

**NATIONAL ARBITRATION**

**BEFORE IMPARTIAL ARBITRATOR STEPHEN B. GOLDBERG**

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**In the Matter of Arbitration Between** )

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**UNITED STATES POSTAL SERVICE** )

) **Case No. Q11C-4Q-C 12252383**  
) **Contracting Out – Roof**  
) **Maintenance and Repair**

**and** )

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)

**AMERICAN POSTAL WORKERS** )  
**UNION, AFL-CIO** )

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BEFORE: Stephen B. Goldberg, Arbitrator

APPEARANCES:

United States Postal Service: Kevin B. Rachel, Labor Counsel; Terry C. LeFevre, Labor Relations Specialist

American Postal Workers Union, AFL-CIO: Darryl J. Anderson, Attorney (O'Donnell, Schwartz & Anderson, PC)

Place of Hearing: American Postal Workers Union, 1300 L Street, NW, Washington, D.C.

Hearing Dates: May 8-9, July 25, 2018

Date of Award: January 4, 2019

Relevant Contract Provisions: Article 32.1. A, Article 32.1.B, Memorandum of Understanding Regarding Contracting or Insourcing of Contracted Service, Administrative Support Manual, Section 535.12

Contract Year: 2010-2015

Type of Grievance: Contract Interpretation

## SUMMARY OF AWARD

The Postal Service contracting out of roof maintenance and repair did not violate Article 32.1.A, Article 32.1.B, the Memorandum of Understanding Regarding Contracting or Insourcing of Contracted Service, or Section 535.112 of the Administrative Support Manual.



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Stephen B. Goldberg, Arbitrator

January 4, 2019

## **I. SUMMARY OF RELEVANT EVIDENCE**

### **A. Number and Types of Postal Roofs**

The Postal Service owns over 8,000 buildings. Some of these buildings have “sloped” roofs; others have “low-sloped” roofs. Postal employees have never been permitted to work on “sloped” roofs.

The low-sloped roofs on postal buildings come in an array of sizes and types, and may be made out of any of several materials. These materials include rubber (acronym EPDM), different kinds of plastic (acronyms include TPO, PVC, KEE, etc.), and asphalt (modified bitumen “built-up” roofs). The value of postal roofs is estimated to be between 2.5 and 3 billion dollars.

### **B. How Postal Roofs Were Traditionally Maintained**

Prior to the contracting out that is the subject of this arbitration, preventive maintenance (PM) on low-sloped roofs was performed by postal employees, most often Building Equipment Mechanics (BEMs), assisted at times by Maintenance Mechanics (MMs). According to the MS-1 Handbook, Operation and Maintenance of Real Property, and Guide Number P-20: Roof, Built-up, contained in MMO-074-00, PM work included semi-annual roof inspections for damage or penetrations, clearing of debris, and “correction of minor defects that can be repaired in fifteen minutes or less (per defect) with small tools and cold process material”. The P-20 Guide provided for staffing time based on the size of the roof, the length of outside and inside walls and gutters, and other factors. BEMs also performed some corrective maintenance work on roofs, consisting of minor repairs that required more than 15 minutes to complete.

In 2011, the Postal Service contracted out all preventive maintenance and repair on low-sloped roofs, as well as larger roofing jobs, including roof

replacement. It is only the contracting out of maintenance and repair on low-sloped roofs that is challenged by the Union in this case.

Not all postal facilities are covered by the MS-1 Handbook and MMO-074-00. At some facilities, generally associate offices, the PM work on postal roofs was performed by Area Maintenance Technicians (AMTs) or Area Maintenance Specialists (AMSs). Staffing credit for this work was based on historical usage, as provided in the MS-45 Handbook. Some PM work, especially at smaller associate offices, was contracted out.

BEMs, as well as AMTs, have a variety of maintenance responsibilities. As provided in the BEM position description, BEMs are responsible for maintaining and operating large air-conditioning and heating systems. They are required to have a thorough knowledge of mechanical, electrical, electronic, pneumatic, as well as the hydraulic controls and operating systems of various types of equipment. They are also required to have knowledge of electricity principles, refrigeration, heating, ventilation, air-conditioning and lubrication procedures, as well as knowledge of one or more skilled trades, such as metalwork, carpentry, masonry, plumbing, painting or welding. There is no direct reference to roofing work in either the BEM position description or the BEM qualification standards. The same is true of the position descriptions and qualification standards of the Maintenance Mechanics, AMTs and AMSs.

Many BEMs attended a week-long course in Norman, Oklahoma, at which they received training in roofing work. Three of those BEMs testified in this proceeding: Victor Foster (Colorado Springs, CO); James Correll (Boise, Idaho); and John Sokolosky (Fox Valley, ILL). According to their testimony, they each received a large training manual at Norman, as well as a checklist to be used during preventive maintenance inspections, in order to be sure that roof inspections were done systematically. Mr. Foster testified that they were taught that preventive maintenance inspections must include examination of the entire roof membrane in a systematic manner to make sure that any punctures or other defect were identified, and all debris was removed. Whenever there is a penetration through the roof, for things such as hatches, vents, air-conditioning units, or other equipment,

the flashings around such penetrations have to be checked to make sure they are properly sealed.<sup>1</sup>

The employees trained at Norman continue to use the checklist they were there given in performing PM inspections. According to Mr. Correll, doing so was accentuated by the instructors in Norman. “That’s what the instructors hounded you on for your daily inspections or your quarterly inspections.” The classroom training in Norman was supplemented by hands-on roof training, where the trainees had an opportunity to practice what they were being taught. Among the techniques on which they were trained was the use of thermal infrared imaging to locate roof leaks. Both Mr. Foster and Mr. Correll subsequently utilized thermal infrared imaging at work.

At the time of the contracting out, there were five BEMs working in Colorado Springs who had completed the Norman training. All five BEMs in Boise had completed such training, as had three of four BEMs in Fox Valley.

Union witness Steve Vaughn, who is an AMT based in Indianapolis, had not attended training in Norman, but had received on-the-job training on roof PM and repair by virtue of working with senior AMTs. Mr. Vaughn, along with other AMTs based in Indianapolis, (five of ten of whom had been trained in Norman), have continued, subsequent to the Roth contract, to provide building maintenance services including PM, on nearly 200 small Postal Service facilities in Southern Indiana.<sup>2</sup>

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<sup>1</sup> Mr. Foster also described the minor repairs taking less than 15 minutes that BEMs did during a preventive maintenance inspection:

Repairs are not as complicated as people make out. . . [F]or small holes I can just take basically roofing cement and mesh. Come over with one coat with a [trowel], later bashed down into it, make sure it’s embedded. Come over again with the coat and smooth it out and seal it. For the small holes, that would be enough to seal that roof. For laps or seams that’s coming through I may have to take a role of bitumen, heat the roof, heat the roll, and I can slide it over the roof, roll it in with the modified bitumen I have that day, it would seal the seam.

<sup>2</sup> The checklist used by Indianapolis AMTs in performing PM work is the same as that distributed during the Norman training

C. Events Leading to Contracting Out of Preventive Maintenance and Repair on Postal Service Roofs

Beginning in 2008, the Postal Service became concerned about the increasing frequency with which roofs needed to be replaced, more frequently than the norm for similar roofs on non-Postal Service buildings. The costs of roof related projects, according to the Postal Service, had also been increasing rapidly, from slightly under \$5M in 2007 to approximately \$19M in 2010.

Anthony Zircher testified as the Postal Service subject matter expert on roofing matters. Mr. Zircher began his employment with the Postal Service in 2004 as an architect/engineer, managing repair and alteration projects, including roofs. He was later given executive responsibilities for all repair and alterations projects in the Eastern United States. Mr. Zircher left the Postal Service in 2015, and is now employed by Technical Assurance, an architecture/engineering company that does roofing and wall asset management.

In 2009, when the Postal Service became concerned that Postal Service roofs were failing prematurely, Mr. Zircher was placed in charge of investigating the cause of such premature failure. As part of this investigation, Mr. Zircher testified that he contracted with Bluefin, a roofing consultant. Bluefin studied 100 Postal Service roofs, and concluded that prematurely failing roofs were caused by inadequate roof maintenance.<sup>3</sup>

According to Mr. Zircher, he decided that the cost of prematurely failing roofs should be compared with the costs of establishing a more aggressive program of maintenance and repair of postal roofs. This, according to Mr. Zircher, led to Postal Service consideration of establishing an overall roof asset management program that would include a preventive maintenance program with a higher level of technical skill than that possessed by Postal Service Maintenance Craft employees.

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<sup>3</sup> The Bluefin report was not introduced into evidence.

#### D. The Roth Brothers Contract

On August 11, 2011, the Postal Service contracted with Roth Brothers (Roth), an asset management firm. Pursuant to the contract, Roth would be responsible for a wide range of roof-related work, including an initial inventory and assessment of postal roofs; ongoing PM; development of a web-based management system that would include tracking of warranty data; a 24-hour emergency call line; oversight and administration of repair work orders; and design services for roof restoration or replacement.

Pursuant to the contract, Roth would perform the PM work and minor repairs. Roth maintained a network of roofing contractors whose technicians were certified and authorized by roof manufacturers to repair roofs whether a warranty applied or not. Requests for emergency repairs on Postal Service roofs were to be directed by Roth to one of these contractors, who would send a certified technician to make the repair. If the repair was covered by the warranty, the repair bill would be sent to the manufacturer who had issued the warranty; if not the bill would be sent to the Postal Service. According to Mr. Zircher, this process improved on the pre-Roth situation in which, if the Postal Service contacted the manufacturer to provide a repair, and the technician sent by the manufacturer concluded that the repair was not covered by the warranty, the Postal Service would nonetheless have to pay the manufacturer for sending a technician to examine the leak, and then pay somebody else to repair it. Inasmuch as Roth would ensure that only certified technicians were assigned to deal with emergency roof repair, the Postal Service would at most be responsible for the services of one technician, not two.

#### E. The Postal Service Memorandum of Due Consideration

The Postal Service Memorandum of Due Consideration (sometimes referred to herein as the MDC), dated June 9, 2011, is attached to this Decision as an Appendix. The MDC discusses each of the five Article 32.1.A factors - public interest, cost, efficiency, availability of equipment, and qualification of employees – as they bear on the Postal Service decision to contract out roof maintenance and



repair.<sup>4</sup> The Memorandum also contains, as Exhibit 1, a document entitled “Additional OSHA Considerations”.

The Memorandum of Due Consideration concludes as follows:

The use of professional roof asset management consultant services and roofing contractors is necessary in order to ensure that USPS roof assets are maintained properly to achieve the procured service life and compliance with Federal, State, and Local codes, including OSHA. Additionally, USPS fall protection guidelines state that managers must eliminate, or reduce to the extent feasible, all tasks performed by employees within 6 feet of unguarded roof edges that are greater than 4 or more feet above the next lower level.

It is in the best interest of the Postal Service and the public to outsource roof asset management, roof repair and roof replacement work to ensure the integrity and longevity of our critical roof assets. Subcontracting these activities at postal facilities ensures timely completion of critical preventive maintenance work, repair work and replacement work that would be performed by suppliers at standard rates with the available resources that can be matched to the aggressive USPS schedule.

## **II. RELEVANT PROVISIONS OF THE 2010 AGREEMENT AND THE ADMINISTRATIVE SUPPORT MANUAL**

### **2010 AGREEMENT**

#### **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.

B. The Employer will give advance notification to the Union at the national level when subcontracting which will have a significant impact on bargaining unit work is being considered ... No final decision on whether or not such work will be

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<sup>4</sup> Mr. Zircher was the principal author of the MDC.

contracted out will be made until the matter is discussed with the Union

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### **MOU Re: Contracting or Insourcing of Contracted Service**

It is understood that if the service can be performed at a cost equal to or less than that of contract service, when a fair comparison is made of all reasonable costs, the work will be performed in-house.

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### **ADMINISTRATIVE SUPPORT MANUAL**

#### **535.112 Facility and Plant Equipment**

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

### **III. ISSUES**

1. Did the Postal Service violate Article 32.1.A by contracting out roof maintenance and repair?
2. Did the Postal Service violate Article 32.1.B by contracting out roof maintenance and repair without first notifying the Union because the contracting had a significant impact on the bargaining unit?
3. Did the Postal Service violate the Memorandum regarding Contracting or Insourcing of Contracted Service by contracting out roof maintenance and repair?
4. Did the Postal Service violate Section 535.112 of the Administrative Support Manual by contracting out roof maintenance and repair?

#### **IV. DID THE POSTAL SERVICE VIOLATE ARTICLE 32.1.A BY CONTRACTING OUT ROOF MAINTENANCE AND REPAIR?**

##### **A. Requirements of Article 32.1.A**

As I and other National Arbitrators have pointed out, the present Article 32.1.A originated as a 1973 Union proposal to ban all Postal Service contracting out of bargaining unit work. That proposal was not accepted by the Postal Service. In its place, the parties agreed that in deciding whether to contract out, the Postal Service would be required to give due consideration to five factors: public interest, cost, efficiency, availability of equipment, and qualification of employees.<sup>5</sup>

The Postal Service rejection of a substantive limitation on its freedom to contract out, and the Union's agreement that the Postal Service need only give "due consideration" to the five factors before contracting out, make plain that the Article 32.1.A limitation on Postal Service freedom to contract out is procedural, not substantive. Stated otherwise, the question before the arbitrator in an Article 32.1.A case is not whether a Postal Service decision to contract out was "right", "wise", or "correct", but solely whether it was preceded by due consideration of the five factors.

Arbitrator Richard Mittenthal, in two landmark decisions in 1981<sup>6</sup>, explained the meaning of "due consideration" as follows:

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

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<sup>5</sup> Case No. Q10V-4Q-C 12324573 (Goldberg 2013)); Case Nos. H4V-NA-C 84, 85, 86, 87; H7C-NA-C 1, 3, 5 (Snow 1992)

<sup>6</sup> Case No. A8-NA-048 (pp. 6-7); Case No. A8-NA-0510. The quoted language can be found in both decisions. Arbitrator Mittenthal's interpretation of the meaning of "due consideration" has consistently been followed by other National Arbitrators, most recently by Arbitrator Das in Case No. Q00C-4Q-C 04003182 (2017)

in terms of the contractual factors. Anything less would fall short of ‘due consideration.’

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

Finally, National Arbitrators, since Howard Gamser in 1977<sup>7</sup>, have consistently held that the burden of proof is on the Union to show that the Postal Service has failed to give due consideration to one or more of the five factors prior to deciding to contract out. As Arbitrator Snow pointed out in 1992<sup>8</sup>:

Placing the burden squarely on the Union to determine how the contracting out decision ignored the factors required by Article 32.1, Arbitrator Gamser denied the Union’s claim.

Arbitrator Snow went on to state in a subsequent case that:

Generally, the Union must show that the decision to subcontract work was made without regard to one or more of the factors set forth in the parties’ agreement, and thus was arbitrary and capricious...[T]he burden was clearly on the Union to show that he Employer failed to give due consideration to the required contractual factors.<sup>9</sup>

Finally, Arbitrator Das stated in 2017 that in order to prevail on an Article 32.1.A grievance, “. . . the Union is required to show that the Postal Service failed to make a good faith effort to evaluate the need for contracting out in terms of the factors in Article 32.1.A before it finalized its decision to contract out.”<sup>10</sup>

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<sup>7</sup> Case No. AB-NAT-6291

<sup>8</sup> Case Nos. H4V-NA-C 84, 85, 86, 87; H7C-NA-C 1, 3, 5, page 21

<sup>9</sup> Case Nos. H7C-NA-C 96 and HOC-NA-C 6) (Snow, 1993), pages 34-35.

<sup>10</sup> Case No. Q00C-4Q-C 04003182 (2017) (pages 27-28). The Union cites and relies upon the Decisions of Regional Arbitrators who have held that the burden of proving whether due consideration was given to the five factors rests upon the Postal Service, not the Union. None of those decisions cited or discussed the Decisions of National Arbitrators Gamser, Snow, and Das, and there is nothing in their reasoning that would persuade me that those National Arbitration Decisions are in need of reconsideration. The Union also relied on language in Arbitrator Das’ 2002 Decision in Case No. HOC-NA-C 19007 to the effect that when management seeks to change long-standing practices that provide advantages to workers, it must show those changes to be “fair, equitable, and reasonable”.

B. Has the Union Satisfied Its Burden of Proving That the Postal Service Failed to Give Due Consideration to One or More of the Article 32.1.A Factors Prior to Deciding to Contract Out Roof Maintenance and Repair?

1. Cost

The Union's central argument is that the Postal Service Memorandum of Due Consideration failed to give due consideration to the cost of contracting out roof repair and maintenance work, compared with the cost of continuing to have that work performed by Postal Service maintenance employees. Indeed, the Union asserts, there is no mention of comparative labor costs in that portion of the MDC dealing with costs.

The Union is correct in pointing out that the MDC does not deal with comparative labor costs. Article 32.1.A, however, in directing the Postal Service to give due consideration to costs, does not limit costs to labor costs. To be sure, comparative labor costs are often a key factor in the Postal Service's consideration of contracting out. That is not, however, always the case (see Das, 2017, cited in note 10), and the Postal Service is contractually free, in evaluating the cost considerations that go into a contracting out decision, to consider all relevant cost factors.

A comparison of the costs of contracting out compared to the costs of keeping the disputed work in-house was at the heart of the MDC. The most important cost considerations, from the Postal Service perspective, related to its needs to (1) extend the useful lives of postal roofs; (2) reduce the costs of emergency leak repairs; and (3) enforce its roof warranty protections. Each of these cost-related factors, the Postal Service concluded, would be better served by contracting out roof related work than by continuing to have that work performed in-house.

The Postal Service reached this conclusion on the grounds that (a) Employing contractor technicians, who would be certified by roof manufacturing companies to perform maintenance and repair on roofs manufactured by them, would eliminate

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Arbitrator Das, however, was addressing an Article 19 challenge to management action, not an Article 32 challenge. The criteria for decision are quite different under Article 19 than under Article 32, which, contrary to Article 19, does not require that the management action be "fair, equitable, and reasonable".

the risk that having such work performed by non-certified Postal Service employees would lead manufacturers to void their Postal Service warranties; (b) Technicians employed by roof contractors, who perform roofing work on a daily basis, would be better trained and qualified to perform such work. As a result, it would be more efficient and cost-effective for the Postal Service to use contractor employees to perform repair and maintenance work, rather than Postal Service Maintenance Craft employees, who received a maximum of one week of training on roof work, and who performed PM only twice per year; and (c) Roofing contractors are familiar with federal, state, and local safety codes applicable to roofing work, as well as OSHA requirements, and will be required by the Postal Service to comply with all, as well as to provide employees with roof safety training, thus providing greater safety to employees, as well as greater protection to the Postal Service against costly litigation and OSHA citations.

The Union response to the Postal Service justifications for concluding that it would be less costly to contract out roof work than to perform that work with Postal Service employees was succinct. According to the Union, the Postal Service was “wrong about roof warranties, wrong about qualifications of employees, wrong about availability of equipment, and wrong about OSHA requirements” (Brief, p. 26).<sup>11</sup>

As numerous arbitration decisions, beginning with those of Arbitrator Mittenthal in 1981 (see note 6), have made plain, the issue in an Article 32.1.A case is not whether the Postal Service was right or wrong in deciding to contract out, but solely whether in making that decision, it examined each factor in good faith, and that its conclusion as to each, whether “right” or “wrong”, was not so clearly erroneous as to warrant a finding that its examination was a mere sham, and its conclusion so wrong as to be fairly characterized as arbitrary and capricious. It is in light of those criteria that I examine the Union’s assertion that the Postal Service’s decision to contract out roof maintenance and repair was unsupported by due consideration of the five factors. I begin, as does the Union, with the question of

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<sup>11</sup> Some of the factors which led the Postal Service to conclude that contracting out of roof maintenance and repair would be less costly than retaining such work in-house are also factors which must receive Article 32.1.A due consideration independent of their effect on costs.

whether the Postal Service gave due consideration to the costs of retaining roof maintenance and repair work in- house, compared to contracting out that work.

a. Roof warranties

Among the factors relied upon in the Postal Service conclusion that the costs of contracting out would be less than the costs of retaining roof maintenance and repair in-house was the effect of contracting out on Postal Service roof warranties. The Postal Service pointed out that new roofs typically come with warranties, and nearly 4,000 postal roofs are covered by such warranties. Mr. Zircher, the Postal Service expert on roofing, testified that he had a comprehensive understanding of roof warranties based upon his collecting information and attending online courses offered by such professional organizations as the Roof Consultants Institute, National Roofing Contractors Association, International Facility Management Association, and Factory Mutual. He also attended seminars offered by roof manufacturers Firestone and Tremco, met with the federal market managers of Johns Manville and Sika Saranfil, and reviewed the warranties of other major roofing manufacturers, including Carlisle, Duro-Last, Soprema, and Garland.

Based on what he had learned, Mr. Zircher testified that there were some common exclusions from warranty coverage. He testified:

R]epairs need to be made by contractors that are licensed with that particular roofing manufacturer. It has to be an approved applicator making the repairs.

And, again, that's very understandable from the manufacturer's perspective. They can't have someone that doesn't know how to properly repair the system making repairs and then they're found liable for the defective thing in the future.

[Another] . . . category [of exclusion] is what's called a failure to use reasonable care as described by their care and maintenance manual. So each manufacturer has kind of a supplement document, the care and maintenance manual, that accompanies the warranty, and it tells you what's expected as far as what you have to do to keep that warranty in place.

Mr. Zircher pointed out the existence of such exclusions in the warranties of three major manufacturers who have roof warranties with the Postal Service –

Firestone, Duro-Last, and Johns-Manville. The Firestone Red Shield Roofing System Limited Warranty provides:

Firestone shall have no liability under this Limited Warranty, or any other liability, now or in the future, if a leak or damage is caused by. (d) Failure by the Owner to use reasonable care in maintaining the System, such maintenance to include, but not be limited to, those items listed on the reverse side of this Limited Warranty entitled “Building Envelope Care and Maintenance Guide”.

The Building Envelope Care and Maintenance Guide provides:

3. . . . If the Firestone Roofing System is in contact with any [contaminants] these contaminants should be removed immediately and any damaged areas should be inspected by a Firestone Licensed Applicator and repaired if necessary.

4. . . . In any areas where periodic roof traffic may be required to service rooftop equipment or to facilitate inspection of the roof, protective walkways should be installed by a Firestone Licensed Applicator as needed to protect the roof surface from damage. . . .

7. Any alterations to the roof, including but not limited to roof curbs, pipe penetrations, roof-mounted accessories, and tie-ins to building additions must be performed by a licensed Firestone Licensed Applicator and reported to Firestone.

The Duro-Last 20-Year High Wind warranty and accompanying material contains similar requirements for maintaining and repairing warranted roofs:

## II. OWNER’S RESPONSIBILITIES

The Owner is not entitled to recover under this Limited Warranty unless Owner exercises reasonable and diligent care in the maintenance of the Duro-Last System,

What’s Typically Not Covered?

Items typically not covered by warranty:

- Improper repairs and/or materials by unauthorized contractors.

Providing Quality Care for Your Roof



All inspections and maintenance must be performed by a Duro-Last authorized dealer/contractor or a Duro-Last Quality Assurance Technical Representative.

The Johns Manville Peak Advantage Guarantee provides:

### **LIMITATIONS AND EXCLUSIONS**

This Guarantee is not a maintenance agreement or an insurance policy; therefore, routine inspections and maintenance are the Building Owner's sole responsibility (see reverse side of this document). Failure to follow the Maintenance Program on the reverse side of the document will void the Guarantee in its entirety.

The Maintenance Program on the reverse side states:

In order to ensure that your new roof will continue to perform its function and to continue JM's obligations under the Guarantee, you must examine and maintain these items on a regular basis.

When checking the Roofing System:

- ... Any damaged, loose, or poorly sealed materials must be repaired by a JM Approved Roofing Contractor only.
- Examine the areas that abut the Roofing System.... Have these items repaired by a JM Approved Roofing Contractor if found to be defective.
- Materials that have been lifted by the wind need to be corrected by a JM Approved Roofing Contractor. . .

The JM Preventative Maintenance Guidelines, which are part of the same document, provide:

Only allow approved JM Peak Advantage® Contractors to maintain or perform repairs on a guaranteed roofing system.

Mr. Zircher testified that if the Postal Service chose to use workers not certified or licensed by the manufacturer to perform maintenance or repair work on the roof, the Postal Service would not be following the warranty's terms and conditions, thus placing the warranty in jeopardy.

The Postal Service brief, relying on the terms of the warranties, as well as the testimony of Mr. Zircher, concluded (page 33):

It would seem almost axiomatic that in order to protect a warranty, the terms, conditions, and expectations associated with the warranty should not be violated. Otherwise, the warranty, if not voided, is at least in jeopardy of not being honored.

According to the Union, the Postal Service assertion that a warranty might be voided if preventive maintenance or repairs were performed by uncertified Postal Service personnel is not supported by the language of the warranty documents.

The Union is on sound ground in arguing that the warranties, with the exception of the Johns-Manville Peak Advantage Guarantee, do not contain explicit language stating that any work on a warranted roof not performed by employees certified by the roofing manufacturer will void the warranty in its entirety.<sup>12</sup> An examination of the other warranty agreements, however, shows language in each on which a manufacturer might rely in declining to honor a warranty claim on a roof which had been maintained or repaired by technicians not certified by the manufacturer.

For example, the Firestone Warranty provides:

Firestone shall have no liability under this Limited Warranty, or any other liability, now or in the future, if a leak or damage is caused by .... (d) Failure by the Owner to use reasonable care in maintaining the System, such maintenance to include, but not be limited to, those items listed on the reverse side of tis Limited Warranty entitled “Building Envelope Care and Maintenance Guide”.

The Building Envelope Care and Maintenance Guide, in turn, provides that certain repairs “should” or “must” be provided by a Firestone Licensed Applicator. The Union asserts that the warranty does not, however, provide that it will be voided if the repairs are not provided by a Firestone Licensed Applicator, suggesting that Firestone would have no authority to void the Warranty. The Owner’s failure to use Firestone licensed applicators could, however, be construed as a “failure by the

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<sup>12</sup> The Johns-Manville Peak Advantage Guarantee provides that “Failure to follow the Maintenance Program on the reverse side of the document will void the Guarantee in its entirety.” (Emphasis supplied.)

Owner to use reasonable care in maintaining the [Firestone]System”, thus providing Firestone with grounds to assert that it is relieved of liability under the Warranty, the practical effect of which would be no different from voiding the Warranty. Even if the liability were not denied totally in some situations, but only for the damage caused by a repair performed by a Postal Service employee, the risk of total denial of warranty coverage would exist and is a risk which the Postal Service has a legitimate interest in avoiding. See Case No. Q00T-4Q-C 06175320 (2017) (Goldberg)(pages 20-21).<sup>13</sup>

The Union next argues, relying primarily on the testimony of its roofing industry expert, Bruce Kanter<sup>14</sup>, that even if the manufacturers’ warranties could be interpreted to be subject to invalidation in the event that roof maintenance or repairs were performed by Postal Service employees, industry practice is not to void a warranty under these circumstances. According to Mr. Kanter, it is common for building owners and their maintenance staffs to make repairs on roofs under warranty, but that in his 40 years in the roofing industry, he had never heard of a manufacturer refusing to honor a warranty because there has been a repair done on one of that manufacturer’s roofs by somebody who was not licensed or certified by that manufacturer.

The testimony of one witness, however, even one who has spent many years in the roofing industry, wholly unsupported by any corroborating evidence, such as documents from or testimony by a roof manufacturer or other roofing contractors, is insufficient to prove that roof manufacturers never enforce what is at least arguably their contractual right to deny warranty protection when the owner has failed to comply with the terms of the warranty. And, in the absence of such corroborating evidence, I cannot find that the Postal Service could not in good faith fear that its

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<sup>13</sup> The Duro-Last warranty, which denies coverage if the “Owner[fails to] exercise reasonable and diligent care in the maintenance of the Duro-Last System” and which provides that “All inspections and maintenance must be performed by a Duro-Last authorized dealer/contractor or a Duro-Last Quality Assurance Technical Representative” is equally subject to the risk that the manufacturer would deny coverage if the Postal Service were to use Postal Service employees to maintain or repair roofs manufactured by Duro-Last on the grounds that the Postal Service failed to exercise “reasonable and diligent care in not using a Duro-Last approved technician.

<sup>14</sup> Mr. Kanter had worked in or directed his family’s roofing business for many years before becoming a roofing industry consultant in 1991.

use of uncertified personnel to perform roof maintenance and repair might lead one or more roof manufacturers to refuse to honor their warranties.<sup>15</sup>

The Union's next argument regarding warranties is that most roof damage is not covered by warranties. Hence, the Union asserts, the Postal Service could not reasonably rely on a potential loss of warranty protection as a justification for refusing to keep roof repair maintenance in-house, rather than contracting it out. This argument, too, is based primarily on the testimony of Mr. Kanter.

According to Mr. Kanter, the most common cause of leaks in membrane roofs are (1) wear due to workers who are on the roof to service equipment such as HVAC units, and drop tools, leading to membrane punctures; and (2) cuts and punctures resulting from the impact of airborne debris striking the roof. Membrane damage resulting from either of these causes, Mr. Kanter testified, is not covered by roof warranties. Additionally, it is rare for modern roof membranes to be defective in a manner that would trigger warranty protection. Finally, many manufacturers use contractors to install roofs, and require the contractor, rather than the manufacturer, to provide a two-year guarantee against roof damage resulting from faulty installation. In sum, according to Mr. Kanter, the value of roof warranties is not substantial, and the risk of losing such warranties if repair and maintenance work is done by Postal employees is not a sufficient justification for contracting out that work.

The essence of this argument is not that the Postal Service failed to weigh the costs associated with contracting out compared to the costs associated with retaining the disputed work in-house, but that the Postal Service did so incorrectly, assigning a greater cost to the risk of losing warranties than was appropriate. This argument – that the Postal Service judgment as to costs was “wrong” - is not, however, relevant in an Article 32.1.A case. The Postal Service relied on Mr. Zircher, its long-time expert on roofing matters, and its doing so cannot be said to indicate cursory or sham consideration of the applicability of warranties in the event of roof damage.

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<sup>15</sup> I reach the same conclusion with respect to the Postal Service's failure to introduce evidence that any roof manufacturer has refused to abide by a warranty based on the Postal Service's use of uncertified employees to maintain or repair a warranted roof. The Postal Service failure to introduce such evidence may indicate that such refusals are uncommon, and that the Postal Service overstated the risk of such a refusal, but, in view of the language of the warranties, it does not indicate that the Postal Service's asserted fear of running that risk was a sham, not asserted in good faith.

The Union asserts that Mr. Zircher's testimony shows that he "failed to understand that the most common source of roof leaks – membrane punctures – are excluded from coverage by warranties". (Brief, p. 36). The basis of the Union's assertion was Mr. Zircher's testimony concerning the typical exclusions from warranties, in which he did not refer to membrane punctures as among those exclusions.

In the testimony relied on by the Union, Mr. Zircher set out the "major" or "common" categories of roof damage excluded from warranty coverage to be:

The first major category is essentially natural disasters, tornadoes, fires, hurricanes, insect infiltration, lightning, volcano, etc...

The second kind of category in the exclusions has to do with what they call other building elements ... They're not responsible if the water infiltration is coming from a different source other than their roofing system.

The third category that's common to all manufacturer warranties has to do with repairs need to be made by contractors that are licensed with that particular roofing manufacturer it has to be an approved applicator making the repairs.

And then the fourth category is what's called a failure to use reasonable care as described by their care and maintenance manual. So each manufacturer has kind of the supplemental document, the care and maintenance manual that accompanies the warranty, and it tells you what's expected as far as what you had to do to keep that warranty in place ...

It is apparent from Mr. Zircher's testimony that his listing of warranty exclusions was limited to those exclusions typically contained in the written warranty. Indeed, the question that elicited Mr. Zircher's testimony was "Are there some provisions that are essentially common to the various roof warranties that we're going to see?" (Emphasis supplied.)

Mr. Kanter's testimony that membrane punctures were typically excluded from warranty coverage was not, however, predicated on written warranty exclusions, but presumably were a matter of industry practice. Assuming (without deciding) that Mr. Kanter's testimony was accurate, it nonetheless fails to contradict Mr. Zircher's testimony concerning the typical exclusions from written warranties, much less does it undercut Mr. Zircher's credibility as a roofing expert, as the Union seeks to do based upon his testimony on this issue.

The Union's final argument on warranties, also attacking Mr. Zircher's credibility, grows out of the conflicting testimony of Mr. Zircher and Mr. Kanter concerning membrane punctures shown on photographs of the roof at the Fox Valley P&DC (Aurora, IL). Mr. Zircher testified that "if these defects. . . were leading to an active leak, the manufacturer's warranty would be a logical way to handle this . . . at the expense of the manufacturer". The Union, relying on the testimony of Mr. Kanter, asserts otherwise.

Even if Mr. Kanter's testimony were credited, rather than that of Mr. Zircher, it would show, at most, that on this issue Mr. Kanter's understanding of manufacturers' roof warranties was superior to that of Mr. Zircher. It would not show that by relying on the testimony of Mr. Zircher, the Postal Service had engaged in a sham, cursory, or bad faith consideration of the risk of losing warranty protection if it retained roof maintenance and repair in-house, rather than contract out that work.

b. Qualification of Employees

The Postal Service considered employee qualifications both as an element of the Article 32.1.A cost factor and as an independent Article 32.1.A factor entitled to due consideration. In both contexts, the Postal Service concluded that contracting out was preferable to retaining the work in-house. This conclusion rested on three factors: (1) The fact that USPS personnel are not certified by the various roof manufacturers causes roof warranties to be voided when work is performed by USPS personnel; (2) Roof preventative maintenance and repair require technical knowledge and skills that USPS maintenance personnel do not consistently possess; (3) The safety risks to Postal Service employees and to the Postal Service itself would be reduced by contracting out.

The warranty issue has already been discussed, and will not be discussed further here.<sup>16</sup> Instead, I turn to the other two grounds on which the Postal Service concluded that an analysis of employee qualifications led to a preference for contracting out.

(1) Roof Maintenance and Repair Require Technical Knowledge and Skills That USPS Maintenance Personnel Do Not Consistently Possess.

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<sup>16</sup> Except to respond to the Union's assertion, based on Mr. Kanter's testimony, that even if Postal maintenance personnel are not certified, their training and skills are sufficient that roof manufacturers would provide such certification if the Postal Service requested it. Mr. Kanter's testimony was devoid of support from any roof manufacturers' representatives or documents, and does not establish that manufacturers would do as he testified.

The Postal Service brief, in supporting this conclusion, relied substantially on the testimony of Mr. Zircher, who testified:

I do not feel like [a more aggressive program of preventive maintenance] could have been done adequately and could have achieved the objectives using Post Office maintenance. . . They're doing electrical one day, HVAC the next, boiler work, chiller work. . . . They are doing work in a whole bunch of categories and that's fantastic; but what we need, though, to . . . achieve the lifespan of a roof that meets industry standards, is someone with a depth of knowledge. They need to be doing roofing work day in and day out. It needs to be their bread and butter where they can properly identify the various deficiencies that might exist and correct those deficiencies in a professional manner . . . That's not – we were not getting an individual with a depth of knowledge doing those aggressive preventative maintenances. . . . The 40-hour, one-week-long training class that they attended does not represent or could never teach the number of skills that are necessary to perform the tasks that are needed on the diverse cross section of roofs in this particular organization. . . .

The Union, in turn, argued that the Maintenance Craft employees who performed roof PM and repair work had the benefit of the one-week training course at Norman, described by Mr. Kanter as “extraordinarily good training. . . infinitely better than . . . roofing contractor employees ever receive. . . The BEMs are infinitely . . . better trained and better qualified than the average person you see working up on a roof”.

The Union also pointed out that at the four installations at which its witnesses were employed (Colorado Springs, CO; Boise, Idaho; Fox Valley (IL); Indianapolis, IND), at least 18 or 19 of the Maintenance Craft employees had completed the training at Norman. This led the Union to assert (Brief, p. 40):

The fact that there were so many trained roof repair and maintenance workers at four of the approximately 400 maintenance capable offices in the Postal Service shows that there were, by 2011, most likely thousands of postal technicians who had received training in Norman, Oklahoma. For the five years prior to the beginning of the Roth Brothers subcontract, the Postal Service was adding to its base of trained technicians at a rate of approximately 100 mechanics and technicians per year by sending them to the roof repair and maintenance course at Norman, Oklahoma.

The Union's assertions are not persuasive. There is no evidence showing that the proportion of Norman-trained employees at the four installations cited by the Union are representative of the approximately 400 installations at which Maintenance Craft employees are present. The proportion of Norman-trained employees at those 400 facilities may be far less (or far greater) than at the four installations cited by the Union, but the record is silent on that point. Furthermore, the asserted fact that approximately 500 postal technicians were trained at Norman in the five years prior to the Roth contract hardly shows that by 2011, there were "most likely thousands of postal technicians who had received training at Norman".

Finally, as Mr. Zircher testified, one week of training at Norman, no matter how high its quality, is not the equal of doing roofing work day in and day out, as the Postal Service would expect (and could insist upon) of the employees who would perform roofing work under the Roth contract. To be sure, Mr. Kanter testified that the qualifications of most roof contractor technicians were minimal, but that testimony was wholly anecdotal, unsupported by any corroborating evidence.

In sum, the evidence supports the MDC assertion that "roof preventive maintenance [and] roof repair . . . require technical knowledge and skills that USPS maintenance personnel do not consistently possess". (Emphasis supplied.)

(2) The Safety Risks to Postal Service Employees and to The Postal Service Would Be Reduced by Contracting Out

The Postal Service consideration of employee qualifications to work on Postal Service roofs was substantially focused on the safety risks to both Postal employees and the Postal Service itself if Postal Service employees continued to perform roof maintenance and repair.

The Postal Service has adopted fall protection guidelines to reduce the risks of employee falls from Postal Service roofs. Central to these guidelines is that managers must eliminate or reduce to the extent feasible all tasks performed by employees within 6 feet of unguarded roof edges that are greater than 4 or more feet above the next lower level. Other guidelines seek to protect employees who are assigned to perform such work by prescribing the conditions under which they may do so. For example, work at unprotected roof edges must be performed from ladders, scaffolds, or aerial lifts whenever possible. In addition to these safety guidelines, the Postal Service provides training and Personal Protective Equipment to employees who must work on roofs



The Occupational Safety & Health Administration (OSHA) has also promulgated regulations to protect the safety of employees performing roof-related construction activities. According to the MDC:

The Personal Protective Equipment required depends on various existing conditions. Because these requirements vary from one location to the next it is challenging for local maintenance staff not familiar with the policies to comply with the various requirements. USPS maintenance personnel have not had sufficient training and do not have all the Personal Protective Equipment to perform the work.

The MDC also noted recent OSHA activities that increased the risk that the Postal Service would be subject to investigations and possibly heavy fines for OSHA violations. The MDC states:

The Occupational Safety & Health Administration recently initiated a new enforcement program called Severe Violator Enforcement Program (SVEP) . . . . Under SVEP, the criteria were changed to concentrate inspection forces on employers who have demonstrated recalcitrance or indifference to the OSH Act. A strong case can be made that the USPS would qualify as a targeted enforcement employer due to precedent issues and recently imposed violations to USPS. . . .

The SVEP created a nationwide referral procedure in which OSHA may inspect related worksites/workplaces of a SVEP employer if OSHA identifies a broader pattern of non-compliance. USPS is squarely in the cross-hairs of OSHA as an SVEP employer, due to its 'broader pattern category', for targeted inspections and follow-up enforcement to include hefty fines. In addition, out of the top ten most frequently cited standards, three of the top five have a direct correlation to roofing:

#2 1926.501 – Fall Protection

#3 1901.1200 – Hazard Communication

#5 1926.1053 – Ladders . . .

In the absence of a formal safety training program geared specifically towards the roofing trade it is reasonable to assume that the USPS would be at greater risk than a private roofing company. (Emphasis in original.)

The MDC concludes:

The USPS has not deployed to its internal Maintenance workforce an effective training program with specific emphasis on roofing related work. By contrast, the Roof Asset Management Consultant, Roof Repair and Roof Replacement contractors will be required to comply with all OSHA requirements and other safety standards. This includes implementing a roofing safety plan to include portable personal positioning devices and portable fall arrest devices. In addition to the safety program, training must include a 10-hour OSHA training, roof maintenance ladder safety training and driver safety training program just to highlight a few.

The Union presents the Postal Service position as being that Postal Service maintenance personnel are not adequately trained and equipped to perform repair and maintenance work on Postal roofs. The Union takes issue with that position, pointing out:

- The mechanics and technicians who performed roof inspection and repair work before the Roth subcontract all work on roofs on a regular basis for reasons other than roof repair and maintenance. All of them have had training in Postal Service roof safety practices.
- Under Postal Service fall protection guidelines, only trained employees authorized to perform specific tasks are allowed roof access.
- Completion of Maintenance Safety Awareness Training is a prerequisite for enrollment in the Norman roof repair course.
- The Student Manual on Roof Inspection provided to students in the Norman course begins with nine pages of information about safety, health, and OSHA.
- The Position Descriptions and Qualification Standards for Maintenance Craft employees who perform roof repair and maintenance work show that those employees all have other work responsibilities that require them to work from heights safely, and to work with power equipment and chemicals safely.

It is undoubtedly true that part of the Postal Service justification for contracting out roof repair and maintenance was that Maintenance Craft employees lacked sufficient safety training and protective equipment to perform that work. The Union points out, however, that the Postal Service did not provide a single

example of an OSHA citation based on Postal Service roofing activities. Nor was there evidence of injuries or falls sustained by Postal Service roof repair and maintenance personnel due to lack of adequate safety training or equipment.

On the other hand, the Postal Service makes the point that whatever the Union may say about the ability of Postal employees to work safely, it can hardly be denied that employee safety is likely to be greater in the case of employees who perform roof repair and maintenance every day, rather than on an occasional basis. It states (Brief, page 38):

Contracting out provided some benefits to the Postal Service with regard to these OSHA and safety-related considerations. A roof asset management company would be using professional roofers who work every day subject to OSHA requirements and regulations and who would have and utilize the proper equipment and required procedures. The challenge in the heavily-decentralized Postal Service of ensuring OSHA compliance in every location and with employees who only occasionally perform roofing work could certainly be satisfied more easily and efficiently by contracting out. This would enhance, first and foremost, postal employee safety, as well as protect the Postal Service from costly litigation and OSHA fines. At a minimum, postal management's determination that this factor lent some added support to contracting out was reasonable.

In support of its position that the Postal Service exaggerates the risk that it will be subject to OSHA sanctions, the Union points out that the MDC cited and relied upon OSHA safety regulations contained in OSHA Part 26, which applies to the construction industry (29 CFR 1910.12). In fact, the Union asserts, the OSHA regulations applicable to the Postal Service are contained in Part 29, CFR 1910.28, which deals with general industry, not the construction industry.

The Union points particularly to that portion of CFR 1910.28, Section (b) (13), which deals with the employer's duty to have fall protection for employees working on low slope roofs. If the work is performed less than 6 feet from the roof edge, the employer must ensure that each employee is protected from falling by either a guardrail system, safety net system, travel restraint system, or personal fall arrest system. The general industry standards (CFR 1910.28 (a)(2)(ii), however, contain the following exception to that requirement:

When employees are inspecting, investigating, or assessing workplace conditions or work to be performed prior to the start of work or after all work has been completed.

According to Mr. Kanter, the effect of this exception is that for preventive maintenance on a flat roof, OSHA generally requires no personal protective equipment. If employees are engaged in repair work on a flat roof, Mr. Kanter testified, personal protective equipment is required only if the employee is to be performing such work continuously for more than four days.

Steven Vaughn, who is an AMT at the Indianapolis P&D, and a certified OSHA instructor, also testified that the Postal Service is not subject to construction industry safety standards, but rather to those applied to general industry. As a result, Mr. Vaughn, like Mr. Kanter, testified that when employees are doing preventive maintenance on a flat roof, no personal protective equipment is required. If the employee is doing repair work near a roof edge, postal policy is that safety precautions (a warning line, an observer, or an attached harness) are required if the work takes more than four hours. OSHA also has regulations dealing with safety precautions, but Mr. Vaughn was unsure of their content.

The Postal Service response to the Union contention that it is not in the construction industry, hence is not subject to Part 1926, is, quite simply, that the Union is wrong. In support of its position, the Postal Service cites 29 CFR 1910.12, which provides:

**§ 1910.12 Construction work.**

(a) **Standards.** The standards prescribed in part 1926 [the construction industry standards –Arbitrator’s Note] of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work. Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph. (Emphasis supplied by Postal Service.)

(b) **Definition.** For purposes of this section, *Construction work* means work for construction, alteration, and/or repair, including painting and decorating. . . . See discussion of these terms in §1926.13 of this title.

As the Postal Service points out, the applicability of Part 1926 is not determined by the industry in which the employee works, but applies, under Section 1910.12 (a), to “every employee engaged in construction work”. Every employer is required to protect employees engaged in construction work by complying with the Part 1926 standards.

Nor may the Union successfully argue that, despite the language of Section 1910.12 (a), the applicability of Part 26 is limited to employees doing construction work for an employer in the construction industry. In Secretary of Labor vs. Tire Star Inc.,<sup>23</sup> BNA OSHC 1091 (Nov. 24, 2009), an employer who sold and repaired tires and automobiles had employees patch a portion of the roof of a vacant building owned by it, and which it planned to occupy after renovations were complete. The employer was found by OSHA to have violated Part 26, Section 1926.501(b) (10) by failing to provide fall protection for employees working on a low-sloped roof. Although the employer was not engaged in the construction industry, OSHA held that the roof patching activities in which the employer had directed the employees to engage constituted “construction work” within the meaning of the Act. The parallel to the instant case is clear. Even though the Postal Service is not engaged in the construction industry, whenever it directs employees to engage in construction work, it is subject to the requirements of Part 26. Hence, the Union’s claim that the Postal Service is subject only to the general industry standards of Part 29, not the construction standards of Part 26, is without merit.

The Union may not successfully argue that Part 26 is inapplicable to preventive maintenance on postal roofs on the ground that preventive maintenance is not “construction work”. Whatever the merits of such an argument may be, it has not been previously raised and may not be raised at this time.

The Union seeks to distinguish Secretary of Labor vs. Tire Star Inc. on the grounds that “This arbitration case is not about the right of the Maintenance Craft to have bargaining unit members assigned to perform work renovating an empty building for future occupation.” (Brief, p. 48) The factual differences between the two cases are, however, irrelevant. The Union did not argue that Part 26 was inapplicable because the work done by Maintenance Craft employees on Postal Service roofs was not construction work, but rather argued that Part 26 was inapplicable to the Postal Service because it was not a construction industry employer. Secretary of Labor vs. Tire Star held otherwise, concluding that Tire Store, although not a construction industry employer, was subject to Part 26 when it assigned employees to construction work. That holding, combined with the explicit language of § 1910.12 (a), set out above, is fatal to the Union’s contention that Part 26 is inapplicable to the Postal Service because it is not a construction industry employer.<sup>17</sup>

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<sup>17</sup> Inasmuch as Part 26 applies, rather than Part 29, the Union’s argument, based on the testimony of Mr. Kanter and Mr. Vaughn, that the Part 29 exception to the fall protection requirements of CFR 1910.28, Section (b) (13), is inapplicable to roof preventive maintenance and repair is irrelevant. To be sure, there is a similar Part 26 exception

Finally, the Union argues that in an undated Postal Service document, “Requirements for Performing Work on Roofs”, the Postal Service provided safety instructions roughly parallel to those found in OSHA regulations governing Fall Protection in General Industry (Part 29). The Union also points out that Article 38, Section 7.A of the National Agreement requires the Postal Service to provide adequate tools and equipment and training on how to use them. As to the latter, the Union asserts that it is neither credible nor appropriate for the Postal Service to assert that its mechanics and technicians were maintaining and repairing roofs for years without having the contractually necessary equipment to do so. As to the former, the Union asserts that the Postal Service is contradicting its own safety instructions by here asserting that Postal Service employees performing roof maintenance and repair are covered by Part 26, rather than Part 29.

The Union’s assertions may be accurate to the extent that the Postal Service is arguably taking the position that it has not in the past fully complied with Article 38, Section 7.A., and is covered by Part 26 OSHA regulations governing fall protection for employees maintaining or repairing roofs. The Postal Service’s core position in this aspect of the dispute, however, is that contracting out roof repair and maintenance is a more satisfactory means of ensuring the safety of Postal Service employees and protecting the Postal Service from future OSHA liability than is retaining that work in-house. It may be embarrassing for the Postal Service to take the positions cited by the Union, but doing so does not indicate that the Postal Service failed to engage in due consideration of the safety aspects of contracting out roof maintenance and repair rather than retaining that work in-house.

## 2. Availability of Equipment

The MDC states, with respect to this Article 32.1.A factor:

The equipment and tools needed to perform routine roof related work varies depending on roof type. Most of the specialty equipment that is needed is not available to the USPS maintenance staff (items such as hot air welders, torches, metal break, etc.). Solvents and primers which are necessary for various roof related projects require special handling and storage. USPS maintenance departments are not equipped with these storage containers. Additionally, OSHA requires a variety of safety devices be in place when performing roof related work. The standard USPS

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(1926.500(a)(1), but the applicability of that exception to Postal Service roof repair and maintenance has not been raised in this case, and I express no opinion on it.

maintenance department does not have all of the required safety devices to be in full compliance with OSHA requirements.

In attacking the MDC findings with respect the availability of the equipment needed to perform maintenance and repair on Postal roofs, the Union relies on the testimony of Mr. Kanter and of Maintenance Craft employees Foster, Correll, and Vaughn.

According to Mr. Kanter:

- “The materials needed to repair roofs – within any given membrane type, they’re pretty much the same. . . You can go into your local roofing and supply house, and they will typically tell you what you need to use,”
- The solvents and primers used in roof repair are “along the lines of turpentine paint thinner that anybody can buy at Home Depot. Acetone, which is nail polish remover, is often used to clean some of the elastomeric membranes. There is nothing special about these – and most people have them at home in their garage or bathroom, some similar products.”

Mr. Foster and Mr. Correll both testified that there were facilities for storing hazardous materials at their facilities. According to Mr. Correll (Boise, ID) there is a concrete building outside the main plant for storing hazardous materials, as well as a Flambeau cabinet. According to Mr. Foster, the facility at which he is employed (Colorado Springs, CO) has both a hazardous material shed and Flambeau cabinets.

Mr. Correll testified to using a torch and all tools necessary to repair a roof leak, and that whatever tools he needed for roof repair, he could obtain from Maintenance Supply. Mr. Sokoloski (Fox Valley, IL), however, testified that when he requested heat welding equipment and other tools necessary to make a durable roof repair, local management refused, asserting that caulk was fine and less expensive.

Mr. Vaughn (Indianapolis, IN) testified, regarding the availability to employees of necessary safety devices when performing roof-related work, that personal protective equipment is obtainable. “If we don’t have it, we can certainly get it.”

Mr. Zircher’s testimony concerning the materials needed to repair roofs differed from that of Mr. Kanter. According to Mr. Zircher:

“Every roof type has different repair techniques that are necessary

for that roof type . . . Different manufacturers have their recommended materials that work best for their particular system.”

With respect to the need for suitable storage facilities for solvents and primers, Mr. Zircher testified:

“The vast majority of the chemicals and materials that are used in these roofing projects require them to be in a consistent temperature setting until they are physically applied. You can’t allow them to go through the freeze-thaw cycle over and over again and expect that when you go back out to utilize them, they are still going to be in a suitable condition for making the repairs . . . All the facilities around the nation are not going to, with any regularity, have a concrete building that’s separate from the main building that can be used for that purpose.”

In sum, the testimony related to the availability of equipment to Postal Service roof technicians shows:

- There was a difference of opinion between Mr. Kanter and Mr. Zircher concerning the need for different tools needed to perform routine roof-related work. (Kanter, no; Zircher, yes.)
- The availability of specialty equipment to USPS maintenance employees differed among the few facilities with which the Union witnesses were familiar. Mr. Correll and Mr. Foster testified that such equipment was available at their facilities; Mr. Sokoloski testified that it was not available at the facility at which he is employed.
- Mr. Kanter and Mr. Zircher disagreed on the need for special handling and storage for solvents and primers. Mr. Zircher testified that a concrete building was needed for that purpose; Mr. Kanter testified that there was “nothing special” about these products, and that “most people have them at home in their garage or bathroom, some similar products.” Two Union witnesses (Mr. Correll and Mr. Foster) testified that there is hazardous material storage space at their facilities.
- According to Mr. Vaughn, the only witness to testify about the availability to employees of necessary safety devices when working on roofs, all the ATMs at his facility have safety harnesses, as do all BEMs.

What this amounts to is contradictory evidence on some of the matters on which the MDC relied in supporting the decision to contract out (need and availability of tools for both routine and specialty work; need for special handling and storage for solvents and primers), and evidence suggesting that at least some of the equipment the MDC found lacking, such as safety devices when performing roof work, was not universally unavailable. The evidence on



which the Union relies, however, in light of the contradictory evidence relied on by the Postal Service, is insufficient to warrant a conclusion that the Postal Service, whatever the merit of its decision to contract out roof work, did not engage in a good faith consideration of the availability of necessary equipment across the Postal Service as a whole.

### 3. Efficiency and Public Interest

#### a. Efficiency

The MDC analysis of the efficiency of contracting out compared to retaining roof repair and maintenance in-house was that:

Contracting the required skilled resources to accomplish the roof related work will ensure efficiency, quality, and construction warranty protection, not available utilizing postal resources. Another critical factor relates to the timing of completing the needed repairs. Delaying the repair due to lack of resources leads to collateral damage of the roofing system substrate, interior finishes and causes safety issues for employees and customers inside the facility. The urgent response needed for these projects can be best accomplished through competitive subcontracting focused on securing a vendor who can perform the work within the program time frame.

The Union asserts that the evidence does not support the MDC assertion that the Postal Service lacked the skilled resources to provide the urgent response needed to inspect and repair Postal roofs. The Union argues that the Postal Service failed to provide an analysis of the availability of trained technicians within the Postal Service, and that the Union's evidence suggested that a large percentage of the mechanics and technicians employed by the Postal Service had received Norman roof maintenance training.

The Union argument is unpersuasive. Initially, as has previously been noted, (p. 24), the evidence does not show what percentage of Postal Service technicians had received roof training in Norman. Furthermore, the Postal Service viewed the skills of its Maintenance Craft employees, even those who had been trained in Norman, as not the equal of roof repair technicians employed by a roofing contractor. From this perspective, which I have found not unreasonable, the Postal Service was entitled to search for the large number of skilled technicians needed to perform semiannual maintenance and repair work by contracting that work to roofing contractors.

The Union's other argument in opposition to the Postal Service conclusion that contracting out was more efficient than maintaining roofing work in-house

was that in fact Roth was not more efficient. According to the Union, the evidence showed that Roth, after it received the roof contract, failed, at least in some instances, to perform the semi-annual PM required by that contract. The Union also points out that the USPS OIG concluded in 2018 that the Roth contract had been ineffective in correcting problems with Postal roofs. Hence, the Union concludes, there is strong retrospective evidence that the Postal Service decision to contract out roofing work, at least to the extent that the decision predicated on the greater efficiency of contracting out, was made in a cursory fashion that ignored reality.

These arguments are not persuasive. Initially, all the evidence on which the Union relies relates to alleged inefficiencies that took place after the contract was awarded to Roth. Hence, unless the evidence shows that the Postal Service should have foreseen these inefficiencies, they are not relevant to whether the Postal Service provided due consideration to the efficiency factor.

The evidence on which the Union relies to show that Roth did not perform semiannual roof inspections consists of photographs of roofs taken in 2012 of roofs that were to be maintained by Roth after November 2011. The Union points to the large amounts of debris on some roofs, as well as the high quantity and severity of roof defects to show that Roth had not been properly maintaining the roofs. Mr. Zircher, however, testified that although the debris might have collected in a year's time, the quantity and severity of the defects were far more than could have developed in a year, suggesting that these defects were attributable to improper maintenance by Postal Service technicians, not Roth.

As for the USPS IG Report on which the Union relies, it attributes the ineffectiveness of the Roth contract to Postal Service Facilities Management, not to Roth.<sup>18</sup> Hence, that Report does not provide evidence of a failure of the Postal

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<sup>18</sup> See Audit Report, U.S. Postal Service Preventive Maintenance Program, Report No. SM-AR-18-006 (July 25, 2018), page 2:

The Postal Service's roofing preventive maintenance program was not effective in ensuring the inspection of the roofs of all its owned facilities, having roofs inspected at a prescribed frequency, or addressing any identified critical issues. Specifically, we identified that Facilities management:

- Did not maintain an accurate inventory of all its owned facilities to ensure they were appropriately inspected.
  - Did not schedule prescribed semiannual inspections for its own facilities, as required by policy and manufacturer's warranties.
  - Did not address the contractor's recommendations, or implement an alternative corrective action, for eight of 29 (28 percent) facilities with roofing issues categorized as critical.

Service to give due consideration to possible inefficiencies by Roth.

The Union relies on a decision by Arbitrator Mittenthal in support of its argument that the inefficiencies it attributes to Roth after the contract had been awarded justify an implication that the Postal Service failed to give due consideration to the Article 32 efficiency factor. In that decision, Arbitrator Mittenthal stated:

An incorrect decision does not necessarily mean a violation of Paragraph A. The greater the incorrectness, however, the stronger the implication that Management did not meet the “due consideration” test.<sup>19</sup>

It follows from Arbitrator Mittenthal’s decision that the less clear the evidence of incorrectness, the weaker is the implication that there was a lack of due consideration. In view of the weakness of the evidence here relied upon by the Union to demonstrate the alleged incorrectness of the MDC with respect to the efficiency factor, no implication can be drawn that the Postal Service failed to give due consideration to the efficiency of contracting out compared to the efficiency of retaining roof repair and maintenance in-house.

#### b. Public Interest

The Union contends (Brief, p. 59) that the Postal Service’s conclusion that the public interest was served by contracting out was “based entirely on its failure to evaluate the relative cost of subcontracting, and on its cursory, perfunctory, and wrong analysis of the other factors it was required to give due consideration under Article 32.1.A.” I have concluded earlier in this Decision that these assertions are without merit, and see no need to repeat the reasoning that led to that conclusion.

#### 4. Costs Revisited

In addition to criticizing the Postal Service for its asserted failure to consider comparative labor costs (discussed at pp. 13-14), the Postal Service also criticizes the Postal Service’s failure to assign numerical cost figures to the costs of retaining

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- Did not consistently track manufacturer warranty data for over 7,000 facility roofs.
  - Did not adequately measure the effectiveness or impact of the roofing preventive maintenance program.”

<sup>19</sup> See Case No. A8-NA-0481 (Mittenthal 1981) at 6-7

maintenance and repair in-house. For example, the Union charges (Brief, page 24) that the MDC:

- Does not estimate the cost of consistently performing preventive maintenance by using postal maintenance personnel;
- Does not estimate the cost of using postal employees to perform repair work;
- Does not estimate the cost of providing any training to postal maintenance personnel;
- Does not estimate the cost of having postal maintenance personnel certified or licensed by roof manufacturers if that should prove to be desirable.

Inasmuch, however, as the Postal Service had concluded that Postal Service Maintenance Craft employees, who did not engage in roof maintenance and repair on an everyday basis, were not as technically adept at such work as were contractor employees (a conclusion that I found to be not unreasonable), there was little need for the Postal Service to estimate the costs involved in consistently performing preventive maintenance or repair, or to the costs involved in providing additional training or to those employees. For even if the Postal Service took those steps, its Maintenance Craft employees would still not be performing roof maintenance and repair on an everyday basis. As for the costs of having Maintenance Craft employees certified, there is no record evidence of that idea having been presented to the Postal Service at any time prior to Mr. Kanter's testimony in this case.

Finally, the Union criticized the Postal Service's failure to provide cost numbers for the overall costs of contracting out maintenance and repair compared with the overall costs of keeping that work in-house. The most important cost considerations for the Postal Service, however, were prolonging the useful life of postal roofs, reducing the costs of emergency repairs, and protecting the manufacturer warranties on postal roofs. Determining how much the useful lives of postal roofs would be prolonged by contracting out, and accurately assigning a numerical value to that prolongation, would be exceedingly difficult, perhaps impossible, as would determining how much the costs of emergency leak repairs would be reduced by contracting out, and how much would be saved in not having warranties challenged or voided.<sup>20</sup> Perhaps the Postal Service could have made a more persuasive case for contracting out if it had attempted to dollar figures to

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<sup>20</sup> Some sense of this difficulty is provided by an examination of Mr. Zircher's efforts to calculate these savings. See Transcript, Volume 2, pp. 48-54.

these savings, but the difficulty of providing usefully accurate cost figures is such that I cannot find that the Postal Service failure to do so demonstrates that its cost analysis was not undertaken in good faith, but was a mere sham.

## 5. Summary and Conclusion

I can do no better in summarizing my conclusion that the Union has not shown the Postal Service to have violated Article 32.1.A than to quote Arbitrator Das' conclusion in a prior contracting out case:

Critically, the obligation placed on the Postal Service by Article 32.1.A, as stated by Mittenthal, is to "make a good faith attempt to evaluate the need for contracting out in terms of the contractual factors." As Snow pointed out, this provision "allows the Union to police arbitrary or irrational contracting out decisions" that are "contrary to ordinary business principles and the common law of the shop." While the Postal Service's determination in this case surely is debatable and some of the factual data on which it relied may be less than fully accurate or even incorrect, the record as a whole does not establish -- as the Union is required to show -- that the Postal Service failed to make a good faith effort to evaluate the need for contracting out in terms of the factors in Article 32.1.A before it finalized its decision to contract out the work in issue.<sup>21</sup>

## **V. DID THE POSTAL SERVICE VIOLATE ARTICLE 32.1.B BY CONTRACTING OUT ROOF MAINTENANCE AND REPAIR WITHOUT FIRST NOTIFYING THE UNION BECAUSE THE CONTRACTING HAD A SIGNIFICANT IMPACT ON THE BARGAINING UNIT?**

Prior National Arbitration cases presenting the issue of whether contracting out had a significant impact on the bargaining unit have focused primarily on the amount of work lost to the bargaining unit as the result of the contracting out. In the Columbus PVS case, for example, Arbitrator Das found that the closing of one PVS location, resulting in the excessing of 57 drivers, which amounted to 0.7% of the total number of drivers nationally and 0.5% of the Motor Vehicle Craft, did not

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<sup>21</sup> Case No. Q00C-4Q-C (04003182) (Das, 2017), pp. 27-28.

constitute a significant impact within the meaning of Article 32.1.B.<sup>22</sup> Conversely, in the California Mode Conversion case, in which the Postal Service contemplated contracting out all PVS operations in California, displacing 800 drivers, approximately 10% of all drivers, I concluded that the proposed contracting out would have a significant effect on the bargaining unit.<sup>23</sup> Similarly, in the Associate Office Infrastructure case, involving the contracting out of approximately 936,000 hours of cabling and wiring work in approximately 8,000 locations over 2 ½ years, Arbitrator Das found a significant impact.<sup>24</sup> In the MPI case, in which the contracting out of approximately 250,000 hours at 340 sites over 5 years constituted 0.137% of total hours worked by the craft employees who could have performed this work, and 0.069 % of total maintenance craft hours worked during the period of the contracting out, Arbitrator Das found no significant impact on the bargaining unit.<sup>25</sup>

In the instant case, it was undisputed that no employees were displaced as a result of the contracting out, and that the amount of work performed by the contractor amounted to approximately 30,000 hours or the equivalent of 18 FTEs, representing 0.6% of the total number of BEMs, AMTs, and AMSs who could have performed this work, and 0.05 of the total building maintenance function of approximately 35,000 employees.

The Union, understandably, does not argue, in light of these National Decisions, that the amount of work lost to the bargaining unit in this case was sufficient, on a quantitative basis, to constitute a significant impact on the bargaining unit. Instead, the Union bases its argument that the contracting out here had a significant impact on a September 2013 Memorandum from Douglas A. Tulino, USPS Vice President, Labor Relations, and David E. Williams, Jr., Vice President, Network Operations, to the Director of Audit Operations for the USPS Office of Inspector General. In that Memorandum, which contained the Postal Service's comments on a draft audit report dealing with the Postal Service warranty process, Mr. Tulino and Mr. Williams stated:

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<sup>22</sup> Case No. Q06V-4Q-C 09343253 (2014)

<sup>23</sup> Case No. Q10V-4Q-C 12314573 (2013)

<sup>24</sup> Case No. Q9HT-4Q-C 97031616 (2010)

<sup>25</sup> Case No. Q00C-4Q-C 04003182 (2017)

The phrase "significant impact" as used in the National Agreements . . . refers to the impact on bargaining unit work. While this impact could be financial, it could also result from a significant change in conditions of employment or a significant impairment of job tenure, employment security or reasonably anticipated work opportunities.

The Union asserts that under the criteria set out in the Tulino-Williams letter, "Maintenance Craft mechanics and technicians have had a significant change in their employment, their employment security, and their anticipated work opportunities have been significantly curtailed".<sup>26</sup>

In support of this assertion the Union relies on Mr. Kanter's testimony that the one-week Norman training provided to BEMs prior to the contracting out would be useful to BEMs starting a second career after leaving the Postal Service. According to Mr. Kanter, this training could "open up a whole bunch of possibilities within the roofing industry", and that he "would definitely consider hiring a [former BEM with Norman training] as a roof inspector". Mr. Kanter also testified that such an employee, if hired by a roof repair company, "would probably go in at the level of . . . probably a project manager, or at the very minimum of foreman. . . [T]hey truly have a wealth of knowledge that very few roofing mechanics . . . ever have".

According to the Union, Mr. Kanter's testimony leads to the conclusion that the contracting out of roof repair and maintenance, and the loss of the attendant training opportunities and experience, had far more than a numerical impact on the Maintenance Craft. In the words of Mr. Tulino and Mr. Williams, the Union asserts, the significant impact on the bargaining unit in this case " [resulted] from a significant change in conditions of employment [and] a significant impairment of job tenure, employment security, or reasonably anticipated job opportunities."<sup>27</sup>

The Union's argument is not persuasive. There is no record evidence that the contracting out of roof maintenance and repair, even including the termination of Norman training as a consequence, has led to a significant change in conditions of employment, impairment of job tenure, or employment security for the bargaining

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<sup>26</sup> Brief, p. 69.

<sup>27</sup> Brief, p. 70.

unit<sup>28</sup>. As for the loss of reasonably anticipated job opportunities testified to by Mr. Kanter, there have been numerous National Arbitration decisions (see cases cited at page 37, notes 22-25) concerning the meaning of “significant impact” in Article 32.1.B, and none of those decisions has suggested that the effect on post-employment job opportunities is to be considered in determining the existence of “significant impact”. Nor is it likely that Mr. Tulino and Mr. Williams, in referring to the effect of contracting out on “reasonably anticipated job opportunities” were referring to job opportunities after an employee had left the Postal Service. Accordingly, I cannot conclude that the memorandum from Mr. Tulino and Mr. Williams to the Director of Audit Operations for the USPS Office of Inspector General, even recognizing Mr. Tulino’s position as Vice President Labor Relations, can reasonably be understood as a Postal Service admission that its ability to contract out bargaining unit work is limited by the effect of that contracting out on the job opportunities of former Postal Service employees.

In sum, I do not find that the contracting out of roof repair and maintenance at issue here had a significant impact on the bargaining unit. As a result, the Postal Service failure to provide the Union with advance notice of this contracting out did not violate Article 32.1.B.

## **VI. DID THE POSTAL SERVICE VIOLATE THE MEMORANDUM REGARDING CONTRACTING OR INSOURCING OF CONTRACTED SERVICE BY CONTRACTING OUT ROOF MAINTENANCE AND REPAIR?**

The Memorandum of Understanding (MOU) Regarding Contracting or Insourcing of Contracted Services provides:

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<sup>28</sup> Steve Raymer, who was at the time of the hearing in this case the Director of the Union’s Maintenance Craft Division, testified that the loss of work resulted in a “degradation of the craft”. In the context of Mr. Raymer’s testimony, however, it is evident that the “degradation” to which he was referring was the reduction in the number of BEMs subsequent to the contracting out. The Union does not, however, contend that the reduction in BEM numbers can be attributed to the contracting out or that it was sufficient to constitute “significant impact” under the arbitration decisions cited at notes 22-25.



It is understood that if the service can be performed at a cost equal to or less than that of contract service, when a fair comparison is made of all reasonable costs, the work will be performed in-house.

A fair reading of the MDC leads to the conclusion that the Postal Service concluded that if all reasonable costs associated with maintaining roof maintenance and repair were taken into consideration, that work could not be performed in-house at a cost equal to or less than the cost of contracting out. I sustained that conclusion in the Article 32.1.A portion of the Decision, and the Union has presented no argument that would lead me to find differently under the MOU.

The Union suggests that my Decision in the California Mode Conversion arbitration (Case No. Q10V-4Q-C 12324573 (2013)) requires a different conclusion under the MOU than under Article 32.1.A. In that case, I stated (p. 24):

[Under the MOU], the Postal Service can no longer justify contracting out work that would be less expensive to keep in-house on the ground that it has given due consideration to cost as well as the other Article 32.1 or 32.2 factors. To be sure, each of those factors must be considered, but if factors other than cost do not rule out keeping the work in-house, and the cost of keeping the work in-house would be less than contracting out, both the text and the bargaining history of the Contracting MOU require that the work be kept in-house.

In the instant case, the Postal Service found that the cost of keeping work in-house was not less or equal to the cost of contracting out, and the Union has not presented persuasive evidence to the contrary.<sup>29</sup> Accordingly, there is nothing in the MOU or in the California Mode Conversion Decision that requires that roof repair and maintenance be kept in-house.

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<sup>29</sup> The Union relies on evidence of actual Postal Service roofing costs during the term of the Roth contract to show that the cost of contracting out was in fact greater than the cost of retaining the disputed work in-house. Assuming, without deciding, that the evidence supports the Union's assertion, that evidence was not available to the Postal Service at the time it was considering whether to contract out, hence is not relevant to the validity of the Postal Service conclusion that the cost of keeping the work in-house would not be equal to or less than the cost of contracting. See also Case No. A8-NA-0481 (Mittenthal 1981), p. 7: "An incorrect decision [by the Postal Service] does not necessarily mean a violation of Paragraph.A."

## **VII. DID THE POSTAL SERVICE VIOLATE SECTION 535.112 OF THE ADMINISTRATIVE SUPPORT MANUAL BY CONTRACTING OUT ROOF MAINTENANCE AND REPAIR?**

Section 535.112 of the Administrative Support Manual provides:

### **535.112 Facility and Plant Equipment**

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

According to the Union, the effect of Section 535.112 is to require the Postal Service to justify subcontracting facility maintenance services by showing that the subcontracting was economically advantageous. The Union further asserts (Brief, p. 61). “Because the Postal Service has not shown economic advantage from subcontracting, the Roth contract violated ASM Section 535.112.”

The Postal Service, however, asserts (Brief, p. 48):

[T]he clear language of ASM 535.112 does not impose any limitations on contracting out, and certainly none that would go beyond compliance with the requirements of Article 32. Rather, ASM 535.112 is a policy directive to management “encourag[ing]” management to normally exercise its discretion in favor of contracting out . . . when economically advantageous. The language of ASM 535.112 is not a limitation on contracting out, but an encouragement to do so.

To interpret ASM 535.112 as the Union suggests would be inconsistent with both logic and National Arbitration decisions. As previously pointed out, National Arbitrators have consistently held that the only limits imposed by Article 32.1.A on Postal Service freedom to contract out are procedural, not substantive. The Union can block a proposed contract under Article 32.1.A only by showing that the Postal Service, prior to deciding to contract out, failed to give due consideration to the factors of cost, employee qualifications, efficiency, availability of equipment, and public interest. If the Postal Service has duly considered each of these factors in making its decision to contract out, an arbitrator cannot overturn that decision under Article 32.1.A on the grounds that the Postal Service decision was “wrong”.

The Union's position here, however, is that the Postal Service, of its own volition, not in response to a Union demand, gave the Union greater power to block contracting out than the Union was able to achieve at the bargaining table in Article 32.1.A.<sup>30</sup> For, under the Union interpretation, Section 535.112 enables the Union to block contracting out if the Postal Service cannot show that the contracting out was economically advantageous. The Union does not have this power under Article 32.1.A, and it is so unlikely that the Postal Service would grant such power in the absence of a Union demand that it do so that I am unwilling to so interpret Section 535.112 in the absence of clear language that the Postal Service intended such a gift to the Union. Language encouraging managers to contract out when economically advantageous to do so does not satisfy that requirement.

The Union suggests that its interpretation of Section 535.112 is confirmed by Arbitrator Das' decision in Case No. HOC-NA-19007 (2002). In that case, the Postal Service proposed to revise Section 535.111 to contain the same language at issue here, encouraging contracting out when economically advantageous, language which was already contained in Section 535.112. The Union challenged the proposed revision under Article 19, asserting that the changes increased the Postal Service's ability to contract out, and so eliminated protections that had been in the ASM for years. Arbitrator Das sustained the Union's challenge on the grounds that the Postal Service had not shown the change to have been fair, reasonable, and equitable. In doing so, however, Arbitrator Das neither held nor suggested that the revised Section 535.111, which contained the same language as does Section 535.112, increased the Union's power to limit contracting beyond its Article 32.A.1 power to do. Hence, Arbitrator Das' decision in Case No. HOC-NA-19007 does not support the Union's position here.<sup>31</sup>

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<sup>30</sup> To be sure, the 2010 Memorandum of Understanding regarding Contracting or Insourcing of Contracted Service allows the Union to block contracting out if the work in question can be performed by the Postal Service at a cost equal to or less than that of contract service. Section 535.112 was enacted, however, prior to the 2010 Agreement, at a time when the only limitations on Postal Service power to contract out were contained in Article 32. Accordingly, for the Postal Service to have provided the Union with power to block contracting out at that time because the contract was not economically advantageous would have vested the Union with power it did not possess under the National Agreement

<sup>31</sup> The Union also relies on Regional Arbitration decisions cited in note 10 in support of its position that Section 535.112 requires the Postal Service to demonstrate economic advantage in contracting out. As I pointed out in that note, however, those Regional Arbitrator decisions do not take account of the decisions of National Arbitrators

In sum, I do not accept the Union argument that the contracting out violated ASM Section 535.112.<sup>32</sup>

### **VIII. AWARD**

The Postal Service contracting out of roof maintenance and construction did not violate Article 32.1.A, Article 32.1.B, the Memorandum of Understanding Regarding Contracting or Insourcing of Contracted Service, or Section 535.112 of the Administrative Support Manual.



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Stephen B. Goldberg, Arbitrator

January 4, 2019

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Ganser, Mittenthal, Snow, and Das on which my rejection of the Union's position regarding Section 535.112 is largely based.

<sup>32</sup> In reaching this conclusion, I express no opinion on the Postal Service's additional argument that Section 535.112 applies only to Maintenance Service Contracts for Facility and Plant Equipment, and is inapplicable to the contracting of roof maintenance because a roof is part of a building, not equipment.

June 9, 2011

## **Memorandum of Due Consideration of Article 32 Factors Related to Roof Asset Management Services**

### **I. Purpose**

This memorandum presents the due consideration given to the five factors contained in Article 32 of the National Agreement with respect to Roof Asset Management Services, as defined by the subcontracting of the work necessary to provide roof preventative maintenance, roof repair, roof restoration, and roof replacement.

### **II Background**

- USPS has over 8,600 owned facilities in its portfolio with an estimated 200,000,000 square feet of roof area. A conservative estimate of value for the roofing asset is in excess of \$2.5 billion. Thus the roof asset is one of the most critical USPS facility assets.
- An automated roof preventative maintenance call system was activated in the Facilities FSSP system in April of 2010, for subsequent issuance twice a year as required in the MS-1 and MMO-074-00. Twice a year, a preventative maintenance request is entered for every owned building in the USPS portfolio. The automated roof PM program was initiated due to increasing premature failure of roof assets.
  - The Spring 2011 FSSP automated Roof PM call yielded 3,632 calls that were completed by maintenance. Remaining calls were either declined or ignored.
  - The reported average time required to complete the task ranged from 2-3 hours.
  - Utilizing 2.5 hours; the total time associated with completing all of the calls that were accepted by maintenance yields 9080 hours per occurrence (approximately 10 FTE)
- USPS owns facilities across the entire United States and in numerous territories. This vastly diverse portfolio is subject to numerous federal, state and local code requirements. These regulations vary from one location to the next and require specific knowledge of the various policies to ensure compliance.
- USPS owned facilities have numerous types of roofing systems. Different roof systems require different materials, different construction techniques, different tools and different skill sets in order to make lasting repairs.
- Many of the solvents/primers necessary to perform roof related service work require maintaining Material Safety Data Sheets (MSDS). Many of these products also require specialized storage containers. The typical maintenance department does not maintain all of the MSDS documentation nor do they have the required storage containers.
- Occupational Safety & Health Administration (OSHA) has regulations to ensure the safety of technicians performing roof related construction activities. The Personal Protective Equipment required depends on various existing conditions. Because these requirements vary from one location to the next it is challenging for local maintenance staff not familiar with the policies to comply with the various requirements. USPS maintenance personnel have not had sufficient training and do not have all of the Personal Protective Equipment to perform the work. See Exhibit #1 for more specific OSHA information.
- Repair work performed by an unauthorized technician on a warranted roof system will void the roof warranty. USPS maintenance personnel are not certified by the various roofing manufacturers.

- Numerous industry studies have shown that an aggressive preventative maintenance program combined with an asset management system extends the useful life of a roofing system. Conservative estimates show the service life of a system being increased by 20%.
- Creation of a National Roof Management Database that warehouses roof history and warranty information will force roofing manufacturers to stand behind the warranties that they provide and will allow for better capital budgeting.
- Roof Preventative Maintenance is currently scheduled to take place semi-annually (April and October). The USPS is challenged with completing the necessary preventative maintenance in over 8,600 facilities in a timely manner in order to comply with the schedule.

### III. Consideration of Article 32 Factors

This document details the Postal Service's consideration of the factors identified in Article 32.1.A of the National Agreement when considering the need to subcontract.

#### A. PUBLIC INTEREST

Roof Asset Management is in the public's interest for the following reasons:

- 1) Following Federal, State and Local codes ensures that the public's best interest is considered and that no codes are violated.
- 2) Complying with OSHA standards ensures that both the roofing technician and the public below are safe from hazards associated with roof work.
- 3) Extending the useful life of an asset is in the best financial interest of the Postal Service and will reduce the amount of waste going to landfills.
- 4) Using USPS personnel requires additional training cost and increases the safety risk to USPS personnel.

These concerns can be mitigated by contracting all roof related work using qualified, certified roofing contractors. The preventative maintenance must be completed in accordance with the semi-annual schedule to ensure that facility is ready for the next season. By subcontracting with a provider who is qualified and knowledgeable, the work will be completed within the critical timeframe. Moreover, the contractor will be required to commit sufficient qualified resources to the project to meet specific timeframes.

#### B. COST

The current philosophy of roof management which consists of inconsistent preventative maintenance performed by technicians that are not properly trained or equipped has yielded dramatically increasing emergency leak frequency. The expense spend for roof related projects has followed the following path:

2007	\$4,805,893
2008	\$6,759,118
2009	\$12,432,763
2010	\$19,144,043

This pattern is no longer maintainable. Subcontracting to complete all of the required roof work on over 8,600 facilities in a timely manner requires the coordination of roofing contractors as afforded through national vendors. These individuals are certified and familiar with the requirements of the Federal, State, and Local codes; OSHA requirements and will be able to ensure the work performed will be accepted by roofing manufacturers for warranty requirements. Contracting the work will provide the USPS with a guaranteed compliance with codes. The contractor uses skilled teams who are experts in performing roof related tasks. Knowledge of the system and repetition allows them to provide the service in a shorter time requiring less work hours per task through higher in-process productivities. Industry standards show that an aggressive preventative maintenance

program typically reduces the emergency leak calls by 80%. In addition to the savings gained from less frequent emergency roof repair calls, the amount of collateral damage to interior finishes, equipment, and operations is significant.

Conversely, utilizing Postal maintenance, who are not certified, would void roof warranties, incur the additional training and certification costs.

#### C. EFFICIENCY

Contracting the required skilled resources to accomplish the roof related work will ensure efficiency, quality, and construction warranty protection, not available utilizing postal resources. Another critical factor relates to the timing of completing the needed repairs. Delaying the repair due to lack of resources leads to collateral damage of the roofing system substrate, interior finishes and causes safety issues for employees and customers inside the facility. The urgent response needed for these projects can be best accomplished through competitive subcontracting focused on securing a vendor who can perform the work within the program time frame.

#### D. AVAILABILITY OF EQUIPMENT

The equipment and tools needed to perform routine roof related work varies depending on roof type. Most of the specialty equipment that is needed is not available to the USPS maintenance staff (items such as hot air welders, torches, metal break, etc). Solvents and primers which are necessary for various roof related projects require special handling and storage. USPS maintenance departments are not equipped with these storage containers. Additionally, OSHA requires a variety of safety devices be in place when performing roof related work. The standard USPS maintenance department does not have all of the required safety devices to be in full compliance with OSHA requirements.

#### E. QUALIFICATION OF EMPLOYEES

Postal maintenance personnel are qualified to maintain existing building structures and systems; however, roof preventative maintenance, roof repair, roof restoration and roof replacement all require technical knowledge and skills that USPS maintenance personnel do not consistently possess. The fact that USPS personnel are not certified by the various roof manufacturers causes roof warranties to be voided when work is performed by maintenance. Each roofing system has a unique installation and a unique repair technique. USPS owns a wide variety of roofing systems thus it requires a technician who has detailed, specific knowledge of each roof system. Roof related work requires technicians who are properly trained and certified by the roofing manufacturer. As noted above, Postal Maintenance Staff are not required to be certified as part of their job qualifications. Consequently, the Postal maintenance personnel are not generally qualified to perform the work.

Additionally, USPS fall protection guidelines state that managers must eliminate, or reduce to the extent feasible, all tasks performed by employees within 6 feet of unguarded roof edges that are greater than 4 or more feet above the next lower level. Additional guidelines state that:

1. No work is to be performed on any roof with a slope greater than 4 vertical feet per 12 feet length.
2. Only trained employees authorized to perform specific tasks are allowed roof access
3. Work at unprotected roof edges must be performed from ladders, scaffolds or aerial lifts whenever possible.
4. A Job Safety Analysis (JSA) must be prepared for all routine tasks performed on roofs. To include safe paths for remaining 6 feet from an unguarded edge.
5. All employees working on roofs must be familiar with the JSA's for such work

6. Either fall protection or a monitor is required when working within 6 feet of the unguarded edge.

#### **IV Conclusion**

The use of professional roof asset management consultant services and roofing contractors is necessary in order to ensure that USPS roof assets are maintained properly to achieve the procured service life and compliance with Federal, State, and Local codes, including OSHA. Additionally, USPS fall protection guidelines state that managers must eliminate, or reduce to the extent feasible, all tasks performed by employees within 6 feet of unguarded roof edges that are greater than 4 or more feet above the next lower level.

It is in the best interest of the Postal Service and the public to outsource roof asset management roof repair and roof replacement work to ensure the integrity and longevity of our critical roof assets. Subcontracting these activities at postal facilities ensures timely completion of critical preventive maintenance work, repair work and replacement work that would be performed by suppliers at standard rates with the available resources that can be matched to the aggressive USPS schedule.





May 31, 2011

## Exhibit #1 – Additional OSHA Consideration

The Occupational Safety & Health Administration (OSHA) initiated a new enforcement program that became effective June 18, 2010. The program, called Severe Violator Enforcement Program (SVEP) displaces the Enhanced Enforcement Program. Under SVEP, the criteria was changed to better focus enforcement efforts on significant hazards by concentrating inspection forces on employers who have demonstrated recalcitrance or indifference to their OSH Act. A strong case can be made that the USPS would qualify as a targeted enforcement employer due to precedent issues and recently imposed violations to USPS.

1. As stated by Greg Bell, Director, Industrial Relations in his July/August article published in the American Postal Workers magazine, "The Occupational Safety & Health Administration (OSHA) has charged the USPS with a series of citations in multiple cities for "willful and serious" safety violations. As of mid-June (2010), OSHA had issued citations to the Postal Service at 12 facilities, and ordered it to pay fines of more than \$2 million."
2. July 6, 2010: "The U.S. Department of Labor's solicitor today filed a complaint against the U.S. Postal Service for electrical work safety violations. The complaint, which asks the Occupational Safety and Health Review Commission to order USPS to correct electrical violations at 350 facilities, marks the first time the department has sought enterprise-wide relief as a remedy."

The SVEP also created a nationwide referral procedure in which OSHA may inspect related worksites/workplaces of a SVEP employer if OSHA identifies a broader pattern of non-compliance. The aforementioned presentation puts the USPS squarely in the cross-hairs of OSHA as a SVEP employer, due to its 'broader pattern category', for targeted inspections and follow-up enforcement to include hefty fines. In addition, out of the top ten most frequently cited standards, three of the top five have a direct correlation to roofing:

1. #2 1926.501 – Fall Protection
2. #3 1901.1200 – Hazard Communication
3. #5 1926.1053 – Ladders

To further bolster this point, in his address to the U.S. House of Representatives on March 16, 2011, David Michaels, Assistant Secretary, OSHA directed his comments regarding "...construction safety..." and remarked that one of the highest fatal injury rates was "...roofers at 34.7 fatal work injuries per 100,000 full-time equivalent workers..." In the absence of a formal safety training program geared specifically towards the roofing trade it is reasonable to assume that the USPS would be at greater risk than a private roofing company.

In addition pursuant to OSHA Standards the following is offered:

- Part Number: 1926
- Part Title: Safety and Health regulations for Construction
- Subpart Title: Fall Protection
- Standard Number: 1926.501
- Title: Duty to have fall protection

..1926.501(b)(10)

[1926.501\(b\)\(10\)](#)

"Roofing work on Low-slope roofs." Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, **personal fall arrest systems**, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roofs 50-feet (15.25 m) or less in width (see Appendix A to subpart M of this part), the use of a safety monitoring system alone [i.e. without the warning line system] is permitted.

#### [1926.500\(b\)](#)

#### **Definitions.**

**Low-slope roof** means a roof having a slope less than or equal to 4 in 12 (vertical to horizontal).

**Personal fall arrest system** means a system used to arrest an employee in a fall from a working level. It consists of an anchorage, connectors, a body belt or body harness and may include a lanyard, deceleration device, lifeline, or suitable combinations of these. As of January 1, 1998, the use of a body belt for fall arrest is prohibited.

Based on the information outlined above the USPS has not deployed to its internal Maintenance workforce, an effective training program with specific emphasis on roofing related work. By contrast the Roof Asset Management Consultant, Roof Repair and Roof Replacement contractors will be required to comply with all OSHA requirements and other safety standards. This includes implementing a roofing safety plan to include portable personal positioning devices and portable fall arrest devices. In addition to the safety program, training must include a 10-hour OSHA training, roof maintenance ladder safety training and driver safety training program just to highlight a few.