

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED STATES POSTAL SERVICE

and

Case 5-CA-122166

AMERICAN POSTAL WORKERS UNION,
AFL-CIO

Daniel M. Heltzer, Esq., for the General Counsel.

Rebecca Horan, Esq., (*United States Postal Service, St. Louis, Missouri*)
for the Respondent.

Darryl J. Anderson, Esq. (*O'Donnell, Schwartz & Anderson, P.C., Washington, D.C.*)
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Washington, D.C. on July 30, and August 1, 2014. The American Postal Workers Union (APWU) filed the charge on February 7, 2014 and the General Counsel issued the complaint on April 30, 2014.¹ The matter involves the Postal Service's refusal to provide the APWU unredacted copies of Form 7463-A, which is filled out by private contractors providing transportation services to Respondent. This form is part of the contract renewal process. These contracts involve work that could be performed by Postal Service employees represented by the APWU, if the work could be done by unit employees at the same cost or less than the contract price of the private contractor.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and Charging Party Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, which has its headquarters in Washington, D.C., provides postal services throughout the United States. The Board has jurisdiction over Respondent pursuant to Section

¹ The consolidated complaint included charge 5-CA-122807, which subsequently settled.

1209 of the Postal Reorganization Act. The APWU is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

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The APWU has represented employees, including motor vehicle employees of Respondent for many years. Its current collective bargaining agreement runs from November 21, 2010 to May 20, 2015. Article 32 of that contract sets forth the conditions upon which the Postal Service may subcontract bargaining unit work, G.C. Exh. 2, pp. 146-49. Generally, the Postal Service must consider the public interest, cost, efficiency, availability of equipment and the qualifications of employees when evaluating the need to subcontract. USPS must provide the APWU at least 60 days notice of its intent to subcontract unit work, or to renew a contract with a private company that is performing unit work. Pursuant to a Memorandum of Understanding which is incorporated into the current contract, the Postal Service may not renew its private contracts if the Union demonstrates that it can perform bargaining unit work at the same or lower cost, G.C. Exh. 2, p. 369. The Postal Service can cancel a contract mid-term if the Union demonstrates that it can perform all or part of a contract route for less than the contractor.

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The instant dispute over Form 7463-A

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On April 23, 2013, the Postal Service informed the Union of its decision to renew contracts with private companies (Highway Contract Routes (HCR)) for eight terminals, G.C. Exh. 12. On May 3, 2013, Michael Foster, then Assistant Director of the Union's Motor Vehicle Service Division, requested that the Postal Service provide the Union information on how the Postal Service determined that the HCR contractor could provide its services at a lower cost than bargaining unit Motor Vehicle Service (MVS) employees. Regarding the contractor's cost, the Union requested 13 Postal Service forms for each of the eight terminals. USPS assigned the number IR13-25 to these requests and ultimately complied with this request with the exception of the Postal Form 7463-A.²

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In a letter dated August 14, 2013, Respondent refused to provide the Form 7643-A, relying on the decision of a two-member Board in case 28-CA-21451, *Postal Service*, 352 NLRB 1032 (2008).

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The HCR Renewal Process

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USPS provides the Union with notice of its intent to renew a HCR contract by means of a Postal Service Form 5500.³ This form is completed by the Postal Service and provides a cost comparison between what it would cost to do the contract work in-house as opposed to renewing the HCR contract. Blocks 29-31 of Form 5500 set forth the contractors total costs. Form 5500 does not indicate how the contractor's costs were determined, i.e., the components of the bottom line figure.

² G.C. Exhibit 4 is a blank Postal Service Form 7463-A.

³ G.C. Exhibit 5 is a blank Postal Service Form 5500.

Postal Service Form 7463-A

The Form 7463-A is completed by the private contractor. The first vertical column sets forth the costs in different categories for the last prior approval of the contract. The second vertical column sets forth the costs for the proposed renewal. The horizontal entries in both columns are as follows:

- 1a Vehicle Cost
 - Motor vehicles
 - Trailers
- 1b Operational Costs (may include profit)
 - 2. Taxes
 - 3. Vehicle Registration
 - 4. Miscellaneous (may show profit)
 - 5. General Overhead (e.g. terminal costs, management and supervision)
 - 6. Fuel
 - 7. Oil
 - 8. Insurance
 - 9. Road Taxes
 - 10. Tolls
 - 11. Sub total
 - 12. Straight time
 - 13. Overtime
 - 14. Payroll taxes (e.g., Social Security, Workers Compensation, Unemployment Insurance)
 - 15. Fringe Benefits (Medical, Vacation, Holiday, Pension)
 - 16. Sub total
 - 17. Contractor's wages
 - 18. Total Cost
 - 19. Return on Investment
 - 20. Total Contract Rate

USPS is willing to provide only the figure in block 20. At hearing there was some evidence as to whether the APWU at some time agreed to delay provision of the Form 7463-A. However, by January 2014, it made clear that it wanted the entire unredacted form. Respondent unequivocally stated that it regarded this document confidential and would not provide it.

The parties stipulated that the Postal Service has a confidentiality interest in the Form 7463-A and that, if this Form is found to be relevant and necessary to the collective bargaining responsibilities of the Union, those confidentiality concerns are addressed by a reasonable non-disclosure agreement in which both parties are willing to enter, Jt. Exh. 2.

Analysis

Where a Union requests information pertaining to employees in a bargaining unit it represents, that information is presumptively relevant, and the employer must provide it. Where the information does not pertain to employees in the unit, such as the subcontracting of unit work, the burden is on the Union to demonstrate its relevance, *Wisconsin Bell, Inc.*, 346 NLRB

62 (2005). A union has satisfied its burden when it demonstrates a reasonable belief, supported by objective evidence, that the requested information is relevant, *Knappton Marine Corp.*, 292 NLRB 236, 238-239 (1988). An employer is not relieved of its obligation to turn over relevant information simply due to confidentiality concerns, but must offer to accommodate both its
 5 concern and its bargaining obligations.

Given the parties' stipulation in Jt. Exh. 2, there is no need to weigh Respondent's confidentiality concerns against the relevance or necessity of Form 7463-A. There is nothing in this record showing the degree of Respondent's confidentiality concerns, i.e., whether those
 10 concerns are slight or substantial. For example, there is no credible evidence that the Postal Service promised HCR contractors that the information of Form 7643-A would be kept confidential, or whether the HCR contractors who were awarded contracts were bidding against anyone other than the bargain unit. While G.C. Exh. 21, a May 21, 2014 letter from USPS
 15 Manager Patrick Devine to the Union asserts that release of the Form 7463-A violates its contracts with HCR providers, neither Mr. Devine nor anyone else with first hand knowledge testified to this effect or introduced documentary evidence in support of this contention.⁴ Thus, this assertion is unsupported by any non-hearsay evidence. Therefore, I do not credit it.

The Union, in the instant case, is entitled by contract to recapture work that has been
 20 contracted out to HCR contractors if that work can be performed for less in-house. Thus in a broad sense, any information regarding the basis on which the Respondent has decided to contract out this work is relevant and necessary to the Union's functions. Respondent's argument, aside from its weak confidentiality claim, seems to be that the unredacted Form 7643-A would be of no use to the Union.

Form 7463-A has no relevance to any grievance that has already been filed. The Union has challenged Respondent's calculations as to what it would cost to perform this work in-house. The 7463-A has absolutely no relevance to this issue. Similarly, I see no relevance of the Form 7463-A in helping the Union to determine how it could lower the costs of performing the work in
 30 question in-house. Once the Union has the bottom line figure for the HCR contractor, it should be able to determine how to lower the in-house costs without this form.⁵

However, I conclude that the Union had demonstrated sufficient relevance of the form, if for no other reason, than to compare the figures on the 7463-A with those of the Form 5500 to insure consistency, and to insure that there haven't been any clerical errors on the other documents that the Postal Service provides to it.⁶ Thus, I find that Respondent has violated Section 8(a)(5) in refusing to provide the Union with the unredacted Form 7463-A for the HCR routes requested by the Union on April 23, 2013.

⁴ Jacqueline Adona's testimony at Tr. 203 is also hearsay because it is not predicated on her first-hand knowledge.

⁵ The Union contends at page 6 of its brief that the contractor may be able to use a smaller sized truck than the contract calls for—without running the risk of having its contract terminated. However, if a smaller sized truck can be used, the Union could demand that the in-house costs as calculated by the USPS be modified accordingly.

⁶ Respondent's reliance on *Postal Service*, 352 NLRB 1032 (2008) is misplaced. First of all, since that is a decision of a two member Board, it has no precedential value. Moreover, the facts of that case are materially distinguishable from this case. Most importantly, the Postal Service does not, in this case,

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, the United States Postal Service, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the American Postal Workers Union by failing and refusing to promptly furnish the Union with unredacted copies of the Postal Form 7643-A that the Union requested.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the Union unredacted copies of Postal Form 7643-A as requested by the Union.

(b) Within 14 days after service by the Region, post at its Washington, D.C. facility copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps

have unfettered discretion to contract out the unit work as it apparently had in the 2008 case. Secondly, in this case, unlike the prior one, there is a Form 5500 to compare with the 7463-A. Thirdly, since the Union is provided the contractor's bottom line, providing the Form 7463-A will not undermine the market forces of "blind bidding" to any greater extent than they have already been undermined.

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

5 shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 14, 2013.

10 (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 10, 2014

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Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with the Union, the American Postal Workers Union, by failing and refusing to promptly furnish information necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of our employees, including vehicle drivers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish the Union unredacted copies of Postal Form 7643-A, that have been requested by the Union.

UNITED STATES POSTAL SERVICE

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

Bank of America Center, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-4061
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/05-CA-122166 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2864.