ARBITRATION DECISION NO.:
514A

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Transportation
District 11

DATE OF ARBITRATION:
August 19, 1993

DATE OF DECISION:
September 29, 1993

GRIEVANT:
James C. Eckard

OCB GRIEVANCE NO.:
31-11-(90-08-03)-0035-01-07

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
Anne Light Hoke

FOR THE EMPLOYER:
Rachel Livengood

KEY WORDS:
Burden of Proof
Subcontracting

ARTICLES:
Article 1 - Recognition
§ 1.03 - Bargaining Unit Work
Article 5 - Management Rights
Article 39 - Sub-Contracting

FACTS:

The grievant, a Project Inspector 2 in the construction department of ODOT District 11, grieved the State's contracting out project inspection work on four District 11 construction projects to consultant inspectors. At an initial stage, the Union and the State disagreed over which party bore the burden of going forward and the burden of proof in an arbitration which required an interpretation of Article 39. The meaning of the first paragraph of Article 39 was central to this disagreement. Specifically, the paragraph reads “[t]he Employer intends to utilize bargaining unit employees to perform work which they normally perform. However, the Employer reserves the right to contract out any work it deems necessary or desirable because of greater efficiency, economy, programmatic benefits or other related factors."

UNION'S POSITION:

The Union contended that the State bore the burden of going forward at the hearing and the burden of proof. The Union emphasized Arbitrator Graham's opinion in the O'Boyle decision where he stated that the first sentence of Article 39 represented a commitment by the State to use bargaining unit members to perform the work that they were performing on the date the agreement went into effect. Also, Arbitrator Graham had previously defined the word "utilize" to impose upon the State a duty to provide overtime opportunities to a reasonable extent to avoid subcontracting out work that bargaining unit employees could perform and have performed in the past. Lastly, the Union maintained that the State had the right to subcontract in only limited circumstances, i.e. where the State demonstrated "greater efficiency, economy, programmatic benefits or other related factors."

EMPLOYER'S POSITION:

The State argued that the Union bore both burdens at the arbitration hearing. The State proffered the intent testimony of their chief negotiator during the 1989 Contract negotiations in support of its position. The State maintained that the first sentence of Article 39. was devoid of meaning. The State even argued that the use of the words in the first sentence was solely to give emotional comfort to the Union and its negotiators. Further, the State argued that the phrase "deemed necessary or desirable" evidenced its intention to retain the absolute right to subcontract.

ARBITRATOR'S OPINION:

Essentially, the Arbitrator rejected both the Union and State positions as extreme. Instead, the Arbitrator adopted a middle-ground approach.

The Arbitrator discounted the State's contention that the first sentence of Article 39 was meaningless for three reasons. First, the rules of contract interpretation require that every one of the drafters, words be given either its reasonable meaning or, where the drafters have specified, its special meaning. Thus, no word can be ignored or treated as inconsequential. Second, the rules of contract interpretation also require that words be given a reasonable meaning in light of the whole Contract. Therefore, if the Arbitrator decided that the first sentence had no meaning, the rest of the Article would be pointless. Third, to accept the State's position would be, in effect, to hold that the State acted in bad faith during the course of the 1989 contract negotiations.

Likewise, the Arbitrator determined that the Union's position was less than accurate. The Arbitrator held that the word "intends" was less than a "commitment". Instead, she held that the word meant that, at the time the Contract was entered into, the State **planned** to use bargaining unit employees to do the work they were currently performing. Thus, despite the State's good faith intention to use bargaining unit employees, it still reserved the right to contract out work.

Finally, the Arbitrator declined to accept the State's interpretation of the phrase "deemed necessary or desirable". The Arbitrator held that the State did not possess an arbitrary or unfettered right to subcontract; to hold otherwise would have rendered the rest of the first paragraph meaningless. The Arbitrator concluded that the second sentence of the first paragraph gave the State the right to contract out work normally performed by bargaining unit employees when the State had a good faith belief that contracting out was necessary or desirable because the end result would be greater efficiency, greater economy, greater programmatic benefits **OR** greater related factors.

The Arbitrator reasoned that this interpretation was consistent with 1) every word of the first paragraph and the rest of the Article, 2) section 1.03 and the State's promise not to intentionally erode the bargaining unit, 3) public policy and taxpayers' expectations that governmental decision be made rationally and objectively.

AWARD:

The burden of proof was allocated as follows: first, the Union bore the burden of proving that the subcontracted work was work that bargaining unit employees "normally perform" by a preponderance of

evidence. Then, the burden shifted to the State to prove that its decision was rationally based on greater efficiency, greater economy, greater programmatic benefits OR greater related factors. Then, the burden again shifts to the Union to prove that the State's decision was erroneous, based in bad faith OR not in the public interest by clear and convincing evidence.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

OCSEA, Local 11,
AFSCME, AFL-CIO
Union

vs.

State of Ohio, Office of
Collective Bargaining

and

Ohio Department of Transportation,
Employer.

Grievance No.:
31-11-(8-3-90)-0035-01-07
Grievant:
James Eckard
Hearing Date:
August 19, 1993
Brief Date:
September 20, 1993
Award Date:
September 29, 1993

Arbitrator:
Rhonda R. Rivera

For the Employer:
Rachel Livengood

For the Union:
Anne Light Hoke

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and

the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. All witnesses were sworn.

Joint Exhibits

1. 1986 Contract
2. 1989 Contract
3. Grievance Trail
4. O'Boyle Decision
5. Union 1989 Bargaining Notes
6. Management 1986 Notes

7a. Union 1986 Proposals
7b. Management 1986 Proposals
8. Management 1989 Notes
9a. Union 1989 Proposals
9b. Management 1989 Proposals

Relevant Contract Sections - 1986

Section 1.03 - Bargaining Unit Work

Supervisors shall only perform bargaining unit work to the extent that they have previously performed such work. During the life of this Agreement, the amount of bargaining unit work done, by supervisors shall not increase, and the Employer shall make every reasonable effort to decrease the amount of bargaining unit work done by supervisors.

In addition, supervisory employees shall only do bargaining unit work under the following circumstances: in cases of emergency; when necessary to provide break and/or lunch relief; to instruct or train employees; to demonstrate the proper method of accomplishing the tasks assigned; to avoid mandatory overtime; to allow the release of employees for union or other approved activities; to provide coverage for no shows or when the classification specification provides that the supervisor does, as a part of his/her job, some of the same duties as bargaining unit employees.

Except in emergency circumstances, overtime opportunities for work normally performed by bargaining unit employees shall first be offered to those unit employees who normally perform the work before it may be offered to non-bargaining unit employees.

Further, it is the intent of the Employer in the creation and study of classifications to differentiate between supervisors and persons doing bargaining unit work. Whenever possible, such new and revised classifications will exclude supervisors from doing bargaining unit work.

The Employer recognizes the integrity of the bargaining units and will not take action for the purpose of eroding the bargaining units.

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08 (A) numbers 1-9.

ARTICLE 39 - SUB-CONTRACTING

The Employer intends to utilize bargaining unit employees to perform work which they currently perform. However, the Employer reserves the right to contract out any work it deems necessary or desirable because of greater efficiency, economy, programmatic benefits or other related factors.

If the Employer considers contracting out a function or service which would displace State employees, the

Employer shall provide reasonable advance notice in writing to the Union for minor contracting out or as much as practicable but not less than ninety (90) days notice for major contracting out. Upon request, the Employer shall meet with the Union prior to deciding to contract out and discuss the reasons for the proposal and provide the Union an opportunity to present alternatives.

If the Employer does contract out, any displaced employee will have the opportunity to fill existing equal rated permanent vacancies at his/her work location or other work locations of the Agency. In the event an employee needs additional training to perform the required work in such other position, which can be successfully completed within a reasonable length of time, the Employer shall provide the necessary training during working hours at the Employer's expense.

Non-state employees will not serve as supervisors (as defined by ORC Section 4117.01(F)) of any bargaining unit employees. Bargaining unit employees will not be responsible for training contract workers, except bargaining unit employees may be required to provide orientation and training related to agency policies, procedures and operations.

Relevant Contract Sections - 1989

Section 1.03 - Bargaining Unit Work

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In addition, supervisory employees shall only do bargaining unit work under the following circumstances: in cases of emergency; when necessary to provide break and/or lunch relief; to instruct or train employees; to demonstrate the proper method of accomplishing the tasks assigned; to avoid mandatory overtime; to allow the release of employees for union or other approved activities; to provide coverage for no shows or when the classification specification provides that the supervisor does, as a part of his/her job, some of the same duties as bargaining unit employees.

Except in emergency circumstances, overtime opportunities for work normally performed by bargaining unit employees shall first be offered to those unit employees who normally perform the work before it may be offered to non-bargaining unit employees.

Further, it is the intent of the Employer in the creation and study of classifications to differentiate between supervisors and persons doing bargaining unit work. Whenever possible, such new and revised classifications will exclude supervisors from doing bargaining unit work.

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ARTICLE 39 - SUB-CONTRACTING

The Employer intends to utilize bargaining unit employees to perform work which they normally perform. However, the Employer reserves the right to contract out any work it deems necessary or desirable because of greater, efficiency, economy, programmatic benefits or other related factors.

If the Employer considers contracting out a function or service which would displace state employees the Employer shall provide advance notice in writing to the Union. In the event of minor contracting out the Employer shall provide reasonable advance notice and in the event of major contracting out the Employer

shall provide not less than ninety (90) days notice prior to displacing any employee as a result of the contracting out which is under consideration. Upon request the Employer shall meet with the Union during the notice period and discuss the reasons for the proposal and provide the Union an opportunity to present alternatives.

If the Employer does contract out, any displaced employee will have the opportunity to fill existing equal rated permanent vacancies at his/her work location or other work locations of the Agency. In the event an employee needs additional training to perform the required work in such other position, which can be successfully completed within a reasonable length of time, the Employer shall provide the necessary training during working hours at the Employer's expense.

Except for government employees from other jurisdictions who are part of a state agency's organizational structure, non-state employees will not ordinarily serve as supervisors (as defined by Ohio Revised Code Section 4117.01(F)) of any bargaining unit employees. Bargaining unit employees will not be responsible for training contract workers, except bargaining unit employees may be required to provide orientation and training related to agency policies, procedures and operations.

Award On Burden of Proof in Article 39

The dispute that arises at the preliminary stages of this arbitration centers on the interpretation of Article 39 of the Contract 1989 to 1992 (Joint Exhibit No. 1). The Employer and the Union disagree over both the burden of going forward and the burden of proof with regard to arbitrations that involve the interpretation of Article 39. Article 39 reads as follows:

"The Employer intends to utilize bargaining unit employees to perform work which they normally perform. However, the Employer reserves the right to contract out any work it deems necessary or desirable because of greater efficiency, economy, programmatic benefits or other related factors.

If the Employer considers contracting out a function or service which would displace state employees the Employer shall provide advance notice in writing to the Union. In the event of minor contracting out the Employer shall provide reasonable advance notice and in the event of major contracting out the Employer shall provide not less than ninety (90) days notice prior to displacing any employee as a result of the contracting out which is under consideration. Upon request the Employer shall meet with the Union during the notice period and discuss the reasons for the proposal and provide the Union an opportunity to present alternatives.

If the Employer does contract out, any displaced employee will have the opportunity to fill existing equal rated permanent vacancies at his/her work location or other work locations of the Agency. In the event an employee needs additional training to perform the required work in such other position, which can be successfully completed within a reasonable length of time, the Employer shall provide the necessary training during working hours at the Employer's expense.

Except for government employees from other jurisdictions who are part of a state agency's organizational structure, non-state employees will not ordinarily serve as supervisors (as defined by Ohio Revised Code Section 4117.01(F)) of any bargaining unit employees. Bargaining unit employees will not be responsible for training contract workers, except bargaining unit employees may be required to provide orientation and training related to agency policies, procedures and operations."

The disagreement begins at the first sentence of Article 39 (entitled Subcontracting). Mr. Brundige, the former chief negotiator for the Employer testified about the bargaining process over the issue of subcontracting; he also testified about his intention (or meaning) with regard to the actual words used in Article 39. The gist of his testimony was that first sentence of Article 39 was devoid of meaning. According to Brundige, the state's goal at negotiations was to retain the absolute right to subcontract; thus, the use of the words in the first sentence was solely to give emotional comfort to the Union and its negotiators.

The view of the Union, not surprisingly, was directly the opposite the view of Mr. Brundige and the

Employer. The Union pointed to the view of Arbitrator Graham in the O'Boyle decision. Arbitrator Graham found that the first sentence "represents a commitment by the State to deploy its bargaining unit members to do work that they were doing on the date the Agreement became effective, July 1, 1986." Arbitrator Graham states that the word "utilize" found in the first sentence "imposes on the Employer the obligation to provide overtime opportunities to employees to the customary extent to avoid contracting out work that employees can perform and which they performed in the past." (p. 15 O'Boyle)

With all due deference to both gentlemen, I conclude that Mr. Brundige makes too little of the sentence, and Dr. Graham, too much. Mr. Brundige, in essence, treats the first sentence as an illusory promise. I reject that interpretation for three reasons:

1. The rules of contract construction[1] give great deference to the intention of the drafters by requiring that each and every word be given either its reasonable meaning or the special meaning given by the drafters. By the same rule, no word can be ignored or treated as nugatory.
2. To find that the sentence has no meaning requires a finding by the Arbitrator that the Employer was acting in bad faith during these negotiations. To claim that the words in question had no meaning and were only inserted as a ploy to fool the union members is to lay claim to bargaining in bad faith. The Arbitrator has no evidence that these negotiations were carried out in bad faith by either party.
3. Rules on contract construction require that words be given their meaning in the context of the larger agreement and that wherever possible, words should be given a meaning that is reasonable in light of the whole contract. If the first sentence has no meaning, the rest of Article 39 is pointless.

The word "intends"[2] in the sentence is less than a "commitment" as interpreted by Arbitrator Graham. Commitment is a covenant, a promise, an agreement in and of itself. To "intend" means "to plan" or "to have a state of mind." I find that the first sentence means that at the time of the contract the Employer, in good faith, planned to use bargaining unit employees to do the work that those persons were, in fact, then currently doing.

The second sentence begins with the word "however. In this context, however is used as an adverb meaning "in spite of that." Thus, "in spite of" the state's good faith intention to use bargaining unit employees, the state reserved a right to contract out work. Note, that this meaning must be given to the second sentence, in order to give meaning to the first sentence.

At this point, in the interpretation of Article 39, the Employer and the Union again put forward different meanings. The Employer claims that its right to subcontract is absolute. The Employer states that the meaning of the second sentence is "in spite" of its good faith intention to use bargaining unit employees, the state can subcontract "any" work that it "wishes to." The state claims that the phrase "it deems necessary or desirable" allows the Employer to subcontract out "any work" that Employer "deems" "desirable" to subcontract. In this interpretation, the state claims, "necessary" can be ignored because of the conjunction "or," and the word "deems" gives free rein to the Employer to act whimsically, capriciously, or arbitrarily.

"Deems" means "to hold as an opinion" to "judge." The state would have the Arbitrator believe that the Employer can have the opinion or make the judgment that subcontracting is merely "desirable" and that judgment or opinion may be totally subjective in content. Under this interpretation, the Employer can subcontract when its opinion or judgment is not based on a reason. To interpret "deems" to mean such an unfettered right to subcontract would make the rest of the first paragraph meaningless. The Arbitrator finds that the Employer's right to subcontract that the Employer reserved can be exercised when the Employer believes in good faith that such contracting is either necessary or desirable "because of greater efficiency, economy, program benefits or other RELATED factors. The Arbitrator holds that the second sentence gives the Employer the right to subcontract work NORMALLY performed by bargaining unit employees when the Employer in good faith honestly believes such subcontracting is necessary or desirable because the end result would be 1) greater efficiency, 2) greater economy, 3) greater program benefits OR 4) greater related factors.

This finding is required by the language of the contract for the following four (4) reasons:

1. Such an interpretation is consistent with fair reading of every word of the first paragraph of Article 39 rendering no words pointless or nugatory.

2. This interpretation renders Article 39 consistent in its intent with Article 1.03 where the Employer commits to "not to erode the bargaining unit." To allow the Employer to subcontract for subjective and irrational reasons or purposes would render meaningless and superfluous the promise not erode the bargaining unit. A contract must be interpreted as a whole.

3. This interpretation is consistent with public policy. The employees and functions at issue in this Arbitration are public employees and public functions. The taxpayers expect the decisions of their government to be made rationally and objectively. They expect that decisions to subcontract would be subject to the restraints of economy, efficiency, and the public good.

4. This interpretation of the first paragraph renders the first paragraph consistent with the next two paragraphs. In these latter paragraphs, the state promises under certain constraints to give notice to the Union before subcontracting. A stated purpose of such notice is to allow the Union to present alternatives. If sub-contracting was subject to no restraints of economy and efficiency, the presentation of alternatives would be meaningless because the decision of the Employer to chose one alternative over another could be made without any objective standards.

Procedural Results

First, the Union must show that work subcontracted out was work that would have been "normally" done by bargaining unit members at the time that the parties entered into the contract.[3] Once shown, by a preponderance of the evidence, the burden then shifts to the Employer, to show that its decision was rationally based on greater economy, greater efficiency, greater program benefits, or other related factors. This showing is aided by the rights of management (Article 5) to make judgments. Once a rational basis of either efficiency, economy, etc. is shown, the burden shifts to the Union to overcome by clear and convincing evidence that the decision of management was erroneous or based in bad faith or not in the public interest. The Arbitrator chooses a clear and convincing standard because under the management rights Article the Employer retains the right to manage its workforce so the presumption is with the Employer.

By requiring the Employer to put forward its reasons for the sub contracting, the Arbitrator's interpretation follows a common practice that the party with the control over a particular type of information should have the responsibility to put that information forward to carry its burden.

RHONDA R. RIVERA, Arbitrator
Date: September 29, 1993

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[1] All rules of contract construction are found in Elkouri.

[2] All definitions are from the American Heritage Dictionary of the English Language.

[3] The Employer could, for efficiency's sake, stipulate to this fact (if true).