

REGULAR ARBITRATION PANEL

C-25692

In The Matter of Arbitration)	Grievant: Class
)	
Between)	Post Office: Napa, CA
)	
UNITED STATES POSTAL SERVICE,)	USPS Case No. FO1N-4F-C 04095443
)	
-and-)	DRT Case No. 01-049011
)	
NATIONAL ASSOCIATION OF)	
LETTER CARRIERS, AFL-CIO.)	
)	
)	

BEFORE: Claude D. Ames, Arbitrator

APPEARANCES: For the USPS: Terry E. Bickleman, Labor Relations Specialist
2000 Royal Oaks Drive, Rm. 114
Sacramento, CA 95813-9715For the NALC: Carly A. Hook, Advocate
Local Business Agent, Branch 269
10361 Merritt Street
Castroville, CA 95012-3306

Place of Hearing: Napa, California

Date of Hearing: October 19, 2004

Date of Briefs: December 10, 2004

Date of Award: January 19, 2005

Relevant Contract Provision: Articles 3, 14, 15

Contract Year: 2001 - 2006

Type of Grievance: Contract Violation

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VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERSAward Summary

The Napa Post Office did violate Articles 14 and 15 of the Agreement by failing to timely comply with a Step B decision to perform asbestos repair work. The appropriate remedy is a monetary award to Branch 627 as reimbursement for its direct cost in maintaining this arbitration. The Napa Post Office shall cease and desist from future violations of Step B decisions. The Union's grievance is sustained.


CLAUDE DAWSON AMES, Arbitrator

I

PROCEDURAL BACKGROUND

This Union is appealing to arbitration a Step B-DRT team decision which declared an **impasse** on the following dispute: Did Management violate Articles 14 and 15 of the National Agreement by failing to comply with a Step B decision concerning asbestos? The Union maintain that Management did violate the Step B decision by failing to contact a licensed asbestos repair contractor as instructed, and failed to scheduled repair work at the Napa Main Post Office to be completed "ASAP." The Service contends that it acted reasonably and in good faith in contacting the owner through Facilities in getting the asbestos repair work completed. Further, any delays in completing the repair work were caused by circumstances beyond the Service's control, which excuses its performance.

The Union filed its original grievance (Case No. FO1B-4F-C 04037310) on December 1, 2003, alleging that "Management violated Articles 14 and 15 by failing to maintain damaged walls that are friable ACBM and thereby potentially exposing employees to asbestos contamination." The Step B-DRT Team chose to resolve the dispute after reviewing all information submitted by the parties, including the most recent "Periodic Asbestos Inspection Sheet," dated 5/14/03, and decided as follows:

"All the repair work on the walls have not been completed, holes and cracks are still present. Management is in violation of Article 14. As remedy, Management shall contact a licensed asbestos repair contractor and schedule the work to be completed ASAP, as was previously identified and authorized as per PS Form 8210 dated 12/10/2003. The Union will be notified as to when the scheduled repairs will be made. Management shall cease and desist from further violations of Article 14."

"ASAP" in this context meant "as soon as the contractor is available to do the work."

DRT arrived at its decision after an undisputed finding that not all the holes and none of the cracks in walls, which were identified as friable asbestos-containing materials, "have been properly repaired." It rejected Management's contention that neither the wall holes nor wall cracks represented a safety issue. A Management contention was based on air quality tests that were completed between August and December 2003 which indicated that there had been no asbestos hazard or risk to postal employees at any time. DRT found Management's contention to be inconsistent with findings in the "Discussion and Recommendations" as contained in the 1996 Asbestos Investigative Survey and Lead-Based Paint Inspection Report." Those recommendations found in part that:

Asbestos fibers are known to cause a number of diseases, including lung cancer, when inhaled or ingested. However, the mere presence of asbestos-containing materials in a building does not mean that an asbestos exposure risk exists. **The risk becomes significant only when the asbestos-containing material is or becomes friable and has exposed or damaged areas.** Friable asbestos materials can release asbestos fibers into ambient air. It is these fibers which pose a significant hazard to human health.

Therefore, according to DRT, the holes and cracks in the wall represent a potential "significant asbestos risk which must be abated without delay." The DRT also declined to issue a requested monetary award to the Union on "what was essentially an Article 15 violation," since "Management was responsive, and did indeed partially abate the hazard." Management was given another opportunity to complete the asbestos repair work.

The Union renews its request for a monetary remedy in the instant grievance alleging Management's failure to comply with the original Step B decision. Specifically, the Union argues

that Management failed to follow instructions in "getting the walls of the post office repaired" and compromised the health and safety of all employees at the Napa installation." According to the Union, the asbestos repairs could have been performed by the Service and rent abated for the asbestos repairs. The Service did not contact a licensed asbestos repair company nor did it abate the rent to schedule completion of the work ASAP. The Union maintains that Management failed to act as instructed and placed employees at risk by failing to abate the asbestos contained in the wall and cracks. The Service denies violating the Step B decision and maintains that it acted in good faith. Management worked diligently with the owner and contacted two licensed asbestos repair contractors in order to complete the work. What took a few months and caused a slight delay, according to the Service, was waiting for the owner to get referrals and for authorization to perform the work. The Union's contention that Management could have had the repairs done and abated the rent fails to consider the legal issues that could arise if the Service does not abide by its lease agreement with the owner.

The Service further argues that any delay in performance should be excused under the legal doctrine of "impracticability of Performance." A legal doctrine that excuses a party's contractual obligation to perform where the performance required would cause extreme hardship or would be unreasonably difficult to complete. The Service maintains that, due to the limited repair-maintenance budget of the local Napa Post Office, it had to rely on Facilities (which was not included in the Step B decision) to contact the owner and coordinate the work completion. Any delay was reasonable and caused no harm or injury to any postal employee.

A hearing was held on October 19, 2004, at the Napa Main Post Office, Napa, California.

The Union and class grievant were represented by Carly Hook, Local Business Agent/Advocate. Terry E. Bickleman, Pacific Area Labor Relations Specialist, represented the Service. The parties were afforded an opportunity for the examination and cross-examination of witnesses, introduction of evidence and for rebuttal. The parties stipulated that the dispute was properly before the Arbitrator. The hearing was closed after timely receiving the parties agreed upon post-hearing briefs.

II.

ISSUE PRESENTED

The issue stipulated by the parties and framed by the Step B Team for resolution is as follows:

Did Management violate Articles 14 and 15 of the National Agreement by failing to comply with a Step B decision concerning asbestos? If so, what is the appropriate remedy?

III.

RELEVANT CONTRACT PROVISIONS-REGULATIONS

ARTICLE 3 - MANAGEMENT RIGHTS

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

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

- B. To hire, promote, transfer, assign and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;
- C. To maintain the efficiency of the operation entrusted to it;
- D. To determine the methods, means, and personnel by which such operations are to be conducted;
- E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and
- F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

ARTICLE 14 - SAFETY AND HEALTH

Section 1. Responsibilities

It is the responsibility of management to provide safe working conditions in all present and future installations and to develop a safe working force. The Union will cooperate with and assist management to live up to this responsibility. The Employer will meet with the Union on a semiannual basis and inform the Union of its automated systems development programs. The Employer also agrees to give appropriate consideration to human factors in the design and development of automated systems. Human factors and ergonomics of new automated systems are a proper subject for discussion at the National Joint Labor-Management Safety Committee.

ARTICLE 15.3.A - GRIEVANCE PROCEDURE

The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated at the lowest possible step and recognize their obligation to achieve that end.

IV

POSITIONS OF THE PARTIES

A. Union's Position

Management failed to comply with a Step B decision and is in violation of Articles 14 and 15 of the National Agreement, including five Step B decisions previously rendered by the Dispute Resolution Team, and two Formal A Settlements. Management failed to abate the known asbestos in the men's rest room, the supervisor's office and the pillar between routes 6 and 7, as directed in the Step B decision issued on January 23, 2004. Management was directed to abate the known asbestos by "contacting a licensed asbestos repair contractor and schedule the work to be completed ASAP as was previously identified and authorized per PS Form 820 dated 12/10/2003." The Union was supposed to be notified by management when the scheduled repairs were to be made. Management never informed the Union of scheduled repairs or that the asbestos areas were abated and contained. In fact, the same asbestos problem remained unabated (men's rest room, supervisor's office, pillar between routes 6 and 7) resulting in the Union taking action by filing the instant grievance.

Management has the responsibility of providing a safe and healthy working environment for its employees. This responsibility is not the owner's, but management's. The Union continually reminded management of the ongoing asbestos exposures in the office. Both Management personnel and employees were exposed on a continuous basis to asbestos as they performed and carried out their duties around cracks in the plaster and broken floor tiles. Management has intentionally shown non-compliance of Step B decisions by allowing employees to work around friable asbestos.

B. Employer's Position

The Union has failed to meet its burden of proof in this case. There has been no showing of any violation of the Step B decision directing Management to contact a licensed asbestos repair contractor and schedule the work to be completed ASAP. Management complied with the DRT Team's agreement by going through Facilities, since the local post office has a limited budget authorization for repair work. It followed the chain of command for this type of repair by having Facilities contact the building owner. What took a few months was the owner getting referrals and authorizations. Unfortunately, the B Team did not include Facilities in the proper chain of command for leased building repair work. To the Service, establishing a working relationship with the new owner makes good business sense versus overruling his choice and taking the repair work out of the rent, since this will be an ongoing type of repair. Management acted in good faith to comply with the B Team's decision by immediately contacting Facilities who then contacted the owner, who indicated that the walls would be repaired by February 15, 2004, but was extended to February 22, 2004. Janus Corp. was also contacted by Facilities to repair the work, but did not receive a quote until two months later on March 23rd. Facilities also contacted contractor PSI to work with the owner, both of whom were scheduled to meet on February 27, 2004.

The Union has not established that hairline cracks in a 1960's building wall creates a serious health hazard. The Union has not demonstrated that Management has failed to provide a safe working condition at the Napa Post Office. Nor has the Union shown that a hazardous condition exists with air levels above the acceptable EPA levels. Various friable and non-friable

asbestos-containing materials exist throughout the building, "but these materials are in good condition and do not pose a threat of immediate fiber release in their present condition." The Union failed to prove that the building was unsafe or that employees filed a PS Form claiming an unhealthy or unsafe condition/concern existed. In the absence of any harm or injury to an employee, a monetary remedy as the Union requests would amount to unjust enrichment. The delay was unforeseeable and beyond Management's control and is excused under the legal doctrine of impracticability of performance. The Union's grievance should be denied.

V

DISCUSSION

The Arbitrator is called upon to determine whether local management violated the Step B Teams' directive of January 22, 2004 concerning asbestos. The Union argues that local management failed to comply with the directive and, in doing so, unnecessarily exposed and put at risk all postal employees including Management personnel at the Napa Post Office. According to the Union: (i) Management failed to contact an asbestos repair contractor so that repairs could be completed ASAP; (ii) failed to notify the Union (Steward Patrick Bjerke) of the dates of repair to abate the asbestos; (iii) failed to provide contractors with a map identifying asbestos repairs; and (iv) asbestos repair areas still remain unabated as noted on the February 2004 Asbestos Inspection Sheet.

The Service denies that it violated or failed to comply with the Step B directive and maintains that it acted in good faith in seeking asbestos contractors to complete the asbestos

repairs. According to the Service: (i) it acted in compliance by following the chain of command and notified District Facilities of the problem, since local management lacked budget funds for repairs; (ii) Facilities then acted reasonably in notifying the building owner of the asbestos problem; (iii) the building owner had the responsibility of hiring a contractor and completing the asbestos repairs; (iv) February 15, 2004 was the date initially scheduled for repair by the owner, but later rescheduled while awaiting bids from PSI and Janus Corp.; (v) neither the wall holes or cracks have been shown to represent a health risk or harm to employees; and (vi) the repair work was performed by Janus Corp at the Napa Post Office.

The Service also argues that any delay in completing the asbestos repair work was unforeseeable and attributable to Facilities not being included in the Step B's directive. Further, since it acted in good faith, its failure to fully comply with the Step B directive is excused under "impracticability of performance." In support of this position, the Service relies on Case No. FOIN-4F-C-04014748, a prior arbitral decision by this Arbitrator excusing Management's performance under a pre-arb Settlement Agreement to replace a light standard bulb in a employee parking lot. There, impracticability of performance arose when neither party anticipated the extreme difficulty and cost in replacing a light bulb that was located off site of, and not part of the leased premises, on the separate property of Pacific Railroad, and had no electrical power source. The Service argues that similarity exists between the two cases and seeks to apply the doctrine in this case to excuse its performance and limit any subsequent monetary award. As will be discussed later, the Arbitrator is not persuaded by this argument.

In analyzing whether a violation occurred and if the Service performance is excused, it

is helpful to review exactly what was decided and the issue resolved by the Step B Team. The issue presented was: Did management violate Articles 14 and 15, by failing to maintain damaged walls that are friable ACBM and thereby potentially exposing employees to asbestos contamination? The Step B Team found that it did; and "Despite a PS Form 8210 which lists the *"Type of Work to Be Performed - Repair holes/cracks in walls"*; all the holes and cracks at Napa Post Office were not repaired and are still present." Management was found to be in violation of Article 14. As remedy, the Step B Team directed Management to "contact a licensed asbestos repair contractor and schedule the work to be completed ASAP. The Union was to be notified as to when the scheduled repairs would be made, and Management was directed to "cease and desist" from further violations of Article 14. The Union maintains that the Step B Team's directive was clear and local management intentionally failed to comply with it.

After a careful review and consideration of the evidence presented and arguments of the parties, the Arbitrator agrees with the Union and finds that local management did violate Articles 14 and 15 of the Agreement by failing to comply with a Step B decision concerning asbestos. Management did not contact a licensed asbestos contractor as directed, or schedule work to be completed "ASAP." The Service's attempt to shift blame for delays in contacting a licensed asbestos contractor and schedule repairs to Facilities is misplaced and represents a fundamental misinterpretation of its obligation to comply fully with Step B decisions. Local management is not relieved nor absolved of its obligation to comply with Step B directives simply because it passes the information up the District's "Chain of Command." To hold otherwise, would severely undermine the Step B Team's authority and its full force and effect to resolve issues, and render

compliance illusory. Even here, when the Step B compliance directive was "passed up the Chain of Command" to District Facilities, it was not accompanied with a sense of urgency that the asbestos repair work should be completed "ASAP." Facility Specialist Viray testified that he was not aware nor informed by local management that the asbestos repair work was required to be completed ASAP, as directed by the Step B Team. In fact, he stated that he was never shown a copy of the directive, nor did Facilities ever supervise or inspect the asbestos work that was eventually preformed. Facilities relied solely upon the owner to complete the work without further follow-through on its part.

The evidence also demonstrates local management's failure to fully notify the Union (as directed by the Step B Team) when the scheduled repairs were to be performed. Notification would have been helpful since Shop Steward Bjerke, who is directly responsible for filing a majority of the asbestos safety grievances at Napa Post Office, could have pointed out the asbestos-exposed areas needing repair to the contractor. Although the Service argues that neither the wall holes nor wall cracks represent a safety issue and air monitoring quality tests done in December 2003 were below the PEI, these arguments were previously considered and dismissed as having no merit. The Step B Team rejected similar arguments as being inconsistent with the "Discussion and Recommendations" set forth in the 1996 Asbestos Investigative Survey and Lead-Based Paint Inspection Report. That report clearly states what is now medically recognized as a scientific fact: *"Asbestos fibers are known to cause a number of diseases, including lung cancer, when inhaled or ingested."* The report further states that, although the mere presence of asbestos-containing materials in a building does not mean that an asbestos exposure risk exists, "the risk

does become significant when the asbestos-containing material is or becomes friable and has exposed or damaged areas." The Step B Team decided that "the holes and cracks in the wall [at Napa Post Office] represent a significant risk"; and directed that the "asbestos risk be abated without delay." The directive was clear and unambiguous, requiring immediate action.

The Service failed to comply with the Step B directive and unreasonably delayed in abating a known asbestos risk at the Napa Post Office. In doing so, management exercised poor judgment and was ill advised in delaying repairs merely to accommodate the building owner for approximately 2½ months, while placing the health and safety of its postal employees at risk. Management should have acted ASAP as instructed in carrying out the Step B directive in abating the asbestos risk. This could have been done by Facilities taking the lead on the project and actively participating in contracting with a licensed asbestos repair contractor to abate the asbestos risk; with cost and liability left for later resolution. The risk would have been abated ASAP in compliance with the Step B Team's directive. Article 14 is clear in its intent. It is Management's responsibility (not the owner's) to ensure and provide safe working conditions, including a work place environment free of hazardous materials for its employees in all present and future postal facilities. As such, the Service cannot rely on "impracticability of performance" to either mitigate or excuse its failure to perform. Compliance by the Service was neither extreme or unreasonably difficult to perform given the potential and identifiable risk of asbestos exposure to the health and safety of postal employees.

REMEDY

The Union has requested a monetary award for Management's failure to comply with the Step B Team's directive and for the potential risk of harm and injury presented to 107 carriers at the Napa Post Office. In support of its request, the Union argues that this must be viewed as a continuing violation of Articles 14 and 15 by local management, and cease and desist orders have proven ineffective in the past in bringing about compliance or stopping continuing violations. It further argues that, although previously requested, it has not been awarded a monetary remedy before for this violation.

The Service objects to any monetary remedy being awarded the Union as being inappropriate "in the absence of a clear demonstration of harm or injury to any postal employee." According to the Service, there was no carrier identified who was injured because of the delay in the asbestos repair work.

While the Union has clearly demonstrated that earlier settlements and formal decisions at the Napa Post Office have failed to bring about compliance and have been ineffective in correcting Management's behavior and adherence to Articles 14 and 15 of the National Agreement, it had not clearly demonstrated either specific harm or injury to any carrier warranting a monetary compensation. This in no small part can be directly attributed to the efforts of Steward Bjerke in monitoring the safety conditions at Napa Post Office and filing appropriate grievances to ensure compliance. It can also be attributed to the efforts of Branch 627 in pursuing this grievance to compel Management's compliance.

Therefore, the Arbitrator finds that a monetary remedy is appropriate for the Union which

was adversely affected by local management's failure to comply with the Step B Team's directive, and as reimbursement compensation incurred to arbitrate compliance by Management. As such, the Service must compensate Branch 627 for all of its direct costs and outlays of money involved in the preparation for and arbitration of this case, including time spent in preparing the Union's post-hearing brief submitted in support of its case. The Union shall provide an itemized account of these costs and expenses to the Service advocate within 30 days of this Award. The Service shall have 15 days to object to the Union's itemization; if the parties are unable to agree upon the proper amount. Thereafter, the Arbitrator will undertake to determine the appropriate amount as remedy for the Service violation of the Step B directive. The Arbitrator shall retain jurisdiction over this matter until a monetary remedy is either agreed upon by the parties or formally determined. Accordingly, for the reasons stated above, the Union's grievance is sustained in part and denied in part.

AWARD

The Napa Post Office did violate Articles 14 and 15 of the Agreement by failing to timely comply with a Step B decision to perform asbestos repair work. The appropriate remedy is a monetary award to Branch 627 as reimbursement for its direct cost in maintaining this arbitration. The Napa Post Office shall cease and desist from future violations of Step B decisions. The Union's grievance is sustained.

Dated: January 19, 2005

Respectfully submitted,



CLAUDE DAWSON AMES, Arbitrator