

C 26913

REGULAR ARBITRATION PANEL

IN THE MATTER OF ARBITRATION

between

UNITED STATES POSTAL SERVICE

and

**NATIONAL ASSOCIATION OF LETTER
CARRIERS, AFL-CIO**

GRIEVANT: Class Action

CASE NOS.

**USPS: B01N-4B-C
06094135**

NALC: 286GB1

DRT # 14-050143

**Before: Robert T. Simmelkjaer, Esq.
ARBITRATOR**

APPEARANCES

FOR THE USPS

Robert LoPrete, SPHR

FOR THE NALC

**Jon Weissman, President, Branch 46
Gary Ghidotti, President, Branch 286**

Place of Hearing: Pittsfield, MA

Date of Hearing: January 8, 2007

RECEIVED

FEB 20 2007

**John J. Casciano, NBA
NALC - New England Region**

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FEB 23 2007

**VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS**

AWARD

- 1) The Service violated Article 5 of the National Agreement when it stopped using Letter Carriers to pick up Express Mail and instead hired a Highway Contractor to perform the service.**
- 2) As a remedy, the Carrier Craft at Great Barrington, MA shall be reimbursed two (2) hours per week at the PTF's prevailing wage on March 17, 2006 until the present.**
- 3) Henceforth, the Express Mail run shall be returned to the Carrier Craft.**

February 16, 2007


Robert T. Simmelkjaer

BACKGROUND

Pursuant to the procedure for arbitration contained in the Collective Bargaining Agreement between the United States Postal Service (hereinafter "the Service") and the National Association of Letter Carriers, AFL-CIO (hereinafter "the Union"), the undersigned was selected to hear and determine the following

ISSUE: Did Management violate Article 5 of the National Agreement when they stopped using Letter Carriers to pick up Express Mail and instead hired a Highway Contractor to perform this function?

Or, in the alternative, whether the Service violated Article 32.1 when it made the decision to sub-contract the transportation express mail from the Lee Post Office to the Great Barrington Post Office.

If so, what shall be the remedy?

At the hearing, the parties were given ample opportunity to present their respective positions, including testimonial and documentary evidence. The record consists of three (3) Joint Exhibits and one (1) Union Exhibit.

RELEVANT CONTRACT PROVISIONS**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 32

SUBCONTRACTING

Section 1. General Principles

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

STIPULATIONS:

- 1) For many years PTF carriers from Great Barrington have made the trip to the Lee Post Office to pick up Express Mail. On 3/17/06, in an effort to be cost effective, Management in Great Barrington began using a Highway Contractor to bring the Express Mail from Lee to the South County Post Offices.**
- 2) At the time the instant grievance arose, HCR #2 has a scheduled run that leaves Pittsfield at 10:30 a.m. and goes to Great Barrington, Housatonic, Glendale, Stockbridge, South Lee and Lee in that order. This HCR #2 run is to pickup empty equipment and to advance any early collection mail to Pittsfield. It leaves Pittsfield at 1030am and returns at about 1230pm, in time for a 115pm dispatch from Pittsfield to Springfield.**

CONTENTIONS OF THE PARTIES

UNION POSITION

The Union, which has the burden of proof in a contract grievance, has argued that the Service violated the National Agreement, specifically Articles 1 and 5, when it changed the past practice of letter carriers performing the Express Mail run in the Great Barrington Post Office, without negotiating with the Union. Referring to the statement of

Postmaster Witkowski that "past practice has been that a carrier would go to Lee to pick up Express Mail, this has been done for many years," the Union contends that the Service violated Article 5 which prohibits the Employer from taking any actions affecting wages, hours, or 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."

According to the Union, management never contacted Branch President Gary Ghidotti on this issue. "OIC Witkowski made the change on March 17, 2006 and then met with the Union on April 5, 2006 to notify them that he was making a permanent change."

In addition, the Union maintains that management has not provided a legitimate cost analysis, with supporting documentation. It further contends:

However, assuming that the cost for HCR delivery was less than City delivery that alone does not determine the outcome of this issue. Cost is a criterion in the decision but not the only one. Management has not shown that it was more efficient to do so, nor that equipment was unavailable nor that there was not a qualified employee to service the area. Nor has it shown that the public interest was served by using a contractor rather than a City Letter Carrier.

Gary Ghidotti, President of Branch 286, testified that around March 17, 2006, he was called to the Great Barrington Post Office by Shop Steward Hainesworth, who informed him that the express mail run of the PTF had been taken away and given to a highway contractor. At this point, a grievance was filed and processed by Colleen Parsons, Vice President.

According to Ghidotti, as Branch President, he should have been consulted by management prior to this decision.

Colleen M. Parsons, Vice President, testified that she met OIC Witkowski at Step 2. At Step 2, she recalled that Witkowski did not respond to her past practice assertion, but acknowledged in his statement that the express mail run had existed for many years.

She received no cost data from management. Parsons recalled Witkowski reference to the contracting out as an experiment which would entail "a couple of miles variance for the HCR." The shop steward was told that the involvement of the HRC was a "new process," which would be evaluated to determine its impact on the HCR driver.

Parsons estimated that the PTF lost one hour of work per day, starting at 11:00 a.m. instead of 10:00 a.m.

On cross-examination, she testified that the number of PTF hours went down, although she did not conduct a pre/post analysis. In claiming an Article 5 and past practice violation, she did not consider the subcontracting factors set forth in Article 32.

Thomas Jones, PTF, testified that he performed the Lee to Great Barrington Express Mail run from 10 a.m. to 11 a.m. daily. He no longer performs that run because, except for Saturdays, the HCR performs the run.

He further testified that the HCR occasionally leaves express mail in Lee if it is not ready, and then "we get them."

On cross-examination, Jones testified that when the regular carrier was absent, the PTF still performed the Lee run, however, when the FTR was absent, the PTF worked 40 plus hours. The Senior PTF would cover the absence of the FTR. Prior to March 2006, "the Lee run was always performed by a PTF carrier, a PTF clerk, or occasionally a supervisor."

He experienced a loss of 2-3 hours weekly, from 38-40 hours on average to 33-40 hours on average.

SERVICE POSITION

The Service maintains that Article 32, Subcontracting, rather than Article 5, is applicable in the instant case. The Service further maintains that the Lee run involved a minor alteration in an existing HCR contract, obviating a duplication in the PTF's and HCR's work. Also, since Great Barrington had no employees on the OTDL, the additional hour gained was beneficial to the parties.

The Service also disputes the Union's claim that, pursuant to National Arbitrator Mittenthal's decision, management has to satisfy all five Article 32(A) criteria but rather had to give them due consideration prior to subcontracting.

According to the Service, the Union has sought to utilize Article 5 to undermine Article 32 because under Article 5 there is no obligation to negotiate costs.

Michael Witkowski, Postmaster at Great Barrington commencing 2006, testified that prior to 2001, the Bradley Airport to Pittsfield "Eagle run" was taken over by FedEx. At that time, the express mail was picked up in Lee at 8:30 a.m. The Eagle network entailed a 12 noon commitment with express mail arriving in Lee for Great Barrington as well as Southern Berkshires and Northern Berkshires and Pittsfield.

The HCR ran a route through Bradley, Westfield, Lee (where the Southern Berkshire County mail was dropped) and Pittsfield. He then described the pre-existing HCR runs as follows:

HCR #1: Lee to Pittsfield – PTF Letter Carrier picked up express mail in Lee for Great Barrington and Southern Berkshires at 10:15 a.m.

HCR #2: N/A at the time. Eagle picked up at 8:30 a.m. in Lee for Great Barrington.

Once FedEx took over, Witkowski testified that since there was no longer a dedicated person available in Pittsfield at 10:15 a.m., the express mail delivery commitment became 3:00 p.m. With the carriers gone, the 15-20 deliveries were delivered by management.

When he arrived in Great Barrington, the PTF carrier had previously gone to Lee at 9:30 a.m. He returned between 10:30-11:00 a.m. and picked up the express mail for the Southern Berkshires. He would then begin delivering the express mail for Great Barrington in order to meet the 3:00 p.m. commitment. On occasion, a supervisor, postmaster or a PTF clerk who drove would deliver the mail.

Around this time, Witkowski considered sub-contracting the express mail run. He considered as factors the absence of any employee on the OTDL, the five City Carriers who owed their bid assignments, and the two HCRs. Also, two FTRs were absent due to disability or injury. The daily variation in the express mail schedule was an issue.

He then considered HCR #2, "one of our best employees." His run came from Pittsfield at 10:30 a.m., arrived in Great Barrington at 11:15 a.m., circled the Southern Berkshire offices and arrived in Pittsfield at 1:30 p.m. The carrier from Lee and the HCR from Great Barrington would arrive at the same time.

At this point, he considered HCR #2 to be a resource. By deviating from his route to stop at Lee rather than going directly to Great Barrington, he could arrive in Lee at 11:20 a.m. with the express mail destined for Great Barrington. The HCR could also drop off at P.O. Boxes and other offices while dropping off the express mail.

As a result of the change, Witkowski found that the scheduling of PTFs was improved and the utilization of supervisors to deliver Great Barrington express mail reduced.

In making the change, Witkowski testified that he reviewed the contract language, met with shop steward Hainesworth on March 17th, and eventually met with both shop stewards.

Initially, his objective was to use the HCR as a resource. Later, he considered the cost, efficiency and savings. "I had no intent to take away

hours from the Union. I did not see this as a subcontracting issue." He estimated that the PTFs had lost 2-3 hours per week as a result of the change.

On cross-examination, Witkowski testified that during the implementation of his plan, he had a discussion with Roger, the HCR driver, where the issue of Article 32 arose. He could not recall whether the HCR had deviated from his route for the weeks without a contract modification.

He acknowledged not discussing the change with Branch President Ghidotti and considered the Union to be the local shop steward with whom it discussed the matter after the fact.

Witkowski acknowledged losing some time with the change as the PTF has returned at 10:00 a.m., as compared to the HCR's 11:00 a.m. In either case, the carriers are on their routes when the express mail arrives. There is less express mail to deliver because the HCR now drops mail at six other offices.

DISCUSSION

It is undisputed that since the beginning of Express Mail, the PTF carriers in Great Barrington have made the trip to the Lee Post Office, Tuesday to Saturday, to pick up the Express Mail. Any Express mail for Southern Berkshire County was collected on the run and dropped off at the

appropriate office on the way back. The round trip started around 10 a.m. and returned to Great Barrington about one hour later.

The evidence of record establishes that prior to March 17, 2006, OIC Witkowski thought that the Highway Contractor, whose run went from Pittsfield, MA to the South County offices and arrived in Great Barrington around 11 a.m., could perform the work previously done by City Letter Carriers. The HCR was primarily tasked to pick up any early collection mail and empty equipment.

Accordingly, on March 17, 2006, Witkowski initiated an experiment which entailed an adjustment to the HCR's route and the Express Mail was delivered to the South County Post Offices in time for the 3:00 p.m. commitment. In the process, the PTFs in the Great Barrington Post Office lost one hour of work – Tuesday to Saturday.

The first issue is whether Article 5 or Article 32 should be applied in the instant case. On the one hand, the evidence indicates that the Express Mail run to the Lee Post Office by the Great Barrington PTFs had been a mutually accepted and longstanding aspect of the carriers' workload for many years. OIC Witkowski acknowledged these past practice elements when he wrote, "Past Practice has been that a carrier would go to Lee to pickup express mail and this has been done for a number of years."

Although the Service has focused on the 2001 FedEx takeover of the Bradley Airport to Pittsfield run (i.e. "the Eagle run") as indicative of a break nullifying any past practice, the Arbitrator finds that the PTF Lee run

per se was not materially affected by the takeover. Nor was the fact that supervisors and clerks occasionally delivered Express Mail relevant to the PTF Express Mail run.

Insofar as the establishment of a past practice was concerned, the Union, in the Arbitrator's opinion, met its burden of proof. There existed a longstanding, mutually accepted and consistent pattern of PTFs making the Lee run sufficient to establish a binding past practice.

Given the finding that a past practice existed, a violation of Article 5 is discernible since the decision to subcontract the work was made unilaterally without bargaining in good faith with the Union prior to the change. OIC Witkowski announced the unilateral change rather than sought to negotiate a change to a binding past practice. As the JCAM provides:

Prior to making such a change unilaterally, the Postal Service must provide notice to the union and engage in good faith bargaining over the impact on the bargaining unit. If the parties are unable to agree, the union may grieve the change.

On the other hand, the Arbitrator finds the Service's reliance on article 32.1 Subcontracting misplaced in this case. Although Article 32.1 might have been an appropriate process to address OIC Witkowski's legitimate concern about the availability of full-time employees and irregularities in the delivery of Express Mail, he neither contemplated nor approached the matter as a subcontracting issue. As he testified, "I didn't see this as a subcontracting issue." Although he subsequently considered

the cost/benefits of utilizing the HCR in lieu of the PTFs to collect the Express Mail for Great Barrington, this was an afterthought rather than a planned subcontracting procedure.

As a result, the Service's retrospective analysis that an Article 32 subcontracting process occurred is negated by the facts. For example, OIC Witkowski did not conduct cost comparisons between adjusting the HCR run and the availability of Postal Service transportation. It is noteworthy that the Service did not introduce any of the subcontracting database relied on by Witkowski to make his decision.

It is significant that, even if Article 32.1(A) were applicable, the Employee's obligation "to give due consideration to the public interest, cost, efficiency, availability of equipment and qualifications of employees" was not fully documented in this case.

Given his objective of issuing the HCR as a resource, he bypassed the requirements of Article 5 that changes in a past practice require notification and bargaining with the Union.

In the final analysis, OIC Witkowski identified a plausible, and ostensibly efficient, cost-effective method to maximize his available resources. The HCR adjustment may have ultimately been the correct solution, but for the fact that a binding practice existed of having PTFs perform the Express Mail run. Management's unintentional violation of the contract had tangible consequences for the PTFs who lost 2-3 hours per week of employment.

As a remedy, the Carrier Craft at Great Barrington shall be reimbursed two hours per week from the March 17, 2006 implementation of the HCR adjusted route to the present and the work shall be returned to the PTFs and the Craft.