

REGULAR REGIONAL ARBITRATION PANEL

In the Matter of the Arbitration between) Grievant: Class Action
)
UNITED STATES POSTAL SERVICE) Post Office: BMC
)
- and -) GLA No.: J90T-1J-C-94013758&9
)
AMERICAN POSTAL WORKERS UNION) Local No. 90MAINT53, 54
)

BEFORE: Donald F. Sugerman, Arbitrator

For the Postal Service: Glenn E. Lee, Manager, Labor Relations

Witnesses: Curtis Brown, Larry Kurkowski, Facilities Engs., Alex W. Santiago, Architect Eng., Robert G. Shirlin, Mgr. Maint. Op.

For the APWU: Gary Kloepfer, National Business Agent

Witness: Fred L. Selvidge, Steward, Michael T. Springstead, Chief Steward

Place of Hearing: Allen Park, Michigan

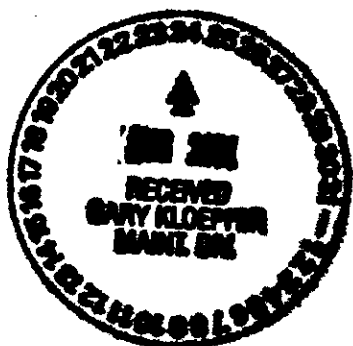
Date of Hearing: October 3 & November 6, 2000

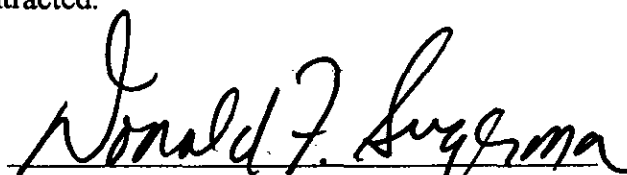
Post-Hearing Submissions: APWU - November 22, 2000; USPS - January 22, 2001

Date of Award: August 13, 2001

Type of Grievance: Subcontracting

Summary of Award: The Employer violated the Agreement by subcontracting the installation of 48 lights on the dock at the BMC, by subcontracting painting, removal and installation of walls, lights, electrical receptacles, and ceilings. The employees qualified to perform this work are to be paid as more fully described below. The USPS also violated the Agreement by failing to provide the Union with a copy of the contract for remodeling. USPS did not violate the Agreement with regard to certain other work that was subcontracted.




Donald F. Sugerman, Arbitrator

OPINION

I

On September 29, 1993 Fred Selvidge ("Selvidge"), a Maintenance Mechanic, Mail Processing Equipment, Level 7 ("MPE 7") and a APWU Steward at the Bulk Mail Center in Allen Park, Michigan ("BMC") observed employees of an outside contractor installing new lighting fixtures on the inbound dock. Because this was the type of work that bargaining unit employees had previously performed (installing fixtures, repairing/replacing all internal parts such as ballasts and holders) and because unit employees were capable of doing this work, he questioned Maintenance Supervisor Bob Frierson ("Frierson") about the matter. Frierson said he would check and get back to Selvidge. When he did not, Selvidge filed the grievance No. J90T-1J-C94013758, one of the grievances in this case. He alleged that USPS by having outside contractors working on the aforementioned canopy lighting violated Articles 7, 15, 17, 19, 32 and 38 of the 1990 - 1994 National Agreement ("Agreement") between the parties. The remedy requested was that all maintenance personnel be made whole at the appropriate overtime rate for all hours worked by the contractors. The grievance was denied at Step 1. No reason for the denial was given by Frierson.

changed 24 of the canopy lights over the course of the last couple of years Management decided to have them all changed. The work should have been done in-house.” (Exhibit J-2, p. 4). The USPS answer at the third step mirrored its answer at 2nd step. On February 10, 1994 the Union filed its Appeal to Arbitration.

II

The other grievance involved here, No. J90-1J-C94013579 followed a route similar to that of the grievance described above. Selvidge questioned Frierson about outside contractors performing work on the office area and locker room. Again, the grievance was denied without any substantive reasons being provided. Contemporaneously, Selvidge filed a formal request with Frierson for a copy of the contract awarded for refurbishing the office area. According to Selvidge, he observed employees of the contractor in the locker room removing old light fixtures, installing a new suspended ceiling and lights and renovating the lobby. APWU claims that this is work that has been done by bargaining unit employees. Accordingly, the requested remedy was for maintenance personnel to be made whole at appropriate overtime rates for all hours worked by the contractor(s). The second and third step answers by USPS were virtually identical to those in the outside lighting grievance. The appeal to arbitration was on the same date as the first grievance. Indeed, it appears that the two grievances were handled by both parties in tandem.

III

The Standard Position Descriptions of employees alleged to be adversely affected by the contracting out of work at the BMC provides in relevant part as follows:

Building Equipment Mechanic, PS-07

FUNCTIONAL PURPOSE: Performs involved troubleshooting and complex maintenance work on Building and Building Equipment systems, and preventative maintenance and preventative maintenance inspections of building, building equipment and building systems . . .

Maintenance Mechanic, Mail Processing Equipment, PS-07

FUNCTIONAL PURPOSE: Performs involved troubleshooting and complex maintenance work throughout the system of mail processing equipment; performs preventative maintenance inspections of mail processing equipment, building and building

equipment . . .

Painter, PS-06

FUNCTIONAL PURPOSE: Performs painting and finishing duties incident to the maintenance and repair of buildings - and equipment . . .

Maintenance Mechanic, PS-05

FUNCTIONAL PURPOSE: Independently performs semi-skilled preventative, corrective and predictive maintenance tasks associated with . . . buildings and building equipment . . . (Exhibits U-12, U-11A, U-9A, U-8, respectively)

IV

The applicable Agreement between the parties provides in relevant part, that:

ARTICLE 3, Management Rights

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

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

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

ARTICLE 19, Handbooks and Manuals

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable,



and equitable. . .

ARTICLE 32, Subcontracting

Section 1. General Principles

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

The administrative support manual, a document referenced in Article 19 of the Agreement, provides in relevant part, as follows:

530 Maintenance

531 General

531.2 Policy

531.21 Definitions The following definitions apply

a. *Plant Equipment* - The building's physical structure, utilities and environmental systems.

531.5 Maintenance Capability

531.51 Offices with Maintenance Capability

531.511 Definition

a. *Maintenance-Capable Office* - Is an office that has assigned maintenance personnel qualified to maintain a facility and the equipment installed in that facility.

535 Maintenance Service Contracts

535.112 Facility and Plant Equipment

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

V

Summary Position of the APWU: Section 535.112 of the ASM and Article 32, Section 1(A) of the Agreement must be considered together. Arbitrators have repeatedly held



these provisions require management to prove it gave genuine good-faith consideration to the public interest, costs, efficiency, availability of equipment and qualifications of employees when evaluating the need to subcontract. When it has done this, the ASM permits such contracts that are "economically advantageous." With this proposition it cites Case C7T-4M-C-34067 (Goldstein, 19) and C7T-4D-C-21543 (Fletcher, 19). USPS failed to produce any evidence that it considered the subcontracting criteria in its decision. Frierson gave no reason for the subcontracting. Lovely cited no facts for the decision only the conclusion that it was the "most expedient and economical method to accomplish the work." And the Step 3 Management Designee simply parroted Lovely's statement. No evaluation was made concerning costs, efficiency, including availability of bargaining unit employees to perform the work. An objection was raised to any effort on the part of the USPS to produce documents or testimony that was not previously made known to the Union. Finally, objection was raised to the undersigned considering the Employer's brief inasmuch as it was filed months after the date established at the hearing for doing so.

Summary Position of USPS: A contract involving the dock lights was more than simply changing light bulbs. APWU presented no documentary evidence that its members installed 24 fixtures as asserted in testimony of the Steward. Moreover, the job was complex. involving the removal and construction of concrete pole bases, moving an existing pole, cutting asphalt, digging a trench and repairing with cold patch asphalt. Similarly, the second contract involved more than simply installing lights, fixtures, ceiling, and painting. It involved breaking out a cement floor, replacing it with quarry tile, installing a turnstile in place of the front door, etc. Looking at these projects as a whole it is clear from the testimony that all of the work could not have been done by in-house employees. Moreover, arbitrators have held that no contractual obligation exists to use employees on overtime to avoid contracting out of disputed work. Case No. E7T-2N-C 21984 (Zobrak, 19); Case No. E7T-2H-C-43203 (Foster, 19). Finally, APWU was not harmed by the failure to provide information. Even were it otherwise, the APWU waived its right to protest this failure by failing to raise the issue at any of the intermediate steps in the grievance procedure.

VI

Inasmuch as the two grievances present parallel situations, they will be treated together with any differences between them noted. Nevertheless, a prefatory statement is in order. These grievances were filed in September of 1993 and followed a parallel track with their submission to arbitration in February of 1994. They were thus processed to that point in a timely fashion. For reasons unexplained in this record, the grievances remained in limbo for the next six years. That long passage of time was not helpful to the resolution of this case. On the contrary, it was prejudicial. For example, crucial documents were unavailable or

could not be found. Only one of the contracts (lighting) was located . None of the records required to be kept by contractors of the hours worked by its employees were able to be produced. Witnesses involved in the decision to let the contracts had died, retired, or were otherwise unavailable. USPS was thus required to rely on secondary evidence to support its position. These factors have made the disposition of the grievances troublesome and difficult.

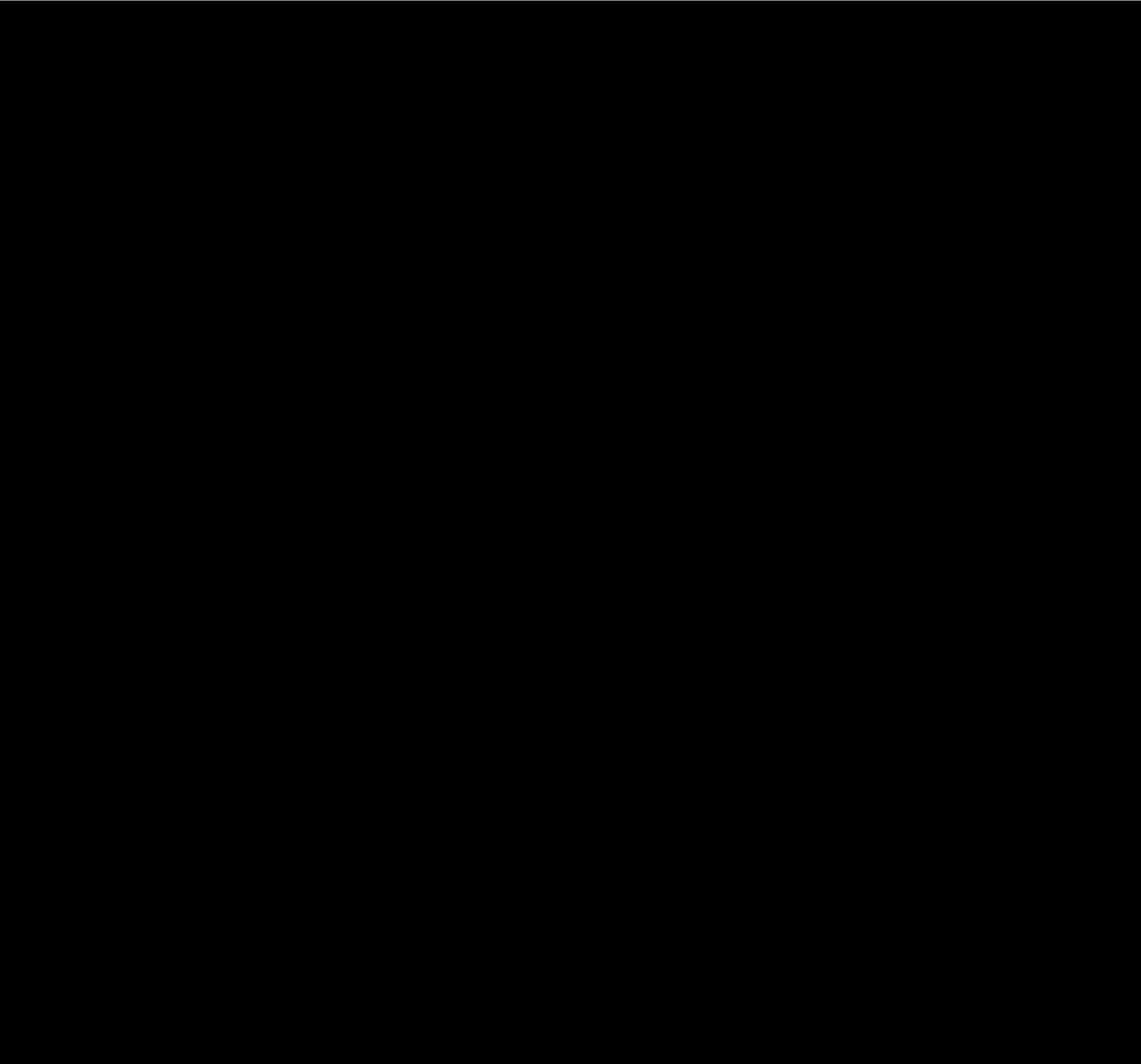
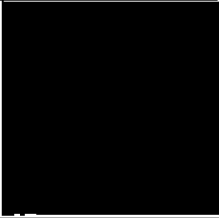
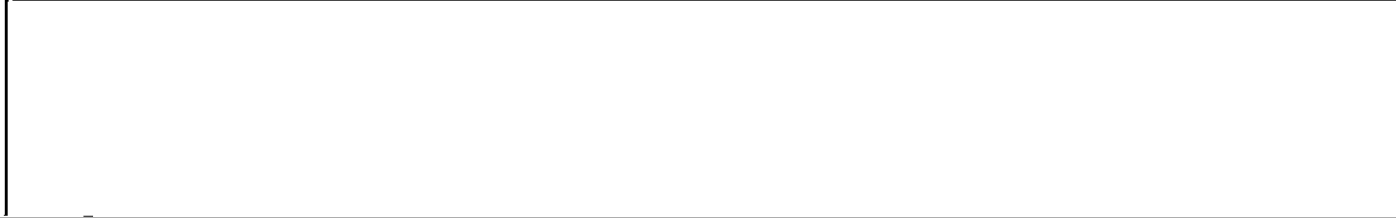
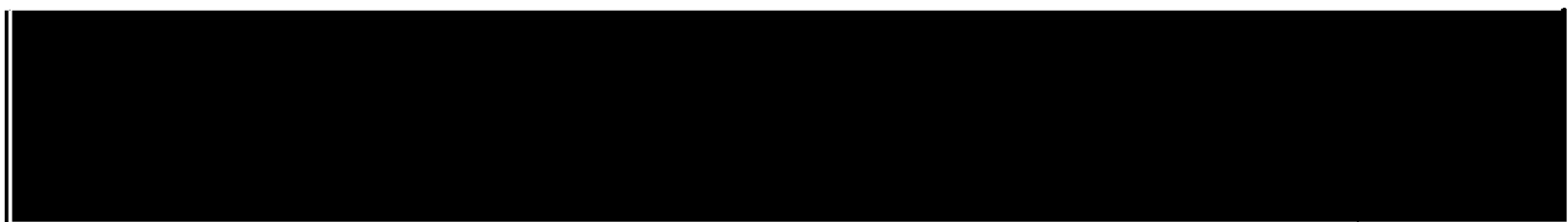
APWU has established that bargaining unit employees were qualified to install dock lighting. They had installed 24 such lights over a year or two period prior to the subcontract in this case. The steward testified to this fact. I credit his testimony. It was not rebutted by the Employer. USPS sought to diminish quality of the work performed by unit employees suggesting it amounted to little more than the changing of light bulbs. And it questions the validity of the testimony arguing that APWU submitted no documentation to definitively establish that its members had, in fact, done the work as described by the steward. I find both of these arguments unpersuasive. The work previously done by unit employees on dock lighting was more than changing light bulbs. They had installed fixtures, changed ballasts, and replaced other parts of the units. I am not sure there is any documentary evidence the Union would have to establish that its members did the work. On the contrary, I would expect that any documentation of the identity of the persons who did the work, whether it be employees or contractors, would be within the possession and control of USPS

The Union implies that the USPS failed to provide information requested concerning the lighting contract. There is no evidence that a request for such information was made, at least not with regard to the lighting contract. I find the APWU argument on this point without merit.

One other part of the equation on lighting must be addressed. USPS claims that the



contract must be looked at as a whole and since some of the work may have been beyond the ability and qualifications of unit employees to perform, it follows that the subcontract is




were it otherwise, no evidence was submitted to show that having the employees do this work on overtime would not have been cost effective. Finally, the evidence fails to establish that USPS considered the criteria required by the Agreement in deciding to subcontract. No facts were provided and none could be as the persons who made the decision were no longer available to testify as to the rationale for having contracts rather than employees perform the work.

Accordingly, I find that USPS improperly subcontracted the installation of 48 dock lights to an outside contractor. (The contract shows that 48 lights were installed, not 60 as alleged). APWU witnesses said, based upon their past experience it takes approximately one hour to install each light. This was not contradicted or rebutted. Unit employees who would have performed this work are to receive 48 hours of pay at their overtime rate at the time the work was performed. The total amount is to be divided among said eligible employees. There is no evidence in this record to demonstrate that bargaining unit employees were qualified or had the expertise to perform the other aspects of the contract (performing work on the lights in the parking area; constructing pedestals, moving lighting poles). Thus, to the extent the grievance seeks a remedy beyond the installation of dock lighting it will be denied.

The remodeling/refurbishing of the offices and locker room must next be considered. Once again, USPS was unable to produce the contract asserting it had been turned over to postal inspectors who have been investigating the contractor and the Inspection Service was unable to locate the documents. The Employer's efforts to secure the documents surrounding the "remodeling" contract was unavailing notwithstanding the fact that it was granted an adjournment of the hearing to do so. (This was over the objections of the APWU. See attachment). Unfortunately, this is, in whole or in part, the result of the passage of time before the case was submitted to arbitration.

I conclude that, clearly, some of the work under the remodeling contract was of the type generally done by unit employees. The quantity of the work, however, is not revealed in the record. I also conclude that some of the work would not have been done by unit employees. For example there is no evidence that unit employees are qualified to break out cement floors and install ceramic tile floors. In addition, Employer witnesses credibly testified that the turnstile doors were purchased as a package, including materials and labor, in order to take advantage of the contractor's warranty, one that would not be obtained were the turnstile installed by USPS employees. I therefore conclude that these two aspects of the contract would not have been performed in-house.

APWU requested a copy of this contract in 1992. Presumably it was available at that



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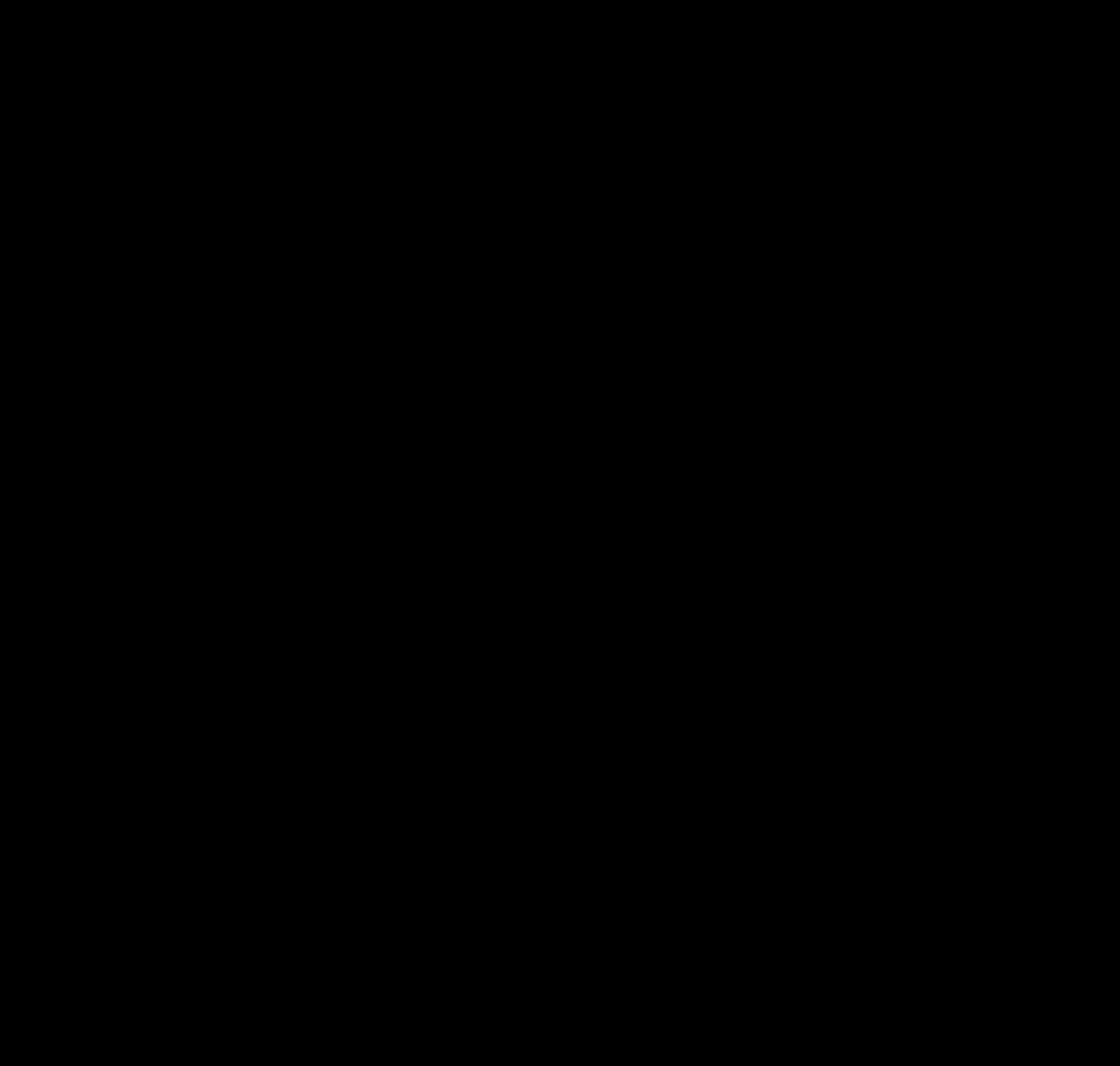
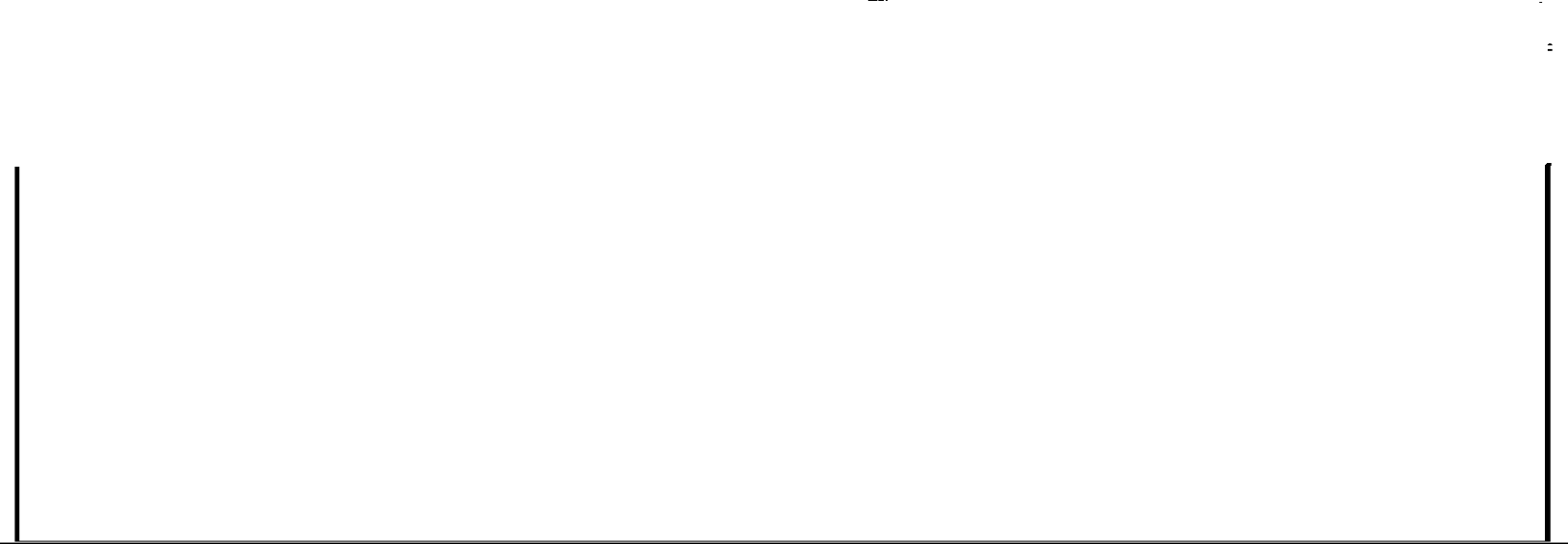
APWU requested a copy of this contract in 1993. Presumably it was available at that time. It was a document the Union needed in order for it to evaluate whether it had a viable grievance. The failure on the part of USPS to produce this document violated Article 31, Section 3 of the Agreement.

Section 3 of the Agreement.

The Employer will make available for inspection by the Union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for

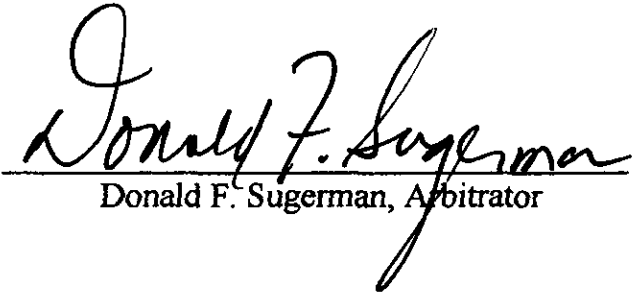
USPS suggests that no such request was made inasmuch as the written request put into evidence was not initialed by a supervisor. Selvidge testified that he specifically recalled giving Frierson the request for information and stated that while he usually, but not always, obtained the supervisor's initials or signature he had failed to do so in this instance (for reasons he could no longer recall). I find that the request for information was made.

From the nature of the dispute and the lack of documents, I believe it unlikely that the parties will be able to identify the work or determine with any degree of precision the number of hours that would have been expended by contractor employees to remove and build new walls, paint, move and install lights, add and remove electrical outlets, and reinstall drop ceilings. (Wallpaper work was also disputed but the evidence strongly suggests that at the



VII

Grievances are granted in part and denied in part. The Employer violated the Agreement by subcontracting the installation of 48 lights on the dock at the BMC, by subcontracting painting, removal and installation of walls, lights, electrical receptacles, and ceilings. The employees qualified to perform this work are to be paid as more fully described above. The USPS also violated the Agreement by failing to provide the Union with a copy of the contract for remodeling. USPS did not violate the Agreement with regard to the other work that was subcontracted.


Donald F. Sugerman, Arbitrator

August 13, 2001

AMERICAN POSTAL WORKERS UNION, AFL-CIO

M E M O R A N D U M

From the Desk of
Gary Kloepper
National Representative at Large
Maintenance Division
1300 L Street, N.W.
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(202) 842 4213
(202) 289 3746 FAX
gkloepper@apwu.org

DATE: August 14, 2001

TO: Duron D. Marshall, President
Charles Turner, Maintenance Craft Director
Denise Borcsani, Bulk Mail Center Vice President

SUBJECT: J90T-1J-C-94013758 - 90MAINT53
J90T-1J-C-94013759 - 90MAINT54

Attached is Arbitrator Sugarman's award with remand instructions for the above referenced grievances in which the Union protested the Postal Service's decision to subcontract bargaining unit work, specifically the installation of lights on the dock at the BMC¹ and subcontracting painting, removal and installation of walls, lights, electrical receptacles and ceilings². The arbitrator ruled, in the Union's grievance involving the dock lights, those bargaining unit employees who would have performed this work are to receive 48 hours of overtime at the rate that existed at the time of the filing of the grievance. The arbitrator made a similar ruling for our grievance involving the remodeling/refurbishing of the offices and locker rooms, which he described as removing and building new walls, painting, moving and installing lights, adding and removing electrical outlets and reinstalling drop ceilings. Of particular interest are the employees that the arbitrator identified for payment. He specifically limited compensation to those eligible employees who continue on the employment rolls of the Postal Service.

The arbitrator in granting the grievance remanded the remedy for the remodeling grievance to the parties. The remand decision was made due to the fact that the Postal Service did not produce any documents regarding its subcontracting decision. The arbitrator established the following criteria in his remand (Page 9):

1. The parties are to determine with as great a degree of precision as possible, the number of hours that would have been expended by contractor employees to remove and build new walls, paint, move and install lights, add and remove electrical outlets, and reinstall drop ceilings.
2. The parties are expected work together in good faith.
3. Determine the bargaining unit employees that were qualified and otherwise eligible,
4. Divide these hours among these employees,

1

The arbitrator denied the part of our grievance involving the lights in the parking area, constructing pedestals, and moving light poles. In his opinion, the Union did not demonstrate that bargaining unit employees had performed this type of work in the past.

2

The arbitrator denied the part of our grievance involving the breaking out of cement floors and installation of ceramic tile floors. In his opinion, the Union did not demonstrate that bargaining unit employees had performed this type of work in the past. He also excluded the installation of the turnstile doors since they were purchased as a package and included a warranty. He also excluded the wallpapering portion of our grievance.

5. Employees retired or deceased are to be excluded from any payment.
6. In the event an agreement cannot be reached, each party is to submit to the arbitrator their description of the work that was performed and an estimate of number of hours it would have taken to perform such work, itemizing each part thereof to the extent possible.
7. The arbitrator will make a decision on the submission that appears to be the most reasonable.

It is important to note that the arbitrator did not provide a time frame for the parties to attempt to resolve this issue. I suggest the Local comply with the above requirements within a time frame that does not extend beyond 45 days from the date of the award³. The Local should immediately write a letter to the Postal Service advising it that you are in receipt of the award and request a meeting for the purpose of finalizing the arbitrator award in these cases. Please free to contact me should you desire any assistance with implementation of this arbitration award.

- [At page 7] USPS claims that the contract must be looked at as a whole and since some of the work may have been beyond the ability and qualifications of unit employees to perform it follows that the subcontract is beyond attack. I must respectfully disagree . . . **If the USPS contention were correct, the Employer could avoid its contractual obligation by including desperate work in the same contract, some of which could be performed by unit employees and some of which could not. Such activity would not be within the spirit of the Agreement nor within the intent of the negotiators.**
- [At pages 7 and 8] The USPS argument concerning availability of employees is not compelling. **There is no evidence that all available qualified employees were working to full capacity. Even were it otherwise, no evidence was submitted to show that having the employees do this work on overtime would not have been cost effective.** Finally, the evidence fails to establish that USPS considered the criteria required by the Agreement in deciding to subcontract. No facts were provided and none could be as the persons who made the decision were no longer available to testify as to the rationale for having contracts rather than employees perform the work.
- [At page 8] APWU requested a copy of this contract in 1993. Presumably it was available at that time. It was a document the Union needed in order for it to evaluate whether it had a viable grievance. The failure on the part of the USPS to produce this document violated Article 31, Section 3 of the National Agreement.

REGULAR REGIONAL ARBITRATION PANEL

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UNITED STATES POSTAL SERVICE)	Post Office: BMC
- and -)	GLA No.: J90T-1J-C-94013758&9
AMERICAN POSTAL WORKERS UNION)	Local No. 90MAINT53, 54

BEFORE: Donald F. Sugerman, Arbitrator

For the Postal Service: Glenn Lee, Manager, Labor Relations

For the APWU: Gary Kloepfer, National Business Agent, Maintenance Div.

Fred Selvidge, Mechanic (MPE-7) and Union Steward
Michael Springstead, Mechanic (MPE-7) and Former Steward

Place of Hearing: Bulk Mail Center, Allen Park

Date of Hearing: October 3, 2000

Date of Ruling: October 13, 2000

Summary of Ruling: At the hearing, USPS requested that this matter be continued because of witness and document problems. Over APWU's strenuous objections, the request was granted subject to certain restrictions and limitations. This ruling memorializes the one made at the hearing on October 3, 2000, and constitutes a Notice setting 9:00 a.m. on Monday, November 6, 2000, at the Bulk Mail Center in Allen Park, Michigan a.m. as the time, date and place of the Hearing.



Donald F. Sugerman
Donald F. Sugerman, Arbitrator

RULING ON REQUEST FOR CONTINUANCE NOTICE OF HEARING

Pursuant to a Notice issued by USPS on August 30, 2000, three cases were scheduled for hearing on October 3, 2000. They were to be heard in the following order: A disciplinary case (Jefferson) followed by two cases involving subcontracting of bargaining unit work allegedly in violation of the National Agreement. The advocates discussed the scheduling in a September 25, 2000, telephone call initiated by Mr. Kloefer. At that time, APWU notified USPS that it was withdrawing the disciplinary case from arbitration and written confirmation would be sent forthwith. Thus, the subcontracting cases were to be presented at the October 3rd hearing. Although USPS had not received written notification of the withdrawal by the date of the hearing, this was a mere formality. It was clearly understood that the two class action subcontracting cases were to be consolidated and the subject of the October 3 hearing.

Prior to formally opening the record on October 3, seventeen exhibits were marked for identification. Joint Exhibits 1 through 6 and Union Exhibits 7 through 17 (including 8A) were to be received. The Employer objected to Exhibit U-9 as post-dating the grievances. The Arbitrator sought to construct a chronology of the significant events in order to more fully understand the dispute. It was surprising to learn that these grievances were filed in the Fall of 1993 and had thus been pending for more than seven years. While this may not be unusual to the parties, it was to this Arbitrator. In any event, it was during these preliminary discussions that the USPS advocate stated he was not prepared to proceed immediately following the APWU presentation of its evidence. He, in effect, was requesting a continuance at the point the Employer would be obligated to go forward with its proofs. According to USPS, it identified three potential witnesses who had been involved in the case in 1993 and have since retired. Further, certain documents considered by the Employer to be vital—such as the subcontracts, among others—could not be located. It was represented that USPS had initiated a search to find these documents. In this regard, it was mentioned that legal action may have been instituted against the subcontractors and the documents could be in the possession of the U.S. Attorney, the District Court, or in storage. It was also conceded that the documents might have been destroyed, lost or misplaced.

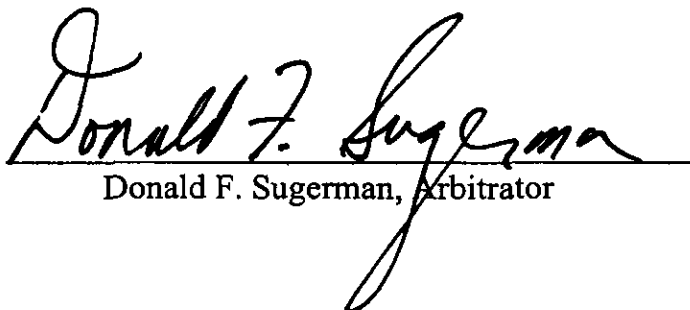
APWU strenuously objected to a continuance. It was prepared to proceed and noted that this matter had been scheduled for hearing once before—on April 25, 2000. At that time the APWU advocate was in Detroit preparing the case and learned the day before that the Arbitrator (not the undersigned) had agreed to a continuance at the request of the USPS advocate (not Mr. Lee) and without his position being solicited or heard. Further, the subcontracts were obviously not reviewed or considered by USPS in its analysis of the grievances, that another postponement would require yet another trip by the National Advocate with the additional cost and expense involved. APWU vigorously argued that no

further postponement be granted.

It was unclear whether these instant grievances were the principal cases to be heard in April or exactly how or why the postponement was granted unilaterally. No probative evidence on this aspect of the case was presented. For that reason and because these cases have been pending for so long, because material witnesses have retired and are no longer under the control of USPS, and because it appeared that a good faith effort was being made to locate "missing" documents, I concluded that a short delay would not prejudice APWU and that the interest of justice would best be served by granting a continuance. I reaffirm that ruling here.

APWU was given the option of presenting its case that day, but declined to put in proofs until the hearing resumed. Two dates were being considered, both of which were acceptable to the parties; Saturday, October 28 or Monday, November 6, 2000 (depending on the Arbitrator's schedule).

The hearing will resume on **Monday, November 6, 2000, at 9:00 a.m.** at the **Bulk Mail Center in Allen Park**. The Union will present its case after which the Employer will present its case. A request by USPS for a further continuance will not be granted. If the Employer has no witnesses or documents, the case will be decided on the record developed at the hearing. Of course, the parties have been encouraged to see if these cases can be settled in the interim period.


Donald F. Sugerman, Arbitrator

October 13, 2000

