

ARBITRATION

R E G U L A R P A N E L

In the Matter of Arbitration )  
  ) Grievant: Class Action  
      between                              ) )  
  ) Post Office: Trenton VMF, NJ  
United States Postal Service )  
  ) Case Nos. A94V-4A-C 96047032  
      and                                  ) Union Gr. No. TNJ-96022V  
  ) )  
American Postal Workers Union ) Date of Award: August 21, 1998

Before: Blanca E. Torres, Esq.

Appearances: For the Postal Service: Jeff S. Olesnovitch  
  For the Union: John E. Smith

Place of Hearing: Trenton P&DC, 680 U.S. Hwy. 130, Hamilton, N.J.

Date of Hearing: August 4, 1998


Relevant Contract Provisions: Articles 1, 3, 5, 19 and  
  Handbook AS-707A

Contract Year: 1994-1998

Type of Grievance: Contract

**Award Summary**

ISSUE: Did the Service violate Article 1 (union recognition, Article 39.3.D (motor vehicle craft positions), Article 5 (unilateral action), or Article 19 (incorporation of AS-707A Manual - re: contracting procedures), when it entered into contracts with private contractors to perform shuttle work during the day shift? If so, what shall be the remedy? There existed an undisputed past practice of assigning all or most shuttle work during the day tour to the VMF staff. I find that the Service engaged in unilateral action when it contracted out shuttle services to private contractors in violation of Articles 5 (which references Section 8(d) of the NLRA) and in violation of the AS-707A Manual. The grievance is sustained. The Service is ordered to cease and desist from violating Article 5 and Section 1.4.1 of the AS-707A Manual. However, the record does not support an award of back pay.

  
Blanca E. Torres, Esq.  
Arbitrator

### Introduction

I heard this case on August 4, 1998, at the Trenton P&DC, located at 680 U.S. Highway 130, Hamilton, New Jersey.<sup>1</sup> The American Postal Workers Union has filed a Class Action grievance on behalf of the Motor Vehicle Maintenance unit. This grievance concerns the fact that the Service has entered into contracts with private parties who perform shuttle (towing) service that the bargaining unit used to perform. ("Towing work" and "shuttle work" will be used interchangeable throughout this decision). The parties were unable to agree upon the issue in this matter. Therefore, I have formulated the issue as follows:

### Issue

Did the Service violate Article 1 (union recognition, Article 39.3.D (motor vehicle craft positions), Article 5 (unilateral action), or Article 19 (incorporation of AS-707A manual - re: contracting procedures), when it entered into contracts with private contractor to perform shuttle work during the day shift? If so, what shall be the remedy?

### Relevant Contractual Provisions

#### Article 1 - Union Recognition (relevant portion)

The Employer recognizes the Union designated below as the exclusive bargaining

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<sup>1</sup> The parties agreed that this case is the "lead case" for five (5) other cases that address the same issue:

1. A94V-1A-C 98086519 (Union No. TNJ - 98081V)
2. A94V-1A-C 98086517 (Union No. TNJ - 98079V)
3. A94V-1A-C 98086516 (Union No. TNJ - 98080V)
4. A94V-1A-C 98073536 (Union No. TNJ - 97063V)
5. A94V-1A-C 98068589 (Union No. TNJ - 98026V)

The decision in this case shall apply in the above grievances.

representative of all employees in the bargaining unit for which each has been recognized and certified at the national level: ..., Motor Vehicle Employees.

Article 3 - Management Rights (relevant portions)

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

To maintain the efficiency of the operations entrusted to it.

Article 5 - Prohibition of Unilateral Action

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

Article 19 - Handbooks and Manuals [are incorporated into the National Agreement.]

Handbook AS-707A - "Contracting for Vehicle Maintenance Agreements" (VMAs) (March 1, 1990).

This handbook is for field personnel involved in the procurement process for vehicle maintenance agreements (VMAs). It includes guidelines and procedures for writing requirements, specifications and statements of work, soliciting proposals, evaluating offers, and awarding and administering contracts...

1.1 Purpose - This handbook provides guidance on obtaining vehicle maintenance and repair services through vehicle maintenance agreements (VMAs). A VMA is an ordering agreement entered into by the Postal Service and a supplier of vehicle maintenance services. It sets forth the terms and conditions upon which a binding contract may be entered into at a later date, through placement and acceptance of an order.

1.3.1 Request - Postal Service installation heads who do not have vehicle maintenance available in-house may request VMAs in accordance with these procedures (see restrictions in 1.4). [emphasis added]

1.3.2 Award - VMAs may only be awarded by contracting officers having authority to establish such agreements. Awards must be made in accordance with these procedures.

#### 1.4 Restrictions

1.4.1 USPS Maintenance Available - VMAs should generally not be used by offices where vehicle maintenance is available in-house. However, when the Vehicle Maintenance Facility (VMF) cannot meet its requirements, such an office may submit a VMA request that justifies the need for supplementary services. [emphasis added]

### Facts

The Trenton Vehicle Maintenance Facility (VMF) is located by the Trenton Processing and Distribution Center (P&DC) in Hamilton, New Jersey. There is also a post office on the premises. The VMF performs the scheduled maintenance of postal vehicles and makes repairs, as needed. The facility is managed by Manager Ron Rutkowski. Carl Sauerborn is the Supervisor of Vehicle Supplies. There is a staff of 24 employees, including 18 automotive mechanics and a support staff of four (4) clerks, and two (2) body and fender repairmen. These positions belong to the motor vehicle craft bargaining unit.

There are trucks of various sizes that pick up and deliver mail to the post office in Hamilton. Each vehicle receives regular maintenance at the VMF in 13-week cycles. The VMF also services postal vehicles from satellite post offices in the immediate

geographical area. Each outlying post office has a Vehicle Operations and Maintenance Assistant (VOMA), an employee who coordinates the maintenance program for that post office with the VMF and, if necessary, with outside contractors.<sup>2</sup> An employee who becomes a VOMA remains in the same craft to which he or she originally belonged, (i.e., the clerk craft, the motor vehicle craft, etc.). Therefore, a VOMA may or may not belong to the motor vehicle bargaining unit.

It is undisputed that at the VMF, prior to 1995, the employees of the motor vehicle craft (including the garageman, the mechanics and truck operators), performed all shuttling work that arose during the scheduled tour. The VMF houses two (2) tow trucks and one new car carrier that used to perform shuttling services. On rare occasions, when no employees were available, management contracted with a private towing company to perform a specific job. If the vehicle that was to be serviced was from a satellite post office, the manager of the VMF arranged for the VOMA from that location to perform the shuttling service.

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<sup>2</sup> The VOMA's in outlying post offices are authorized to "perform road calls and minor repairs, such as replacing batteries and tires." The function of a VOMA is to "conduct the vehicle operations program and maintenance function at a perimeter post office where postal-owned vehicles are assigned" at post office where there is no vehicle maintenance facility. The VOMAs duties include "sending postal vehicles to garages having contracts [with the Service] or to a designated vehicle maintenance facility" whenever the vehicles need inspection, repairs, or preventive maintenance. According to their job description, the VOMA's "arrange for delivery of vehicles for necessary servicing" whenever the work is performed by an [outside] contractor.

Therefore, the past practice at the Trenton VMF is undisputed. When a postal vehicle from the VMF or a perimeter post office broke down on the road, the Garageman, a VOMA or an Auto Mechanic would shuttle the vehicle. They would tow it to the VMF facility, or, in the case of a VOMA, to another designated location (an outside contractor) for repairs. During the regularly scheduled work day, bargaining unit employees performed all the towing/shuttle work that arose during their shift. After the Vehicle Maintenance Facility closed, the Service contracted all shuttle work to outside contractors/vendors.

In 1995, Management began to contract out shuttle work that was previously performed by bargaining unit employees during their normally scheduled day shift. It is undisputed that the "day" towing work that management gave to outside vendors is the same work that bargaining unit employees (garageman and auto mechanics, truck operators and VOMA's) used to perform. The parties stipulate that the staff at the VMF currently performs less shuttle work than before. This is because management now contracts with outside contractors to perform daytime shuttling services over a given period of time, ranging from three (3) months to one year.

On February 22, 1996, the Union filed this grievance alleging that the Service violated Articles 5 and 19 of the National Agreement when it contracted shuttle work that was previously performed during the day tour by the VMF staff. In evidence, there are various contracts for shuttle service with different outside contractors dated June 23, 1995; November 15, 1995; January 2,

1996; August 4, 1997; and, September 9, 1997. It is also undisputed that the Service did not negotiate with the Union before contracting out the shuttle service duties.

Union's Position

The Union states that in Article I of the National Agreement, the Service recognizes the American Postal Workers Union (APWU) as the representative of the Motor Vehicle Division. Article 39.3.D. provides that all motor vehicle craft positions designated to the motor vehicle craft shall be under the jurisdiction of the Motor Vehicle Division of the American Postal Workers Union. The APWU represents the 26 motor positions in the craft, including some of the VOMAs. Therefore, the Union seeks to preserve bargaining work belonging to the motor vehicle craft.

The Union alleges that the Service violated Article 5 of the National Agreement, "Prohibition of Unilateral Action". In Article 5, the parties agreed that the Service "will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of the National Agreement." Section 8(d) provides in relevant part:

Where there is in effect a collective bargaining contract...the duty to bargain collectively shall also mean that no party to such contract shall...modify such contract unless the party desiring such...modification

(1) serves a written notice upon the other party to the contract...sixty days prior to the time it is proposed to make such...modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a...contract containing the proposed modifications.

The Union argues that there was an ongoing practice of assigning the garageman, the mechanics and other supporting staff to perform shuttle work. In addition to the established past practice, performance of shuttle work is encompassed in the job duties of the garageman, the mechanics, the motor vehicle operators and the tractor-trailer operators and VOMA's (see job descriptions submitted into evidence). In spite of the fact that the work belonged to the bargaining unit, management did not negotiate with the Union before contracting out the shuttle work previously performed by the bargaining unit.

The Union further argues that pursuant to Handbook AS-707A, Section 1.4.1, Vehicle Maintenance Agreements (VMAs - contract requests used to obtain outside vendors) should generally not be used by offices where vehicle maintenance is available in-house. The only exception is when the VMF "cannot meet its requirements." Then, the request for an outside contractor must contain a justification showing the need for supplementary services. The Union argues that management has not justified the need for supplementary services. On the VMAs that are in evidence, there is no justification provided. Throughout the lower steps of the grievance/arbitration procedure, the manager gave no justification other than to say - without documented substantiation - that the contracting out of the shuttle work helped to maximize the time

that mechanics spend on doing repair work. At the instant hearing, the manager stated for the first time that the increase in outside vendor contracts was due to a backlog of repair work at the VMF.

Finally, the Union argues that although Management states that the bargaining unit has lost no work and that the Mechanics have lost no hours, the position of garageman no longer exists and the auto mechanics no longer work overtime on unscheduled days and shuttle work assignments to mechanics and other bargaining unit members have decreased drastically.

As a remedy, the Union requests that all shuttle work of postal vehicles be returned to the Motor Vehicle Craft employees and that all employees be made whole for lost work opportunities at the applicable overtime rate.

#### Management's Position

The Service states that under the Article 3 of the National Agreement, the Management Rights clause grants management "the exclusive right, subject to the provisions of the Agreement and consistent with applicable laws and regulations to maintain the efficiency of the operations entrusted to it." Thus, management may expand the use of outside contracts (VMAs) with outside vendors as long as the action is not inconsistent with the terms of the National Agreement.

The Service argues that it has always used contracts with outside vendors to perform towing work after the VMF closes, between approximately 5:00 p.m. and 6:30 p.m. In 1995-96, Management expanded the use of outside contractors to include

daytime towing service as well evening/night service in order to increase the productive time of the auto mechanics doing repair work, rather than shuttling vehicles. Thus, there was a practice of contracting out shuttle work after the VMF closed. Occasionally, when no one was available to perform shuttle service during the day, management had to use outside contractors. Therefore, this practice is not new. It is the position of the Service that the expansion of this practice does not constitute a unilateral action.

Further, the Service argues that the auto mechanics still perform shuttle work, as needed. The wages, hours and working conditions of the bargaining unit were not affected. The mechanics still work 40 hours a week and are offered overtime hours. With regard to the Union's claim that the employees have lost overtime on non-scheduled days, the work on non-scheduled days was not necessarily for the purpose of shuttling vehicles. Thus, the Service argues that the Union cannot meet its burden of showing that the Service has violated any terms of the Agreement since there has been no change in the wages, hours or working conditions of the bargaining unit. Nor has the Union shown that management unilaterally changed the past practice since the mechanics and support staff still perform shuttling duties.

In addition, the Service argues that the VMF employees are not solely responsible for shuttling services because, nationwide, there are contracts with outside vendors for maintenance work at

satellite post offices to provide for pickup and delivery (shuttle) of the postal vehicles.

Carl Sauerborn, Supervisor of Vehicle Supplies for Central New Jersey Performance Cluster (CNJPC), testified that the mechanics are trained by the Service to repair new Long Life Vehicles that are highly technical. They are highly skilled in this area. Using mechanics to shuttle vehicles is a misapplication of their talents, and is not cost efficient. If the auto mechanics were to perform the bulk of the shuttle work, management would have to use private contractors to perform the repair work that requires a skilled mechanic. Supervisor Sauerborn stated that it is more expensive to contract out repair work than it is to contract out shuttle work.

Manager Ron Rutkowski testified that the Service acquired Long Life Vehicles between 1987 and 1994. The mechanics are sent to another state for a week of training on how to repair the vehicles. In 1995, when he first began to contract out towing services during the scheduled tour, there was a back log of scheduled maintenance of approximately 100 vehicles. This was not communicated to the Union prior to the instant hearing because the Union never requested this information. Management argues that if the current contracts are canceled, the Service would be unable to tow vehicles after the VMF closes because the contracts are for 24-hour shuttling service. The manager further testified that none of the bargaining unit employees have lost any work hours since the contracting out of shuttle work expanded. All personnel are

employed 40 hours a week and are offered some overtime hours at the end of the scheduled tour.

In the alternative, the Service argues that the job description of garageman does not include the duty of shuttling postal vehicles for repair, nor do the job descriptions for mechanics, motor vehicle operator or tractor-trailer operators.

#### Analysis and Conclusion

Article 3 of the National Agreement establishes that the Service has the right to direct its work force and maintain the efficiency of its operations. Here, the Service claims the right to maintain the efficiency of its operations by using outside contractors to perform shuttle work. The Union argues that Management's action of contracting out the shuttle previously performed by the bargaining unit violated Article 5 of the National Agreement, "Unilateral Action".

The Service does not dispute that the majority of the daytime shuttle work was previously performed by the VMF staff and VOMAs. It is well established that an established or bona fide past practice rises to the level of explicit terms of the Agreement. See Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). A unilateral change of that practice would violate the terms of the Agreement, as contemplated by the parties in Article 5. Although the alleged unilateral change in this case concerns the contracting out of bargaining unit work, the parties agree that Article 32 ("Subcontracting") was not raised at the lower steps of the grievance procedure and is not at issue here. However, Article

5 of the Agreement prohibits unilateral action under national labor law. The NLRA provides at Section 8(d) that the employer shall give notice to and bargain with the union when contemplating a change to the provisions of a negotiated agreement. As discussed above, the undisputed past practice in this case rises to the level of a negotiated contract clause.

Management states that it has always used a combination of VMF employees, VOMA's and outside contractors to perform shuttle service and that it has now simply increased the use of outside contractors. Therefore, management considers the change in practice to be the exercise of its management rights and has refused to bargain with the union.

The Union bears the burden of proof in this case and must show that there was a unilateral action that has impacted negatively on the bargaining unit. The Union argues that there is less overtime available. The Union has not provided a detailed comparison of overtime hours available before and after the increase of outside contractors. However, management does not dispute that overtime is no longer available on non-scheduled days. Management maintains that overtime is still available at the end of the day shift and all employees work 40 hours a week or more.

The Union introduced written statements by some of the bargaining unit members attesting to the fact that they used to perform shuttle work almost daily or every other day. The statements are not clear as to the frequency of shuttle assignments after 1995, although some employees stated that they had not

performed shuttle work for three (3) months prior to writing their statements in 1998. Again, management does not dispute that the VMF employees now perform much less shuttle work now than prior to 1995. The Union argues that since the alleged unilateral change, the bargaining unit has lost the position of garageman. (Although the appropriateness of the reversion of the garageman position is not before me, the fact that it was reverted is a fact in this case). In view of the above, I find that the change in practice has affected the bargaining unit. There has been a loss of work, a loss of overtime and the loss of a bargaining unit position.

I find that management engaged in a unilateral change in violation of Article 5 of the National Agreement. This change in practice affected the amount of overtime hours worked by the bargaining unit, decreased the frequency of shuttle work assignments for the members of the bargaining unit and decreased the bargaining unit by one employee. Therefore, management is ordered to cease and desist from engaging in the unilateral action of contracting out shuttle service work performed by the bargaining unit during the scheduled tour.

Nonetheless, the Union, who bears the burden of proof in this case, has not introduced any conclusive evidence on the specific amount of overtime hours or overtime pay that the bargaining unit lost since 1995. Therefore, I find that there is insufficient evidence to substantiate an award of back pay for lost work. However, the parties are ordered to bargain over the impact of (future) outside contracts for shuttle services.

However, this does not entirely dispose of the allegations raised in this case.

The AS-707A Manual has been incorporated into the National Agreement by reference, thus it is an integral part of the Agreement. (See Article 19). Section 1.4.1 of the AS-707A Manual, allows "offices where vehicle maintenance is available in-house", such as the Trenton VMF, to use outside contractors under very restricted conditions. Specifically "when the VMF cannot meet its requirements, such an office may submit a VMA request that justifies the need for supplementary services." Thus, the use of outside contractors at VMF facilities has been addressed by the parties.

Section 1.4.1 restricts the use of outside contractors at offices with vehicle maintenance facilities to instances when the VMF cannot meet its requirements. Section 1.4.1 squarely places the burden on the Service to justify the need for such supplementary services. Therefore, the Service bears the burden of proof on the issue of justification of the use of outside contractors.

The record is barren of any such evidence. While management has made arguments to justify its "the need for supplementary services" during the scheduled work day, the record contains no demonstrable evidence in support of these arguments. Management has provided no VMA (request for a contract with an outside vendor) that contains an explanation for the need to contract out the shuttle work in question. Further, Management has not presented

any substantive evidence in support of its assertion that there was a backlog at the VMF in 1995. Therefore, I find that the Service has violated Section 1.4.1 of the AS-707A Manual. The Service is hereby ordered to cease and desist from violating this provision and to adhere to the terms negotiated by the parties at the national level. The parties are ordered to bargain over the justifications advanced by management in support of use of VMAs under Section 1.4.1 of the AS-707A Manual.

Again, the Union has not come forward with any conclusive evidence of how the bargaining unit was harmed and I have no basis upon which make an award of back pay for this violation.

In Arbitrator Edwin H. Benn's case, Case No. I90V-11-C 93050171 (August 5, 1994), the arbitrator found that the Service engaged in unilateral action and granted back pay as a remedy. However, the facts of that case differ from those in the case before me. In Arbitrator Benn's case, submitted into the record by the Union, there was no question as to how extensively the bargaining unit was damaged.

The Service submitted a case by Arbitrator George T. Sulzner, Case No. B90V-1B-C 96008844 (January 24, 1997). That case differs from the facts of this case in that the evidence was specific enough for the arbitrator to determine that there existed a past practice of using outside contractors to perform the shuttle work at issue and that after the Service increased the use of these outside contractors, the bargaining unit still performed up to 50 percent of the shuttle work during the month of December 1996.

Here, a clear past practice of using outside contractors during the scheduled shift has not been established.

Order

1. The Service engaged in a unilateral action in violation of Article 5 when it used outside contractors to perform shuttle work previously performed by the bargaining unit members during the day tour.
2. The Service shall cease and desist from entering into contracts with outside contractors for the performance of shuttle work. The parties shall enter into impact bargaining.
3. The Service violated the AS-707A Manual, Section 1.4.1 when it failed to justify the need for supplementary services requested in VMA contracts and has continually failed to provide adequate evidence of its alleged justification.
4. The Service shall cease and desist from violating Section 1.4.1 of the AS-707A Manual. It shall provide justification as required by this provision and shall make the information available to the Union.
5. The Union's request for back pay is not substantiated by the record and is hereby denied.

  
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Blanca E. Torres, Arbitrator

August 21, 1998