C # 13007

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration between UNITED STATES POSTAL SERVICE and AMERICAN POSTAL WORKERS UNION and NATIONAL ASSOCIATION OF LETTER CARRIERS	CASE NOS. H7C-NA-C 96 and H0C-NA-C 6

BEFORE: Professor Carlton J. Snow

APPEARANCES: For the U.S. Postal Service:

Mr. Edward F. Ward

For the American Postal Workers Union:

Mr. Anton G. Hajjar

For the National Association of Letter Carriers:

Ms. Michelle D. Guerra

PLACE OF HEARING: Washington, D.C.

DATES OF HEARING: December 20, 1991; May 4, 1992; May 5, 1992; June 4, 1992; June 5, 1992; July 16, 1992; July 17, 1992; August 20, 1992; August 21, 1992; and October 15, 1992

POST-HEARING BRIEFS: February 15, 1993.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer violated Article 4 by failing to honor contractual rights of employes set forth in Article 4.3 of the parties' National Agreement. It is the Employer's obligation to determine tasks involved in Remote Video Encoding work. Once the nature of the job has been defined, it is the Employer's obligation to identify those employes capable of being trained for the job who should have had an opportunity to apply for the work. Once that task is accomplished, the Employer shall create a position or modify an existing one in order to offer the new jobs to affected workers. It, of course, is the Employer's obligation to provide the jobs in a manner consistent with other provisions of the parties' agreement. The arbitrator shall retain jurisdiction in this matter in order to resolve any problems that might result from implementing the award in this case. It is so ordered and awarded.

DATE: May 20, 1993

Carlton J. Snow

Carlton J. Snow
Professor of Law

IN THE MATTER OF ARBITRATION BETWEEN UNITED STATES POSTAL SERVICE AND AMERICAN POSTAL WORKERS UNION AND NATIONAL ASSOCIATION OF LETTER CARRIERS (Case Nos. H7C-NA-C 96 and HOC-NA-C 6)	ANALYSIS AND AWARD Carlton J. Snow Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from July 21, 1987 to November 20, 1990. The parties filed the initial grievance in the matter on November 2, 1990 challenging (chiefly under Article 4) a decision by the Employer to sub-contract the performance of certain Remote Bar Coding services. Hearings took place on December 20, 1991, May 4, 1992, May 5, 1992, June 4, 1992, June 5, 1992, July 16, 1992, July 17, 1992, August 20, 1992, August 21, 1992, and October 15, 1992. All meetings were held in a conference room of the United States Postal Service Headquarters located at 475 L'Enfant Plaza in Washington, D.C. Mr. Edward F. Ward, Chief Counsel of Labor Relations, represented the United States Postal Service with assistance from Mr. Kevin D. Rachel. Mr. Anton G. Hajjar of the O'Donnell, Schwartz & Anderson law firm in

Washington, D.C., represented the American Postal Workers Union, with assistance from Mr. Larry Gervais, Special Assistant to the President of the American Postal Workers Union. Ms. Michelle D. Guerra of the Cohen, Weiss & Simon law firm in New York City represented the National Association of Letter Carriers.

The hearings proceeded in an orderly manner. There was a full opportunity to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. A court reporter for Diversified Reporting Services, Inc. reported all proceedings and submitted a transcript of 1,689 pages. The advocates fully and fairly represented the parties.

The arbitrator bifurcated the first hearing to address issues of arbitrability. Following an intervention by the National Association of Letter Carriers, however, the parties stipulated that the grievance was arbitrable and authorized the arbitrator to hear and decide the case on its merits. The parties also agreed to consolidate the initial grievance with a subsequent grievance challenging the same decision by the Employer to subcontract certain work under Article 32 of the parties' agreement. At the first hearing on the merits of the consolidated grievance, the Employer challenged the procedural arbitrability of the grievance encompassing Article 32 as it pertained to the first nine contracts covering remote keying that had been let by the Employer. There, however, were no other challenges to the substantive or procedural

arbitrability of the grievance. The parties agreed that the arbitrator had jurisdiction to proceed to the merits of the case and authorized him to state the issues.

The parties elected to submit post-hearing briefs. The Employer submitted a brief of 294 pages with an Appendix of 113 pages. The American Postal Workers Union submitted a brief of 176 pages. The parties submitted an unusually extensive record, and the index for the Union's exhibits covered twenty-three single-spaced, typewritten pages.

II. STATEMENT OF THE ISSUES

Did the Employer violate Articles 4 or 32 when it subcontracted work associated with video encoding for the Remote Bar Coding System? If so, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 4 - TECHNOLOGICAL AND MECHANIZATION CHANGES

Section 3. New Jobs

Any new job or jobs created by technological or mechanization changes shall be offered to present employees capable of being trained to perform the new or changed job and the Employer will provide such training. During training, the employee will maintain his/her rate. It is understood that the training herein referred to is on the job and not to exceed sixty (60) days. Certain specialized technical jobs may require additional and off-site training.

An employee whose job is eliminated, if any, and who cannot be placed in a job of equal grade shall receive rate protection until such time as that employee fails to bid or apply for a position in the employee's former wage level.

The obligation hereinabove set forth shall not be construed to, in any way, abridge the right of the Employer to make such changes.

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 Unions at the national level when subcontracting which will have a significant impact on bargaining unit work is being considered and will meet to consider the Unions' views on minimizing such impact. No final decision on whether or not such work will be contracted out will be made until the matter is discussed with the Unions.

IV. STATEMENT OF FACTS

In this case, the American Postal Workers Union and the National Association of Letter Carriers challenged the Employer's decision to subcontract work associated with a new Remote Bar Coding System. The Remote Bar Coding System is one of many projects designed to automate mail processing. The goal of automated processing is to place a computer readable bar code on virtually all letter mail by 1995.

Through the use of rate incentives, the Employer has encouraged its customers to pre-bar code approximately forty percent of the mail volume in the United States. Bar coded mail can be automatically sorted at high speeds by a bar code sorter. A "bar code sorter" is defined as:

> A computer-controlled, high speed machine that sorts letters, based upon an imprinted bar code. Consisting of a mail feed and transport unit, stacker module, and associated electronic equipment, it can sort into 96 separations. (See, Clossary of Postal Terms, 60).

Use of the bar code sorter reduces a need for manual and other mechanized sorting. It, of course, also reduces a need for skilled employes capable of memorizing complicated sorting schemes and operating other mechanized sorting equipment.

The Employer also has developed multi-line optical character readers. Multi-line optical character readers electronically scan or "read" the address of a letter and determine the correct nine-digit ZIP code. Once the code has been determined, the machine sprays the appropriate bar code on the letter. Letters successfully read by the multi-line

optical character reader, then, are processed on bar code readers. The Employer anticipates that another forty percent of the mail can be routed to bar code readers using multi-line optical character readers.

It is the remaining twenty percent of the mail which is not pre-coded and cannot be read by the multi-line optical character readers that prompted the Remote Bar Coding System at issue in this grievance. The Remote Bar Coding System functions by bringing additional computer systems to bear on mail unreadable by the multi-line optical character readers. Two additional systems are used by the Employer.

First, mail rejected by multi-line optical character readers is re-read by a Remote Computer Reading system. The Remote Computer Reading system attempts to do what the multi-line optical character reader tries to do, but at a slower pace. Typically, the Remote Computer Reading system will be able to bar code about twenty-five percent of what the multi-line optical character readers reject. (See, Employer's Exhibit No. 13). Remaining unreadable mail is to be processed by remote video encoding.

Remote Video Encoding is the final step in the Remote Bar Coding system, and it has provided impetus for the central disagreement in this dispute. When the multi-line optical character readers cannot "read" an address on a letter, it "tags" the letter and stores an electronic image of the address in its computer memory. It is this stored electronic image that the Remote Computer Reading system, then, tries to

decipher. If the Remote Computer Reading system is unsuccessful, the image can be displayed on a computer video terminal. This computer terminal display is the heart of the Remote Video Encoding system.

Operators of the Remote Video Encoding system read the address for the video image and key in information necessary for the computer to determine the proper ZIP Code. Once the computer is confident of the proper ZIP Code, this information is returned to the bar code sorters. Bar code sorters, then, can process the mail as they would other pre-coded or MLOCR-coded mail. There, of course, is no need for the mail itself ever to leave the postal facility and no need, given modern communication systems, for a Remote Video Encoding facility to be anywhere near existing postal facilities.

As part of the Remote Bar Code system, the Employer tested the bar code sorting, remote computer reading, and remote encoding technology at two test sites in the eastern United States. Then management established these "early activation" pilot sites in Western Gnaws, New York and Louisville, Kentucky. Both test sites demonstrated the value of the new technology, and management determined that the Remote Bar Coding system would be implemented nation-wide.

On June 18, 1990, the Employer made a preliminary decision to subcontract the Remote Video Encoding keying portion of the Remote Bar Code System. (See, Employer's Exhibit No. 66). Accordingly, the Employer began developing a comparative analysis of subcontracting costs and "in-house" costs of

performing Remote Video Encoding work. A series of rather detailed exchanges of information regarding the Remote Bar Coding System took place between the parties. Those exchanges overlapped and became the subject of contract negotiations.

A comparative analysis of subcontracting the work suggested a net saving to the enterprise of 4.3 billion dollars over the ten year operating period of the project. It was determined that contracting out the work would have a present value to the U. S. Postal Service of 1.97 billion dollars. (See, Employer's Exhibit No. 64). According to the Employer's analysis, contracting out is advantageous because of the less expensive labor rate available in the private sector, the decreasing need for Remote Video Encoding as Remote Computer Reading equipment evolves, and because the parties' collective bargaining agreement could not easily accommodate the part-time nature of the work. (See, Tr., June 5, 1992, pp. 153-55).

On June 28, 1990, the American Postal Workers Union filed its grievance asserting that the Employer had no authority to contract out bargaining unit work on the scale proposed in its test sites and that such action constituted a violation of the parties' agreement. On July 9, 1990, the Employer reiterated its "preliminary decision" to subcontract the Remote Video Encoding work. (See, Employer's Exhibit No. 13). The parties continued to discuss the contracting out issue at the bargaining table, in the Article 32 confrontation process,and under the grievance procedures of Article 4. An Article 32 grievance was filed on December 18, 1992. When

the parties were unable to resolve their differences, the matter proceeded to arbitration.

V. POSITION OF THE PARTIES

A. Introduction

Because of the importance of this dispute, both parties have offered hundreds of pages of argument in post-hearing "briefs." The briefs have advanced detailed arguments covering virtually every conceivable aspect of the dispute. Evidence has been drawn from many days of hearing and thousands of documents. It would serve no purpose to summarize a record of such gargantuan proportions.

The arbitrator has made no attempt to reproduce the monumental effort of the parties. There has been an attempt by the arbitrator to state the positions of the parties that are crucial to resolving this particular conflict. It is within this context that the positions of the parties are set forth.

B. The Unions:

Having offered more than a hundred pages of "facts," the Unions argue that the encoding job of the Remote Bar Code System is a new or changed job within the meaning of Article 4 in the parties' agreement. According to the Union, Article 4.3 of the National Agreement requires that new or changed jobs created by technological or mechanized changes must be offered to present employes capable of being trained to perform the new work. The Unions contend that Remote Video Encoding jobs are such "new" or "changed" jobs.

It is the position of the Unions that the plain meaning of Article 4.3 is dispositive of the dispute. According to the Unions, the disputed sentence of Article 4.3 means that, "if technological or mechanization-type changes create any new or changed jobs, the Employer must offer those jobs to present employees." The necessity of offering the jobs to present employes, according to the Unions, precludes subcontracting the work.

According to the Unions, there is an important distinction between "jobs" and "positions." The Unions argue that, while every position is a job, not every job is a position. The distinction, according to the Unions, is important because the Employer creates "positions" but not necessarily "jobs." The Unions argue that a "position" may contain any number of "jobs." Jobs, according to the Unions, are created by duties and responsibilities within a position. Accordingly, the Unions conclude that changes in the workplace, such as changes

contemplated in Article 4, can and do create jobs, whether or not the Employer chooses to create corresponding positions.

The Unions also maintain that their interpretation of Article 4.3 is consistent with (1) the Postal Reorganization Act, (2) the purposes of Article 4, and (3) bargaining history.

The Unions assert that the Postal Reorganization Act resulted in needed reforms. According to the Unions, the Postal Reorganization Act contained a "social compact" intended to deal with issues underlying a postal workers' strike in 1970. The Unions argue that the compact included the promise that workers would benefit from, rather than be harmed by, technological changes necessary to make the Postal Service an efficient, modern business.

The purpose of Article 4.3 in the parties' National Agreement, according to the Unions, is to give the social compact contained in the Postal Reorganization Act expression in the parties' collective bargaining agreement. The Unions contend that the existence of Article 4, in a relatively unchanged state since the parties' first agreement in 1971, shows that they intended any benefits of technological development to inure to existing workers. According to the Unions, the purpose of Article 4 in the parties' agreement is both to protect existing workers from harsh effects of automation and to secure for existing employes new jobs or training when changes caused by technology occur in the workplace.

The Unions contend that Article 4 represents a bargained-for

balance between interests of the Employer (being able to make necessary technological changes without bargaining or litigating each change with the Unions) and the Unions' interest (keeping new jobs that result from technological changes for existing workers). It is the belief of the Unions that the parties collapsed the gap between them by adopting Article 4 of the National Agreement. According to the Unions, the "new jobs" provision of Article 4 was part of a quid pro quo for the right of the Employer to introduce technological changes. This bargained-for balance, according to the Unions, is reflected in the contemporaneous document entitled Local Post Office Orientation Program Prior to Installation of 1971-73 National Agreement.

As an example, the Unions have pointed to the following quotation from the 1971 orientation program as evidence of their claim:

> The article [Article 4] provides management with the right to make technological and mechanization changes. However, it will offer any resulting new jobs to present employees capable of being trained for them. The Postal Service will provide the necessary training. Negotiations with the Unions will be limited to the impact such changes may have on employees.

That this 1971 orientation document of the Employer reflected the bargain of the parties, argues the Unions, is demonstrated by the Unions' subsequent focus of attention on other aspects of Article 4, rather than the "new jobs" provision. According to the Unions, the relative lack of negotiation over the "new jobs" provision of Article 4 demonstrates that the parties

assumed new jobs would remain in the bargaining unit.

The Unions also rely on the course of performance by the parties under Article 4 in order to support their contention that any new jobs created by technological change must go to the bargaining units. According to the Unions, there is no past instance of the Employer contracting out a new or changed job. The Unions argued it is reasonable to imply that, until Remote Video Encoding, the Employer did not believe it had a contractual right to subcontract such work.

Because they believe Article 4 protects bargaining unit work, the Unions categorically reject the Employer's contention that management is free to contract out such work under provisions of Article 32. According to the Unions, Article 32 of the National Agreement is a general contracting provision which must give way to more specific provisions of Article 4.

In summary, the Unions contend that Article 4.3 would have no meaning if Article 32 preempts Article 4.

C. The Employer

The Employer argues that its decision to contract out the Remote Video Encoding portion of the new Remote Bar Coding System is consistent with and permitted by Article 32. According to the Employer, Article 32 is a procedural provision requiring no more of the Employer than that it give "due consideration" to certain factors prior to subcontracting

Postal Service work. The Employer contends that it has complied with these contractual procedural requirements and that, therefore, management did not violate Article 32 when the Employer decided to subcontract the Remote Video Encoding work created by the new Remote Bar Coding System.

The Employer also argues that Article 4 of the National Agreement does not prohibit it from subcontracting Remote Video Encoding work under Article 32. The Employer rejects as unfounded and unsupported any contention that Article 4 in some way interferes with its right to subcontract Postal Service work under Article 32. According to the Employer, the word "jobs" in Article 4 was not intended by the parties to have any meaning separate from the word "position."

"Jobs" and "positions," according to the Employer, are interchangeable terms for purposes of interpreting the parties' collective bargaining agreement. According to the Employer, there are any number of places in the present collective bargaining agreement where terms are used in a manner that shows the parties intended no distinction between them. Accordingly, the Employer argues that "new jobs," like any "job" or "position," are not created until the Employer itself creates the job. Since no "job" was created by the Employer in this case, management argues that Article 4 is irrelevant to its decision to subcontract work under Article 32.

The Employer also maintains the bargaining history of Article 4 demonstrates that the contractual provision was not intended to limit management's right to subscontract work

under Article 32. According to the Employer, bargaining history of the provisions reveals that both Articles 32 and 4 of the National Agreement implicates critical areas of managerial rights over which the Employer was willing to suffer a strike rather than compromise its rights. The Employer maintains that the repeated failure by the Unions to gain improvement in their position under Article 4 or Article 32 demonstrates the fact that the present argument about Article 4 prohibiting what is allowed under Article 32 is simply unfounded.

The Employer also rejects any notion that past practices of the parties under Article 4 support the Union's contention that work created by new technology cannot be subcontracted. According to the Employer, the Union's proof of a past practice of not subcontracting such work falls far short of the evidentiary standard required to bind management. The Employer maintains that, while it is true past jobs created by new technology have created new jobs and training opportunities for existing workers, the present situation with the Remote Video Encoding System has been created outside of a postal facility by advancements in technology. Because video encoding is the first off-site job created by new technology, past practice, according to the Employer, provides no basis for concluding that the disputed work cannot be subcontracted under Article 32.

VI. ANALYSIS

A. Did the Employer Violate Article 4?

1. History of Article 4

It must be decided whether the Employer violated Article 4 when it subcontracted work associated with encoding for the Remote Bar Coding System. It was in 1968 that the parties achieved the last agreement between them before the advent of true collective bargaining under the Postal Reorganization Act of 1970. In 1968, the parties considered effects of "mechanization" on postal employes. They reflected their consideration in Article XXV of the 1968 agreement. Article XXV of the 1968 agreement stated:

> MECHANIZATION
>
> A. It is recognized that representatives of Employee Organizations can contribute to the efforts of the Department in the area of mechanization. Therefore, while the Department retains the right to determine the methods, means and personnel by which operations are conducted, a mechanization committee shall be established. The committee shall be primarily concerned with the effects on personnel of proposed or adopted mechanization.
>
> B. Representation on the committee, to be specifically determined by the Department and the Organizations, shall include one person from each of the Organizations and representatives from appropriate Bureaus in the Department.
>
> C. In relation to mechanization, the committee shall:
>
> 1. Be consulted about proposed implementation.
>
> 2. Identify and discuss problems resulting from mechanization.
>
> 3. Propose solutions to problems.
>
> 4. Be advised of research where appropriate.

D. The committee shall be scheduled to meet bi-monthly and at such other times as the committee may deem necessary.

E. The effects on personnel of proposed and adopted mechanization are proper subjects for consultation or exchange of information, as appropriate, at Labor-Management meetings at the installation level.

In 1971, during their first collective bargaining relationship following the Postal Reorganization Act, the parties again addressed the issue of technological or mechanized changes. On January 28, 1971, the American Postal Workers Union offered the following proposal:

> Advance notice of technological and other changes in the operation, processing and delivery shall be given to the Unions. A training program shall be established to qualify employees for newly created positions. No employee shall be downgraded or suffer any loss in compensation in the event of any such changes. Advance notice shall be given to the Unions as soon as the Employer has under consideration any such changes which in any way affect the wages, hours, tenure, or working conditions of employees or the hiring of additional employees. The Union shall be advised of the nature of such changes as they are being considered. There shall be established a joint labor-management operational changes committee composed of an equal number of management and union representatives. In the event that management determines that it wishes to institute any changes of the kind described above, either technological or otherwise, management shall give the Unions at least ninety days advance notice that it intends to introduce such changes. The joint labor-management committee shall meet forthwith and negotiate regarding any issues concerning wages, hours, tenure and working conditions of any employees who would be affected by such changes. If the committee fails to resolve any such issue or issues within ninety days of giving such notice, then such unresolved issue or issues shall at the request of either party be submitted to final and binding arbitration. No changes shall be instituted unless and until the arbitrator has issued an award permitting such change or changes.

"Experiments" are included in the scope of these proposals. (See, Union's Exhibit D , Tab 1). emphasis added).

The parties memorialized the provision of the final 1971 agreement addressing the issues raised by the Union in Article 4 of the National Agreement. This provision stated:

ARTICLE 4: TECHNOLOGICAL AND MECHANIZATION CHANGES

Both parties recognize the need for improvement of mail service.

Section 1. The Unions party to this agreement will be informed as far in advance of implementation as practicable of technological or mechanization changes which affect jobs including new or changed jobs in the area of wages, hours, or working conditions.

Section 2. There shall be established at the National Level a Joint Labor-Management Technological Mechanization Changes Committee composed of an equal number of representatives of management and the Union representatives. Notice to said Committee shall satisfy the notice requirements of the preceding paragraph. Upon receiving notice, said Committee shall attempt to resolve any questions as to the impact of the proposed change or changes upon affected employees and if such questions are not resolved within a reasonable time after such change or changes are operational, the unresolved questions may be submitted by the Union to arbitration under the grievance-arbitration procedure.

Section 3. Any new job or jobs created by technological or mechanization changes shall be offered to present employees capable of being trained to perform the new or changed jobs, and the Employer will provide such training. During the training, the employee will maintain his rate. It is understood that the training herein referred to is on the job and not to exceed sixty (60) days. Certain specialized jobs may require additional and off-site training.

Employees whose jobs are eliminated, if any, and who cannot be placed in a job of equal grade, shall receive rate protection for a period not to exceed the term of this Agreement.

The obligation herein above set forth shall not be construed to in any way abridge the right of the Employer to make such changes. (See, Union's Exhibit D, Tab 4, p. 7).

Since 1971 Article 4 has been the subject of bargaining in each of the parties' agreements, as both parties conceded. In each bargaining period since 1971, the Union has sought to (1) create a binding interest arbitration process that must be completed before the Employer can "institute" changes; (2) prohibit the creation of "new or changed" jobs without Union agreement; and (3) expand rate protection and training rights for existing employes. (See, Union's Exhibit D, Tabs 8, 12, 18, 23, 28, and 34). In response to these pressures, Article 4 in the parties' National Agreement has changed only slightly over the years.

As it has since 1975, Article 4 presently states:

TECHNOLOGICAL AND MECHANIZATION CHANGES

Both parties recognize the need for improvement of mail service.

Section 1. Advance Notice

The Unions party to this Agreement will be informed as far in advance of implementation as practicable of technological or mechanization changes which affect jobs including new or changed jobs in the area of wages, hours or working conditions. When major new mechanization or equipment is to be purchased and installed, the Unions at the national level will be informed as far in advance as practicable, but no less than 90 days in advance.

Section 2. Labor-Management Committee

There shall be established at the national level a Joint Labor-Management Technological or Mechanization Changes Committee composed of an equal number

of representatives of management and of the Union representatives. Notice to said Committee shall satisfy the notice requirements of the preceding paragraph. Upon receiving notice, said Committee shall attempt to resolve any questions as to the impact of the proposed change upon affected employees and if such questions are not resolved within a reasonable time after such change or changes are operational, the unresolved questions may be submitted by the Unions to arbitration under the grievance-arbitration procedure. Any arbitration arising under this Article will be given priority in scheduling.

Section 3. New Jobs

Any new job or jobs created by technological or mechanization changes shall be offered to present employees capable of being trained to perform the new or changed job and the Employer will provide such training. During training, the employee will maintain his/her rate. It is understood that the training herein referred to is on the job and not to exceed sixty (60) days. Certain specialized technical jobs may require additional and off-site training.

An employee whose job is eliminated, if any, and who cannot be placed in a job of equal grade shall receive rate protection until such time as that employee fails to bid or apply for a position in the employee's former wage level.

The obligation hereinabove set forth shall not be construed to, in any way, abridge the right of the Employer to make such changes.

2. Interpretation of Article 4

The parties offered novel, often conflicting interpretations of Article 4 and the purpose for adopting it. For the most part, those arguments failed to be persuasive because there was a failure to focus attention on the language of Article 4 itself. The Employer suggested that the fundamental issue in the case was whether Article 4 limits management's right to subcontract work under Article 32. Because of its approach to the problem, the Employer's effort went foremost to arguing in favor of its broad authority under Article 32 and that Article 4 was never intended to interfere with this pervasive authority. The Unions, on the other hand, attempted to cast workplace changes caused by the Employer's subcontracting of Remote Video Encoding work as some sort of issue for interest Arbitration to be addressed under Section 2 of Article 4. The Unions contended that Article 4 protects members of the bargaining unit by prohibiting the subcontracting of work created by advancing technology.

The history and language of Article 4 demonstrate that the provision was never intended to interfere with or limit rights that might be enjoyed by either party under other provisions of the collective bargaining agreement. The 1968 provision dealing with mechanization and each provision since then clearly have focused on the impact of changes on existing employes with regard to the way mail is processed and delivered. The scope of the 1971 version of Article 4 failed to exceed the scope of issues addressed in the 1968 agreement.

In 1968, the Employer retained the right to change the manner and method of mail processing and delivery by the introduction of technology. That right expressly has been retained in the last sentence of every version of Article 4, including the last agreement between the parties. In 1968, the Unions were concerned with (1) notification of changes in the workplace; (2) some influence on how or whether those changes would be made; and (3) some way to resolve problems caused by the changes for members of the bargaining unit. Each version of Article 4 has addressed these areas of concern.

Although the Employer has retained the right to change the manner and method of mail processing in response to technological developments, Article 4 has placed certain contractual obligations on management when the Employer engages in such changes. In this particular dispute, the conflict is over the nature of the Employer's obligations under Article 4.3. In reality, the only disagreement between the parties is about the meaning of the first sentence of Article 4.3.

Language in the first sentence of Article 4.3 never has been changed by the parties. It reads now as it has since 1971, namely,:

> Any new job or jobs created by technological or mechanization changes shall be offered to present employees capable of being trained to perform the new or changed job, and the Employer will provide such training.

The fundamental disagreement between the parties is about who

will get jobs and training necessary to perform the work when technological advancements change the way mail is processed.

According to the Unions, the first sentence must be interpreted, using all the usual common law principles of contract interpretation,to mean that, when the development of technology creates work that bargaining unit members can be trained to perform, the Employer must give not only training but also the work to appropriate bargaining unit members. Since the Unions believe the work must go to the membership, they have contended that the work cannot be subcontracted pursuant to Article 32. Such subcontracting, according to the Union's theory of the case, would render meaningless the obligation of Article 4.3 to offer the work and train the employes.

The Employer has contended that, under the parties' agreement, management alone can "create" jobs. According to the Employer's theory of the case, management has created or changed no "job;" and, therefore, the Employer has no obligation to offer jobs or to train workers because no such obligation ever arose. As long as the decision to subcontract the work was consistent with its obligations under Article 32, the Employer has concluded that it was free to forego the creation of Postal Service jobs.

Much of the Unions' "offer and training" argument depends on a definition of the words "jobs" and "positions." According to the Unions, the Employer creates "positions" under Article 1.5 of the National Agreement, but technology itself

creates "jobs." Such a theory, while highly creative, helps but little to explicate the goal of understanding the nature of management's "offer and training" obligation under Article 4. Technology by itself does not, indeed cannot, create either "jobs" or "positions."

Jobs are created when technology is applied to accomplish work. Positions are created when the new job is categorized by applying some existing method of differentiation among jobs. There is no question about the fact that the Employer alone creates positions. Indeed, the standards for that differentiation are set forth in Article 1.5 of the National Agreement. There can be no substantial question about the fact that the Employer, not technology, creates jobs.

It is the Employer alone who must decide whether particular technology should be applied to existing means and methods of mail processing and delivery. The mere existence of technology is not sufficient. Nor is the use of new technology by postal subcontractors relevant under Article 4 of the parties' agreement. What is important is the decision to apply technology or mechanization to the existing system in such a way that the system is suitably changed. Only when the Employer chooses to exercise its unilateral right to introduce technological or mechanized changes into the workplace does its obligation under Article 4.3 arise.

Evidence submitted to the arbitrator in this case has made clear that the Employer developed a plan to change the

way mail is processed. The Remote Bar Coding System calls for retrofitting existing machinery as well as purchasing and installing new equipment. Pursuant to the Employer's directives, machines were retrofitted; and new equipment and "softwear" have been purchased. Beyond any doubt, the new manner and method of mail processing resulted from technological and mechanized changes.

Because the Remote Bar Coding System involves technological and mechanization changes, the Employer had a contractual obligation to keep its promise under Article 4.3 of the parties' agreement. The Employer seemingly realized that this was the case because it acknowledged its obligation under the "rate protection" provision of Article 4.3. Accordingly, the only issue is whether the technological and mechanization changes implemented by the Employer created any new jobs.

The creation of new jobs by technological or mechanization "changes" does not necessarily require the creation of new positions under Article 1.5 of the parties' agreement. Recall the verbiage of Article 1.5. It states:

> Each newly created position shall be assigned by the Employer to the national craft unit most appropriate for such position within thirty (30) days after its creation.

This provision would become important only after new jobs created by changes in the means and methods of mail processing had been identified and offered to present employes. Only if present employes were interested in and capable of being trained for the new positions might it be necessary for the

Employer to create new positions under Article 1.5. In some cases, the technological changes might not even require the creation of new positions but merely a change in duties of an existing one.

The question, then, remains whether or not introduction of the Remote Bar Coding System created "new jobs." As previously explained, it is the Employer, not the technology, that creates jobs. Consequently, before it can be said that new jobs have been created, it is necessary to identify purposeful conduct by the Employer that fairly can be said to have created tasks sufficiently different from present tasks to be considered a new job. A new job, of course, must result directly from introducing technological or mechanization changes to the existing means and methods of processing or delivering mail.

The Employer's own "Executive Summary" of the solicitation it offered for the subcontracted keying services documents action of management with respect to Remote Video Encoding. (See, Unions' Exhibit B, vol. 1, Tab 19). From the summary, it is clear that no Remote Video Encoding jobs (video image reading tasks) would have been created but for the purposeful conduct of the Employer. Remote Video Encloding jobs, whether in-house or subcontracted, resulted directly from the purchase and deployment of Postal Service equipment and "softwear" in order to change the method of mail processing.

The Employer not only caused equipment and "softwear" necessary to the new mail processing task of Remote Video

Encoding to be developed, but also it actually purchased all the equipment and "soft wear" necessary to make Remote Video Encoding operational. A person working at Remote Video Encloding tasks is working on Postal Service equipment. Not only is a Remote Video Encloding worker working on Postal Service equipment, but he or she is interacting directly with the ZIP + 4 Database of the Employer. The work product of a Remote Video Encoding worker is fed directly into bar code sorters of the Employer in a Postal Service facility. The Remote Video Encoding worker is a fundamental component of the means of processing the mail.

For purposes of Article 4.3 in the parties' agreement, the Employer created a new mail processing task and, hence, a "new job" when it purchased equipment and "softwear" necessary for Remote Video Encloding and integrated that operation directly into the means and methods of processing the mail. The fact that the Employer used its contractual rights under Article 32 of the National Agreement to transfer those jobs to the private sector has nothing to do with its obligations under Article 4 of the agreement. An obligation under Article 4 of the agreement arose when the "new job" was created. That action took place no later than the time when the Employer purchased the equipment and "softwear" necessary to perform Remote Video Encoding tasks and integrated them into the existing means and methods of processing the mail.

B. Resolving the Conflict

Permeating every contract in the United States is the common law doctrine of good faith. As Restatement (Second) Section 205 instructs, "Every contract imposes on each party a duty of good faith and fair dealing in its performance and its enforcement." By contrast, one scholar has maintained that behavior by a party that is "contrary to the other party's understanding of their contract, but not necessarily contrary to the agreement's explicit terms," is characterized as opportunism and not acting in good faith. (See, Muris, 65 Minnesota Law Review, 521 (1981)). The concept of good faith incorporates values of fairness and not only limits undesirable conduct but also may require affirmative action as well. In other words, the doctrine of good faith teaches that a party may be under a contractual duty not only to refrain from engaging in undesirable conduct such as subterfuge but also may be required to act affirmatively in an effort of cooperation to achieve the mutual goals of the parties' agreement. As the Court has stated in one example, "The promisee . . . must not only not hinder this promissor's performance; he must do whatever is necessary to enable him to perform." (See, Kehm Corporation, 93 F. Supp. 620 (1950)).

The first sentence of Article 4.3 states:

> Any new job or jobs created by technological or mechanization changes shall be offered to present employees capable of being trained to perform the new or changed job, and the Employer will provide such training.

The plain meaning of the Employer's obligation under the first sentence of Article 4.3 is to offer its present employes who can be trained to perform the work any jobs created by technological and mechanization changes. The Remote Video Encoding job is a new job created by technological or mechanization changes purposefully implemented by the Employer. Accordingly, the Employer was obligated to "offer" the new job to present employes "capable of being trained to perform the new or changed job."

It is unduly restrictive to view the issue only in terms of whether Article 4 of the National Agreement prohibits subcontracting of "core functions" or "traditional bargaining unit work." Those concepts lack logical symmetry with Article 4. Article 4 does not prevent the Employer from introducing technological changes, and it does not explicitly require the Employer to reserve "core functions" or "traditional bargaining unit work" for members of the bargaining unit. It, instead, requires the Employer to offer new jobs to present employes who can be trained to perform the work.

The thrust of Article 4 is to require the Employer to "offer" the jobs. It does not demand that the jobs be accepted. Nor does Article 4 itself determine the wage rate, hours, or conditions of new jobs. What Article 4 requires is that, when the Employer's deliberate implementation of technological changes creates new jobs, those jobs first must be offered to present employes. Article 4 does not differentiate between those jobs that might be desirable to present employes

and those that might not. That is for present employes to decide once the job has been offered.

The Remote Video Encoding job is not so much a highly skilled job as it is a "high tech" job. That is, the use of "smart" machines makes it possible for someone with little training and few skills to do what previously could be done only by a highly trained and skilled employe. Assuming remote computer reading technology advances as anticipated, the Remote Video Encoding job will be not only work requiring minimal skills but also of short duration. Judging from evidence submitted to the arbitrator, it is likely to be part-time work as well.

Given the nature of the Remote Video Encoding job and the rate protection provision of Article 4, it is highly unlikely that existing mail sorters will be interested in Remote Video Encoding jobs. This is not to say that other entry level personnel might not be interested. Under Article 4 of the parties' agreement, all employes "capable of being trained" must have the choice.

Evidence submitted to the arbitrator in this case made clear that existing work rules make it difficult for the Employer to incorporate such a job into its operation in a cost effective manner. Indeed, most of the phenomenal savings anticipated by subcontracting Remote Video Encoding work appear to flow as much from the flexibility of the private sector as from lower wage scales. It, however, is not an appropriate role for an arbitrator to evaluate the equivalency

of the parties' bargain. The clear intent of the parties in Article 4 is that present employes be offered new jobs created by the purposeful introduction of technological or mechanization changes. The fact that changes made by the Employer produce jobs that fit poorly to existing work rules does not alter the contractual obligation in Article 4.3 of the parties' agreement, although it may guide both parties toward necessary future changes in wages, rules, and conditions of employment.

C. What is an Appropriate Remedy?

Advancing technology is destined to have an enormous impact on the workplace. Technology not only tends to drive down skills required to accomplish certain routine tasks, but also it tends to reduce the number of workers required to accomplish tasks. Moreover, technology creates the potential for far more flexible operations in terms of hours and conditions. To a considerable extent modern business has been created by technology and, at the same time, is now the primary innovator of technology. Evidence submitted to the arbitrator made clear that both parties must be concerned with the impact and consequences of technology, not only on bargaining unit members but also on the economic viability of the agency itself.

The Unions have not seen themselves as beneficiaries of modern advancing technology. Each bargaining session has

seen proposals designed to take control of the pace of technological change from the Employer and vest it ultimately in arbitrators under a type of interest arbitration proceeding. The Unions have not been successful in creating such a model, and the Employer remains solely responsible for the introduction of technology. It also determines, consistent with provisions of the parties' agreement, wages, hours, and working conditions.

At the same time, the parties have agreed that the Employer is obligated to offer jobs created by advanced technology to members of the appropriate bargaining unit, and this contractual obligation required the Employer to offer the Remote Video Encoding jobs it created by implementation of the Remote Bar Coding System to present employes. As a result, management must now determine the nature of those jobs and offer them to appropriate employes. Results of the offer will determine the extent of any remedial action necessary to place those workers who, but for the contractual violation, would have been capable of being trained for and willing to accept a Remote Video Encoding job.

If present employes, capable of being trained to do the job, desire it, the contract between the parties mandates that they have an opportunity to perform the work. The contractual obligation imposed on the Employer under Article 4.3 of the National Agreement extends only to employes employed on or before the date the Employer first purchased and installed the Remote Video Encoding equipment. Once management

determines wages, hours, and conditions of the Remote Video Encoding job consistent with the parties' agreement and offers the work to employes, its contractual obligation under Article 4 of the National Agreement has been fulfilled. There, of course, is an obligation actually to provide the jobs for those employes who can be and, ultimately are trained to perform the work.

The Employer violated the parties' agreement not because it subcontracted the Remote Video Encoding work but because it contractually agreed first to offer the work to present employes and ignored the obligation. Rights set forth in Article 4.3 of the parties' agreement benefit individual, present employes. The point is that the scope of the remedy should not exceed the scope of the contractual violation. If individuals have been harmed, those individuals need to be made whole.

D. The Matter of Article 32

The parties devoted considerable time to whether or not the Employer violated Article 32 when management subcontracted work associated with encoding for the Remote Bar Coding System. While there is no question about the fact that requirements of Article 32 in the parties' agreement are applicable to the Employer's decision to subcontract the Remote Video Encoding portion of the RBCS, it is clear that

those requirements have been met in this case. Apart from purely procedural requirements of the provision, Article 32 in the National Agreement requires only that:

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

The nature of the burden to be met when there is a challenge to a managerial decision under Article 32 most recently has been addressed in Case No. H4V-NA-C 84. 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. This represents the bargain struck by the parties, and it is not an appropriate role for the arbitrator to evaluate the wisdom of the parties' equivalent exchange. Perhaps, such a role is appropriate in interest arbitration but certainly not in rights arbitration.

Evidence submitted to the arbitrator failed to establish that the Employer did not give the required factors "due consideration." The Unions seem to view Article 32 only as a defense to their contention that Article 4 protected "traditional bargaining unit work" from being subcontracted. For that reason, there was little appreciation for the fact that the Employer's rights and obligations under Article 32 are not inextricably linked to obligations under Article 4 of the parties' agreement. Obligations under Article 4 extend to individuals, and present employes have "offer and training"

or "rate protection" rights pursuant to Article 4 of the National Agreement. Subcontracting rights under Article 32 are not contractually linked to these individual rights.

The Employer accepted an obligation to defend its decision to subcontract the Remote Video Encoding work, even though the burden clearly was on the Unions to show that the Employer failed to give due consideration to the required contractual factors. The Union, for its part, never carried such a burden. There, however, was clear and convincing evidence presented by the Employer regarding the factors set forth in Article 32 to demonstrate that due consideration had been given them.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer violated Article 4 by failing to honor contractual rights of employes set forth in Article 4.3 of the parties' National Agreement. It is the Employer's obligation to determine tasks involved in Remote Video Encoding work. Once the nature of the job has been defined, it is the Employer's obligation to identify those employes capable of being trained for the job who should have had an opportunity to apply for the work. Once that task is accomplished, the Employer shall create a position or modify an existing one in order to offer the new jobs to affected workers. It, of course, is the Employer's obligation to provide the jobs in a manner consistent with other provisions of the parties' agreement. The arbitrator shall retain jurisdiction in this matter in order to resolve any problems that might result from implementing the award in this case. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow

Carlton J. Snow
Professor of Law

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