The Step 2 requested remedy was exactly what the union wanted in this case. The union wanted all work provided for in Mr. Mallett's notification to be placed on hold immediately. The union wanted management to see an accurate picture of what work was to be performed and to have the chance to determine actual material cost prior to finalizing the decision to subcontract this work. The union made the argument in step 2 a number of times that we did not feel management's cost comparison was accurate. When information was provided to management supporting this argument, management either failed to understand this information or chose to ignore it. The union made it abundantly clear at Step 2 that this instant grievance was filed for the express purpose of getting management to reexamine their determination to subcontract. As is evidenced by the Step 2 denial, this did not happen.

Referencing the last paragraph of the step 2 denial, Mr. Mallett states, that in fact the determining cost was labor and not parts.' The union fails to understand this statement. Back to Mr. Mallett's cost comparison, he lists a total cost for parts per fixture of \$88.82. Even subtracting the \$25 for the modification kit, this still leaves a parts cost per fixture of \$63.82. This is still far in excess of the average cost per fixture installed of \$40.57 which he lists and the union corrected to \$55.77 as this was not a retrofit only contract. That management argues labor cost was the determining factor when their cost comparison shows that the average cost per fixture for parts is, by the union's calculation, 14% greater than the average cost per installed fixture at other facilities is offensive to the union. Further, that argument has been fully and clearly refuted by the evidence which was presented at the Step 2 discussions.

In his cost analysis, Mr. Arnold also included the rebate from the utility company for the transition to energy-saving fixtures which was estimated at \$6,991.00.

Introduced as Employer Exhibit 11 was a statement from Fairview Electric, setting forth the prices for the cost of performing the work in the contract:

Below is the breakdown of prices you asked for, if you have any questions please call.

Beaverdale Station	\$2,802.27
Urbandale Station	\$3,074.06

Urbandale Training Center	\$2,410.15
West Des Moines Station	\$7,435.35
West Suburban	\$4,747.12
Metro Annex	\$4,874.08
East 14th Street Station	\$5,634.80
Morgan Street Annex	\$7,461.20
South Des Moines	<u>\$8,080.70</u>
 Total	 \$46,519.73

Attached to Exhibit 11 was the following chart:

<u>Location</u>	<u>Zip</u>	<u>*</u>	<u>Utility</u>	<u>KWH Rate</u>	<u>Square Feet</u>	<u>Estimated or Award Cost</u>	<u>Rebate</u>	<u>Net</u>
Beaverdale	50310		MEC	0.062	7452	\$3,845.00	\$634.00	\$3,211.00
East 14th	50316		MEC	0.091	5826	\$7,876.00	\$1,114.00	\$6,762.00
Metro	50309		MEC	0.069	9031	\$6,885.00	\$1,070.00	\$5,815.00
Morgan St.	50312		MEC	0.089	14280	\$10,831.00	\$1,722.00	\$9,109.00
South DM	50320		MEC	0.06	19400	\$11,576.00	\$1,522.00	\$10,054.00
Urb. Trg Ctr	50322		MEC	0.103	4828	\$3,520.00	\$500.00	\$3,020.00
Urbandale	50322		MEC	0.066	7744	\$5,344.00	\$700.00	\$4,644.00
West DM	50325		MEC	0.061	7628	\$10,752.00	\$1,262.00	\$9,490.00
West Sub	50266		MEC	0.063	10829	\$6,775.00	\$984.00	\$5,791.00
						\$67,404.00		

<u>Annual Saving</u>	<u>ROI Years</u>	<u>Fixtures (note 1)</u>	<u>Cost per Fixture</u>	<u>Comments</u>
\$759.52	4.2	83	\$38.69	plt maint will do work room
\$2,424.39	2.8	143	\$47.29	
\$1,687.31	3.4	142	\$40.95	
\$3,563.47	2.6	249	\$36.58	
\$1,330.25	7.6	267	\$37.66	
\$713.23	4.2	82	\$36.83	
\$759.44	6.1	127	\$36.57	plt maint will do work room
\$1,668.65	5.7	185	\$51.30	
\$1,239.87	4.7	158	\$36.65	plt maint will do work room

*X Sow by Lighting Ed

As it turns out, the rebate estimate was more in the neighborhood of \$10,492.00 rather than Mr. Arnold's \$6,991.00. Likewise, the cost per fixture ranged from \$36.58 to \$51.30 for an average of about \$40.28. As was pointed out at the hearing, this average cost did factor in the rebate.

Mr. Mallett testified that a reason for using the contractors was to have the work done in

the evening when the mail carriers were not present. As it turned out, the work assigned to the postal craft workers was done in the afternoon, but the contractor worked during the day.

Discussion

Although the Step 2 appeal did not reference Article 32, "subcontracting," the issue presented by the Service recognizes that Article 32 is central to the dispute here, as well as Article 19 incorporating the handbooks and manuals published by the Postal Service. Article 32, "subcontracting," in section 1, "general principles," has been in the parties' collective bargaining agreement since at least 1974, if not before, and reads:

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

Over the years, Article 32 has also set forth specific provisions as to subcontracting involving the motor vehicle craft in the highway movement of mail.

The Article 32 "general principle" language has been the subject of analysis at the national level beginning with Arbitrator Gamser's opinion and award in *Case No. AB-NAT-6291* (1977), when he noted at pages 7-8:

The APWU did not claim that the provisions of Article XXXII prohibit subcontracting. It only pointed out that this article requires that the USPS take a series of steps before embarking on this form of subcontracting.

After so noting, Arbitrator Gamser, in denying the grievance protesting the sale of stamps at banks as such, though providing relief with regard to the grievance involved, noted at 15-16:

This language is different in at least two significant respects from subcontracting provisions which are frequently encountered in other collective bargaining agreements. The section in which it is found does not go on to provide that if the Employer could undertake the work as efficiently and cheaply with its own employees and its own equipment then it cannot enter into the subcontracting arrangement. The second manner in which this language differs from the customary provisions found in agreements dealing with subcontracting is that the factor of 'public interest' that the Employer must consider is found in Section 1 of the Article. That is not a normal criteria that an employer in the private sector must consider before determining whether he should or can subcontract under the terms of its collective bargaining agreement.

The Union did not furnish any evidence that the Employer ignored

'public interest' when it determined to enter into these subcontracting arrangements with banks. If the public interest was served by providing easier access to stamps required on Christmas and other mail, and that appears to be a reasonable assumption, establishing self service units in more locations, such as banks, and providing for the sale of stamps in banks certainly appears to be in the public interest. The Union furnished no evidence either to indicate any possible adverse effect upon the public interest of permitting bank employees to be trained by postal technicians to perform routine service and maintenance on the SSPC's.

For the reasons set forth above, the undersigned must find that there was no violation of Section 1 of Article XXXII in the manner in which the arrangements with the banks, about which the Union grieved, were implemented.

Subsequently, in denying a grievance wherein the APWU was protesting the Service's action in engaging a contractor for the highway movement of mail in Spokane, WA, Arbitrator Mittenthal, in *Case No. A8-NA-0481* (1981), in interpreting the Article 32 due consideration language as to subcontracting, noted at 6-7:

Unfortunately, the words 'due consideration' are not defined in the National Agreement. Their significance, however, seems clear. They mean that the Postal Service must take into account the five factors mentioned in Paragraph A in determining whether or not to contract out surface transportation work. To ignore these factors or to examine them in a cursory fashion in making its decision would be improper.* To consider other factors, not found in Paragraph A, would be equally improper.

* Ignoring all factors would involve a lack of 'due consideration.' Examining them in a cursory fashion might constitute 'consideration' but certainly not the 'due consideration' contemplated by Paragraph A.

The Postal Service must, in short, make a good faith attempt to evaluate the need for contracting out in terms of the contractual factors. Anything less would fall short of 'due consideration.'

Thus, the Postal Service's obligation relates more to the process by which it arrives at a decision than to the decision itself. An incorrect decision does not necessarily mean a violation of Paragraph A. Incorrectness does suggest, to some extent at least, a lack of 'due consideration.' But this implication may be overcome by a Management showing that it did in fact give 'due consideration' to the several factors in reaching its decision.* The greater the incorrectness, however, the stronger the implication that Management did not meet the 'due

consideration' test. Suppose, for instance, that 'cost' is the only factor upon which Management relies in engaging a contractor, that its cost analysis is shown to be plainly in error, and that it would actually have been cheaper for the Postal Service to use its own vehicles and drivers. Under these circumstances, the conclusion would be almost irresistible that Management had not given 'due consideration' in arriving at its decision.**

* Conversely, a correct decision does not preclude finding a violation of Paragraph A where the proofs reveal a lack of 'due consideration.'

** None of this is inconsistent with Arbitrator Gamser's observation in Case No. AB-NAT-6291 that the contracting out language 'does not go on to provide that if the Employer could undertake the work as efficiently and cheaply with its own employees and its own equipment then it cannot enter the subcontracting arrangement.'

(Emphasis in original)

Later in 1981, Arbitrator Mittenthal, in *Case No. A8-NA-0510*, again denied the grievance challenging the subcontracting of certain highway movement of mail and, in doing so, quoted extensively from his decision in *Case No. A8-NA-0481* issued April 2, 1981. After doing so, in discussing the parties' arguments over costs, Arbitrator Mittenthal wrote in part at pages 7-8:

The resolution of this kind of disagreement may be possible. But, on the present state of the record, I am in no position to make expert judgments as to how trips can best be combined into runs or how long an idle period need be before it can be effectively used for reassignment of an employee from driving to mail processing. Those questions can only be answered through detailed knowledge of day-to-day operations of the Baton Rouge facility. I have no such knowledge. Therefore, I cannot rule that the Union's driver hours are more realistic than the Company's driver hours. There is no reason to believe that either side arrived at its figure in an arbitrary or capricious manner.*

* * *

For these reasons, no confident conclusion can be drawn with respect to cost. I can neither accept nor reject the Postal Service's figure; I can neither accept nor reject the Union's figure. It follows that the Postal Service cannot be deemed to have acted unreasonably in relying upon its cost calculations. That means, at the very least, the Management had some sound basis for believing that it was cheaper to engage a contractor than to perform the transportation work in-house. Therefore, it cannot be said that the Postal Service did not give 'due consideration' to cost in

contracting out this transportation work.

*There are other conflicts which may account for some of the disparity in the parties' cost estimates. For example, the Postal Service used 102,361 annual miles in its calculation while the Union used 99,523 miles. No satisfactory explanation for this difference was offered by the parties.

After so writing, Arbitrator Mittenthal then turned to other factors, namely, efficiency and concluded at page 9:

The proofs in this case cannot support a conclusion that the Postal Service failed to give 'due consideration' to 'cost' and 'efficiency' in making its decision to engage a contractor. Management has satisfied the 'due consideration' test. There has been no violation of Article XXXII, Section 4A.

Though referencing Article XXXII, Section 4A, which at the time dealt with highway movements, the due consideration language used in Section 4A is identical to the general principles language of Section 1A. The principles announced by Arbitrators Gamser and Mittenthal were discussed by Arbitrator Carlton J. Snow in *Case No. H4V-NA-C 84, 85, 86, 87* who denied a grievance challenging the subcontracting of highway movement. In that case, Arbitrator Snow confirmed the analysis of both Arbitrators Gamser and Mittenthal, referring to the Gamser and Mittenthal guidelines. *See* page 21.

The Advocate for the APWU, though acknowledging the existence of the Gamser and Mittenthal opinions and awards, suggests that the awards addressed issues other than the maintenance craft, noting that by virtue of the ASM issued in March 1996 and incorporated into the parties' contract by Article 19, there are different considerations as to the maintenance craft when applying the general principles of Article 32. It is noted that the Step 2 appeal referenced Article 19 and ASM 535.111.

ASM 11, at 531.21 provides:

531.21 Definitions

The following definitions apply:

- a. Plant equipment - the building's physical structure, utilities, and environmental systems.

- b. Postal equipment - a broad range of equipment used either directly or indirectly in moving the mail and for providing customer services (including scales, stamp vending machines, collection boxes, letter and flat sorting and canceling machines, containers; and fixed mechanization, such as, but not limited to, conveyors, parcel sorters, and sack sorters).

ASM 11.535 provides in part:

- 535 Maintenance Service Contracts
- 535.1 General
- 535.11 Use
- 535.111 Postal Equipment.

Maintenance of postal equipment should be performed by Postal Service personnel, whenever possible. Exceptions are:

- a. Where capable personnel are not available.
- b. When maintenance can be performed by contract and it is economically advantageous.
- c. When a piece of equipment is a prototype of experimental model or unusually complex, so that a commercial firm is the only practical source of required maintenance expertise.

535.112 Facility and Plant Equipment

Contract service is encouraged for Postal Service-operated facility and plant equipment maintenance, when economically advantageous.

The suggestion was made that if postal equipment was involved, pursuant to ASM 535.111, cost would be the dominant consideration. It was also suggested that, pursuant to ASM 535.112, cost, namely "economically advantageous," would be a factor.

During closing statements, the advocate for the Service, while acknowledging that 535.112 gave the Service "more latitude" in subcontracting, argued that the Arbitrator should not consider 535.112 as the Step 2 appeal only referenced 535.111. Pursuing this argument, the Service's advocate then suggested that under the definitions set forth in ASM 11, 535.121, plant equipment was involved rather than postal equipment. This latter argument is correct because the modification of lighting was to the buildings' physical structure and utilities.

An argument relying on the question of whether the Union, in its Step 2 appeal, cited the incorrect ASM 11 provision, 535.111 as contrasted to 535.112, begs the issue. The Union did not cite Article 32; yet, the Service in its issue, made reference to Article 32. The fact is, this is a

subcontracting case where the issue of the general principles set forth in Article 32, Section 1A, i.e., "due consideration to public interest, cost, efficiency, availability of equipment and qualifications . . ." are to be considered. That is the issue here, regardless of the analysis of which provision of the ASM 11 applies. Whether it is 535.111 or 535.112, cost is a factor, a factor which is recognized under the general principles.

Furthermore, there is no dispute in this matter that the question is not one of availability of equipment or qualification of the employees, for the postal employees had the equipment and were qualified to do the work. As noted, both BEM's and electricians did do some of the work. Nor can there be a question of public interest involved, for this is not a factor in the subcontracting. What seemed to be the issue here was cost with some consideration of efficiency. Thus, the guidelines suggested by Arbitrator Mittenthal, building upon the Gamser award and confirmed by Arbitrator Snow, would seem applicable, with the recognition that due consideration had not been defined in the contract and that an incorrect decision does not necessarily violate the contract although "the greater the incorrectness, however, the stronger the implication that management did not meet the 'due consideration' test. This could include a cost analysis 'to be plainly in error'."

In both his opening and closing statements, the Union's advocate referred to a decision by Arbitrator Lamont Stallworth in *Case Nos. 19DT-II-C94056229 and 230* (1999) upholding a grievance challenging the subcontracting of certain painting work and installation of an air conditioning unit as precedent for granting the grievance here. However, the basis for the Stallworth decision was a failure to notify and/or discuss the subcontracting work with the union prior to the decision to subcontract. That is not the case here. This case involves the fact that Mr. Mallett, beginning with his letter of November 26, 1996 followed by his letter of December 6, 1996 to Craft Director Jon Arnold, provided information concerning cost before the subcontracting commenced, and there was some discussion as to cost, although by the time the grievance was appealed to the third step if not before, the subcontracting had commenced.

And, there was the testimony of Mr. Arnold suggesting that he believed, after his preliminary discussion with Mr. Mallett, that Mallett had made his mind up and would not change his decision.

Among the cases cited by the Union in support of the grievance here was a decision by Arbitrator Linda DiLeone Klein in *Case No. 194T-11-C 97013888* (2001) wherein, in granting the grievance concerning the subcontracting of roof work, Arbitrator Klein noted that the union contended that 'no cost analysis was provided during the grievance procedure or at arbitration' (page 17), and noted that "conspicuously absent from these proceedings is any documentation to show that a cost analysis was performed prior to April 1996, when management notified the union that they had elected to contract out the preventative maintenance on the rooftop units at the Priority Annex" (page 17).

Prior to writing this statement, Arbitrator Klein suggested that, based upon Section 535 of the ASM, "while the contract does not emphasize one element more than another, the ASM terminology, 'economically advantageous' suggests that 'cost' is of greater significance" (page 17). Thereafter, at pages 21-22, Arbitrator Klein wrote:

As stated previously, the extent of the work which was contracted out was routine preventive maintenance. In the Arbitrator's opinion, the Postal Service was unable to show that an appropriate 'due consideration' determination was made prior to deciding to utilize an outside contractor; Management's examination of the five factors was ' cursory,' at best. Management's arguments pertaining to 'due consideration' were unpersuasive. It could not be shown that 'fundamental notions of fairness and good faith' were followed here. Management was unable to show how the preventive maintenance work on the roof top units was 'separated and distinguished' from the other maintenance and preventive maintenance work performed by qualified BEMs traveling from the P&DC to the annex. The BEMs on the roles were 'qualified' and they could have performed the preventive maintenance work at issue. The Postal Service was unable to justify this decision from a cost perspective through cost comparisons. To provide a copy of the last contract to the Union in the days before arbitration does not constitute such a demonstration; even though this contract was presented, albeit some five years after the grievance was filed, there was still no evidence of the preparation of a cost analysis from 1996.

The Klein opinion recognizes, as suggested by the Union's advocate, that by virtue of Section 535 of the ASM, in this case 535.112, "cost is of great significance." The facts before Arbitrator Klein are not the facts before this Arbitrator. Mr. Mallett did supply Mr. Arnold with a cost analysis. And the work involved, though it could be done by Postal Service employees, was not routine preventive maintenance, but a retrofit project. Thus, this Arbitrator cannot

conclude, as Arbitrator Klein did, that on the facts here, management's examination of the five facts was "cursory at best." Except for the reference to the ASM and the cost significance, Arbitrator Klein's decision in *Case No. I94T-II-C 97013888* is not helpful to resolving the dispute before this Arbitrator.

The Union relied on a second opinion by Arbitrator Klein issued in October 2003 in *Case No. I94T-4I-C 96027232*, wherein she did grant a grievance challenging the subcontracting of certain remodeling work. But the facts before Arbitrator Klein in that case are distinguishable from the facts before this Arbitrator. Arbitrator Klein concluded that management did not give due consideration noting that the "burden shifts to management to establish compliance with Article 32 and the ASM." In the case before Arbitrator Klein, there was no evidence to show such compliance or to show that an assessment of the five factors was made prior to contracting out. Instead, there were "speculative unsupported assertions of consideration" and there was reliance on the claim that "the work had to be completed within thirty days" (page 11).

Among the other factual distinctions noted by Arbitrator Klein, "there was no evidence to show how it was concluded that it was 'economically advantageous' to subcontract the renovation project. There was no evidence to indicate that a cost comparison was completed to determine the expense involved to assign the work to in-house personnel versus contracting out" (pages 10-11). Arbitrator Klein, noting that management claimed the work had to be done within thirty days, observed "that there was a substantial time period between the project approval and the project completion" (page 14). Thus, Arbitrator Klein was leery of the timeliness argument proffered by management.

Again here, information was provided to the Union. Mr. Mallett's view of the cost was supplied to Mr. Arnold. Therefore, factually, the second Klein opinion is not particularly persuasive to support the Union's position in this case.

There is a glaring distinction on the facts suggesting that the decision of Arbitrator Arnold Ordman in *Case No. C4T-4FC-8761* (1988) granting a grievance protesting the assignment of electrical work to an outside contractor, in that Ordman found as a fact that at the time of the subcontracting, the electricians involved who were capable of doing the work were "doing non-electrical work outside their craft" (page 4). That is not this case.

There were other cases cited by the Union supporting this grievance based upon the facts before the arbitrators. Arbitrator Erbs in *Case No. C7T-4C-C 6509* (1990), involving the moving of a transformer, noted at page 7, "the cost of the employees doing it in-house was substantially less than the subcontractor cost. Certainly, based upon that evidence alone, the subcontracting was not 'economically advantageous' to the postal service."

In granting the grievance in *Case No. H94T-1H-C 98068944* (2000), Arbitrator Lurie, finding that the Service did not give due consideration and noted, "the union was furnished with neither the testimony of any person involved in the decision making process nor with any written record which evidenced that process," and therefore concluded that the subcontracting of certain work was not as the result of "due consideration."

In granting the grievance in *Case No. E90T-4D-C, 94004922* involving the painting of inside walls, Arbitrator Roy noted at page 9, "while the Service may have considered those factors in this case, there is no evidence that it actually did so as it never articulated them to the union. At least it never did until its final witness testified during the arbitration hearing. Up until that point, the Service representatives have never once mentioned Article 32 or given any hint that it had considered any of the factors enumerated in that provision."

In another painting subcontracting issue, Arbitrator Linda DiLeone Klein, in *Case No. J90T-4J-C 94005366* (1995) granted a grievance challenging the subcontracting and noted, "there was no evidence to suggest that the actual cost of assigning the painting work to the bargaining unit was calculated and/or compared to the cost of subcontracting. Absence of evidence regarding due consideration of the cost factor is critical to the decision here" (page 6).

In a case involving the installation of lighting fixtures, Arbitrator Dean granted the grievance challenging the subcontracting in *Case No. D94T-1D-C 96080772* noting at page 14, "the Service provided no reliable proof that concern over the time of completion had factored in management's decision to contract the work outside the bargaining unit. In fact, among the primary deficiencies in the Service's evidence ostensibly justifying management's decision to subcontract both of these projects is that the principal witness could not identify the person or persons responsible for the subcontracting decision or indicate the basis upon which the decision was reached."

In each of the cases cited here, the Arbitrator was unimpressed with the Service's evidence that it did give due consideration within the meaning of Article 32.

There were two cases which the union maintained were similar to this case. In *Case No. H98T-1H-C 00052840* (2002), Arbitrator Miles in a removal and replacement of fluorescent lighting fixtures, granted the grievance, noting at page 11 after citing a number of arbitral opinions on the issue, "the lack of testimony and documentary evidence to establish that due consideration was given to the relevant factors leaves the undersigned with nothing to substantiate the decision to use the electrical contractor to install the replacement of fluorescent lighting at the VSM in Fort Lauderdale."

In *Case No. D98T-1D-C 99256929* (2001), Arbitrator Evans sustained a challenge to the subcontracting of work and, in doing so, noted at page 5:

Specifically, there are three (3) flaws in the position of the Postal Service that it gave 'due consideration . . . when evaluating the need to subcontract' the disputed lighting project. First, there is no record evidence that it ever conducted a thorough cost analysis between subcontracting the project versus using in-house personnel. And Purchasing Specialist Bruce Perry does not indicate that he did such an analysis. Second, Perry concedes that he did not know whether or not the Clarksburg maintenance staff was available to handle the project. Third, Perry stated that he was not familiar with the qualifications of the Clarksburg BEMs.

What emerges from the record here is that management, relying mostly on assumptions, concluded early-on that the project was too big and complex for its Clarksburg in-house personnel. Management assumed that, if in-house personnel were given this project, it would detract from the performance of their regular duties because of its duration. Thus, management assumed that personnel in Clarksburg would not be available to handle the project. Management assumed that the cost of doing the project in-house would be excessive since its employees would end up doing the work on overtime. Management also assumed that its personnel would be unable to overcome certain 'safety' obstacles in handling the project. Finally, and significantly, as Mr. Perry testified, the warranty that came with the subcontractor's installation of the parts was too good to pass up.

Arbitrator John C. Fletcher in two decisions sustained grievances challenging subcontracting. In *Case Nos. 190T-11-C 95003723, 726* (1995) involving the installation of dock door seals and levelers, Arbitrator Fletcher concluded that the Article 32 factors were not

considered, and thus at page 16, wrote: "Public interest in not mentioned. Costs between doing the work in-house or with a contractor is not addressed. Efficiency seemed to have been ignored." In a later opinion in *Case No. 194T-11-C 97117569* (2000), Arbitrator Fletcher sustained a grievance challenging the subcontracting of remodeling and enlarging the battery room, again noting at page 7, "nothing was supplied to support management's decision. The failure to furnish an adequate justification to support the contract and the failure to furnish the union with requested information concerning the subcontract is fatal to management's defense in this grievance."

After reviewing the numerous cases cited by the Union and discussed above, it becomes clear that, besides the obvious distinction from this case, most of the cases involved failure to furnish information to the union or make a cost comparison, which is not the case here. It becomes clear that, in cases like this, the decision becomes fact-intensive.

Perhaps the most fact-relevant case cited by the Union is the decision of Arbitrator Nathan in *Case No. CIT-4C-C 23371* (1992) concerning the contracting out of electrical work. Arbitrator Nathan concluded that there was a violation of Article 32 in a situation where information was furnished to the union and a cost comparison was made, and in doing so, wrote at 10-11:

First, Drier testified that the cost factor he considered was the cost of mail damaged by the old system, yet there was no testimony that he made any effort to determine the actual or approximate cost of those losses to the Postal Service or to the public. In fact, Steward Jan Bly was told that no cost comparison was done. Moreover, the damaged parcel 'cost' factor remains constant whether the work is performed by an outside contractor or by bargaining unit employees. There is no evidence that Drier gave any consideration at all to the real cost variable, the difference in the cost of the project if the work were performed by Service employees instead of subcontracted. Thus due consideration was not given to cost.

Second, Drier testified that he considered the relative efficiency of having the work performed by an outside contractor, and that he subcontracted only the work that Service employees could not complete 'in a timely manner.' He testified that one basis for his decision as the constraint that the subcontracted work could be performed only during non-operating hours; however, based on the site tour, I credit the testimony of union witnesses that the work would not have significantly disrupted regular mail processing and could have been performed on any

tour. Drier also asserted that bargaining unit employees were not available to perform the work because they were already working 40 hours per week on other priority projects. However, many of the work orders he submitted to support this explanation reflected work in progress while the Service still intended to assign the work to bargaining unit employees or work completed before the August 30-October 20, 1983 contract period, none of which would support the subcontracting decision. Equally important, the Service never offered this explanation or evidence during the grievance process. In contrast, Drier apparently gave no weight any efficiencies that might be achieved from the bargaining unit employees' performance of much of the NMO project electrical work that preceded and followed the completion of the disputed work. Based on the entire record, I find that Drier did not give 'thoughtful managerial consideration (Case No. W1T-5C-C 19965 (Levak 1987)) to efficiency issues in deciding to contract out the disputed work.'

Finally, the Service contends that the Union cannot question whether due consideration was given to issues of public interest because public interest was not among the factors cited in the grievance documents. However, in this case, the public interest includes not only an interest in avoiding damage to parcels, but also an interest in the Service's costs, its efficiency, and its assignment and retention of qualified employees. Moreover, Article 32.1 requires due consideration of all of the factors, not some of them. This grievance cannot be overruled because the union omitted a reference to one factor from its description of the alleged violation when it was otherwise implied in the description.

Thus the service violated Article 32 when it contracted out certain electrical work on the NMO project to Muska Electric Company in August 1983.
(Emphasis in original)

Thus, Arbitrator Nathan concluded that though there were not omissions of cost comparison as in the other cases cited, the premise of the cost comparison coupled with not being persuaded that timeliness was an issue was erroneous under the provisions of Article 32.

There were cases cited by the Service in support of its position that the grievance should be denied. In *Case No. E94C-4E-C 98014657* (2002), Arbitrator Howell Lankford denied a grievance involving energy programs and an "umbrella agreement covering the Western Region." In concluding there was not a violation of Article 32, Section 1A, Arbitrator Lankford wrote at 11-12:

Does Article 32, Section 1(A) require that the Service show that a committee sat down one day and said, 'now we will consider the Article 32 factors with respect to this proposal to subcontract?' In the cited national level Article 32 decisions (listed above) the Service put on that sort of evidence at the national arbitration hearings; but no such specific and direct evidence was offered in the case at hand. In fact, it is pretty clear that, when the Step 2 meeting was held - and when the time case for the (missing) Step 2 response - the local Postmaster had no very clear idea of the organizational level at which the contracting decision had been made, much less what the decisional steps had been leading up to that contract. The only thing that the Service had provided at that point was a part, at least, of the contract itself. The crucial question then comes down to this: Can the Service sometimes meet its burden of producing evidence in an Article 32 case by offering the outside contract itself? The record before me is very thin on that important question, but I have no reason to conclude that the outside contract itself is not enough to meet the Service's burden if the outside contract includes features or possible advantages which fall under the factors listed in Article 32, Section 1(A) and which *could not be met* by using bargaining unit employees to do the work.

In the case at hand, the outside contract which is contained in the moving papers shows that the *totality* of the contracted work was far outside the expertise of the bargaining unit and included, in particular, evaluative, engineering, cost projecting and financing alternatives which could not have been met by using bargaining unit personnel. That is enough to provide at least some substantial evidence that the Service's *decision* to subcontract complied with Article 32. Taken as a whole, the record establishes that the work in question *was* bargaining unit work, but it does not establish that the Service's decision to contract that work out as part of its regional agreement with PacifiCorp did not reflect proper consideration of the factors listed in Article 32, Section 1(A). (Emphasis in original)

In some ways, this Arbitrator can distinguish the decision of Arbitrator Lankford with the case before him, as this Arbitrator has done with the cases cited by the Union, noting that because there was an umbrella agreement and the contract seemed to cover expertise that the Local the Postal employees did not have, there was no violation of the Article 32, Section 1(A) factors; that there was due consideration. In the case before this Arbitrator, the work could have been done by the maintenance craft at Des Moines. That is not the issue.

In *Case No. F94N-4F-C 97104491* (2000), Arbitrator Gary Axon denied a challenge to the subcontracting of certain letter carrier work out, finding that the Service did consider the

Article 32, Section 1(A) factors, noting at page 30, "The evidence offered by the Postal Service regarding the cost effectiveness of subcontracting to transport the bulk mail in Bakersfield was un rebutted." Arbitrator Axon also wrote at page 30 before arriving at his conclusion:

Applying Article 32.1(A) to the evidence of this case, the Arbitrator finds management gave due consideration to the Section 1(A) factors. The most important factors stated by the post office managers were cost, efficiency, and availability of the necessary type of equipment to transport the bulk mail. Article 32 relates more to the procedure than the decision to subcontract. Given that Article 32 places procedural obligations on the Postal Service, the fact management may make errors or miscalculations cannot by itself equate to a contract violation.

Arbitrator Randall M. Kelly, in *Case No. B94T-1B-C 99212924* (2002), denied a grievance challenging the contracting out of placing light bulbs using an outside contractor and in so doing concluded, "Here, while management failed to conduct a cost analysis, I find that it gave good faith consideration to the availability of employees before deciding to subcontract the work." (Page 4) Arbitrator Kelly's opinion was very conclusionary but, again, emphasizes that the resolution of this type of case is a fact intensive case.

In *Case No. H94T-1H-C 97110595* (2003), Arbitrator Lurie, specifically centering on Section 535.112 of the Administrative Support Manual, concluded that the contracting out of the construction of an EEO office and an Administrative Services storage room did not violate Article 32 and in doing so at page 7 made a finding:

The Arbitrator finds that the cost analyses performed by Manager Sumner was timely furnished to the Union and satisfied, *prima facie*, the requirements of Article 32.1.A.; and that the Union, which bore the burden of proving that the analyses were unreasonable or arbitrary, has not sustained that burden. Specifically, the Union has not shown that Manager Sumner's conclusion that the 440 hours of work could have been performed by the bargaining unit during only overtime hours was unreasonable, or that his costing of the project based upon the overtime rates was in error. The Union's sole argument on this point was that if a longer, albeit undefined, time limit had been placed on the completion of the projects, then the bargaining unit could have completed the work using small intervals of members' availability, from time to time, during the normal workday. The Arbitrator finds this argument to be unpersuasive, given the need of the EEO and Administrative staffs for the availability of the facilities, the inconvenience and inefficiencies that would have ensued from the protracted "work-in-progress" conditions, and the uncertainty of the

demands of normal maintenance upon the Grievants' time.

This Arbitrator, in analyzing the issues here, has reviewed a number of cases cited, emphasizing differences with the factual pattern in this case or recognizing that the cases were decided based upon the proofs presented to the arbitrator as to the application of the Article 32 factors. In fact, after reviewing the cases, this Arbitrator can write that the Arbitrator has returned from his review a sadder – if not wiser – man echoing the plaint of Omar Khayyam: “Myself when young is eagerly frequent doctor and saint and heard great arguments about it and about; but ever more came out by that same door wherein I went.”

Translated, this is a fact intensive case. Dave Mallett did not commit the fatal flaws that arbitrators found in numerous cases cited. He did a cost analysis. He presented them to Mr. Arnold. Mr. Arnold challenged the cost analysis. Mallett did not accept the challenge.

Now, the question becomes centered on the significant factor of cost when reviewing the Article 32.A.1 factors in this case as the availability of equipment, qualification of employees, or public interest were not considerations because the employees involved were qualified and the equipment was available. Nor was there a public interest involved. And the cost issue comes down to Mr. Mallett's cost estimate, which was incorrect and thus, in the words of Arbitrator Mittenthal, “The greater the incorrectness ... the stronger the implication that management did not meet the due consideration test. ...” Or, if the “cost analysis is shown to be plainly in error ... under these circumstances the conclusion would be almost irresistible that management had not given “due consideration in arriving at its decision.”

This brings the Arbitrator back to the initial analysis as noted in this Opinion previously, namely, that the total cost for Postal maintenance personnel was \$102.14. The cost of material was plainly in error beginning with the \$25.00 modification kick which was not needed. As it turns out, there is a serious question that the cost for the ballast at \$25.00 was accurate when the estimate that the Union obtained was around \$14.60. One therefore could argue that Dave Mallett's figures were plainly wrong and that this is a situation where it “would be almost irresistible that management had not given due consideration in arriving at its decision.” According to the corrections and additions, the labor cost to install the fixtures would vary between \$13.01 per fixture to \$13.66 per fixture, depending on the classification used for the

work, namely, BEMs or electricians.

Now what occurred here is that Mr. Mallett, based upon the experience in the Hawkeye District as to the cost per fixture on retrofit was expecting a cost of \$40.57 per unit. As it turns out, with factoring in the rebate, the cost of the work performed was around \$44.35 – somewhat higher than the average cost in the Hawkeye District. But the problem faced by the Service in this matter is that, as pointed out by Mr. Arnold in his corrections and additions and testimony before the Arbitrator, that Mr. Mallett before the subcontracting commenced was relying on erroneous figures to the point that they were “plainly erroneous.”

This is not a question of being incorrect. It is a question of using labor costs and parts costs in the cost analysis that were not factually correct. Therefore, arguably, this becomes a question – again, using the Mittenthal language – where the facts make it “almost irresistible” that management had not given due consideration.

It may be that, as matters turned out, the actual cost figures were similar to the Hawkeye District’s experience in other retrofit situations. But due consideration, even applying the language that is more favorable in the ASM Section 535.112, namely, contract service is encouraged “when economically advantageous,” it would seem that under the cases cited that the Service had the burden of establishing that it gave due consideration and that it considered cost considerations. The fact that Mr. Mallett’s cost considerations may have been erroneous is not fatal. But, in this case the cost considerations were “plainly erroneous,” thus undermining the Service’s claim that the requirement of due consideration set forth in Article 31, Section 1.A were met.

The only possible saving grace for the Postal Service is the testimony of Dave Mallett that if the 11 REMs and two electricians were used when combined with their other duties and applying the work on straight time, would have taken up to a year to complete the work and that the rebate that was being offered by the public utility would have expired before the work was completed. The Union objected to this argument, maintaining that it was new argument.

Arbitrator Fletcher, in *Case No. 190T-11-C 95003723, 726* (1995), in sustaining a subcontract case, beginning at page 12, noted:

Because of this, the Arbitrator is precluded from considering many of the justifications advanced at the hearing by the Service in

support of contracting out the projects. The requirements of Article 15 are clearly stated, and while frequently tested in arbitration decisions, they generally proscribe "arbitration by ambush." Pre-disclosure is a clear obligation under Article 15. Neither party may bolster its case with new arguments raised for the first time in arbitration. In this regard see McAllister in *J90T-4F-C 93020926*, (1995), a subcontract case, where it was held:

In summation, this case represents a failure on the part of local Management to appreciate the evidentiary requirements established by the National Agreement. It may very well be that local Management internally gave due consideration to public interest, cost, efficiency, availability of equipment, and qualification of maintenance employees. But once this grievance was filed, local Management simply failed to appropriately communicate its reasoning to the Union.

It may be that a rebate in excess of \$10,000 might have been in jeopardy if the rebate offer was for a limited time and would have expired before the work could be done by the available BEMs and electricians on straight time. But in reviewing the Step 2 denial and noting that in the additions and corrections Mr. Arnold seemed to cover all aspects of the discussion with Mr. Mallett, there was no mention of the time issue. Nor did the testimony suggest that this was discussed between the parties.

Mr. Mallett did bring it up in his testimony before the Arbitrator, but he did not establish that he had communicated this factor to Mr. Arnold as part of the due consideration. Therefore, the objection that this was a new argument is well taken.

Based upon the above analysis, this Arbitrator concludes that the Service did not give due consideration in that it based its cost analysis on plainly erroneous factors. It may be that if Mr. Mallett had considered the arguments of Mr. Arnold and revamped his erroneous figures and still came out with an economic advantage to contracting out and had also communicated the time issue, the results here would be different. But the contract requires due consideration and there was not due consideration here for the reasons stated.

Therefore, consistent with the remedies provided by arbitrators in the cases cited by the Union, this Arbitrator will provide that the affected members of the bargaining unit, namely, the 11 BEMs and two electricians employed from January 1997 shall be compensated at the straight

time rates in their classification in effect in January 1997 for the time that the employees of the contractors devoted in doing the work involved. *See, e.g., Case No. E94T-1D-C 96080772* (Dean, 2001); *Case No. 190T-11-C 95003723, 726* (Fletcher, 1995).

A W A R D

1. The grievance is granted.
2. The adversely affected members of the bargaining unit, namely, the 11 BEMs and two electricians employed in January 1997 in Des Moines shall be compensated at straight time rates in effect in their respective classifications in January 1997 for the time that the contractor's employees devoted to retrofit the fixtures involved.
3. The parties are directed to compute this time.
4. The Arbitrator will keep jurisdiction of this matter for one hundred twenty (120) days to resolve any disputes as to the calculation of the remedy set forth in this Award.


GEORGE T. ROUMELL, JR.
Arbitrator

May 12, 2004