In the Matter of Arbitration		
Between		Case Number:
OCSEA/AFSCME Local 11		31-08-(88-08-12)-0073-06-01
and		
		Before:
The State of Ohio, Department of Transportation		Harry Graham

Appearances: For OCSEA/AFSCME Local 11:

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Introduction: Pursuant to the procedures of the parties a hearing in this matter was held on November 16, 1992 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on January 30, 1993 and the record was closed on that date.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Did the State violate the Collective Bargaining Agreement

when it subcontracted loop repair in 1988? If so, what shall the remedy be?

As will become apparent the Union regards this issue to be one of several issues that must be decided in connection with this dispute.

Background: This dispute is of longstanding. The facts that prompt it are not a matter of controversy. In connection with the control of traffic lights there is installed in pavement a device known as a loop. The loop senses traffic flow and controls the timing of traffic signals. Proper operation of the loop is essential to ensure the smooth flow of traffic through intersections. If a loop breaks signals change according to a preset pattern. While the intersection remains under the control of the signals, traffic does not move as expeditiously as if the loop were operating correctly.

Loops break from time to time and must be repaired. On occasion District 8 of the Ohio Department of Transportation had utilized Signal Electrician 1's and 2's to repair loops. On May 17, 1988 the Employer determined to subcontract loop repair to Miller Pipeline Co. The contract between the State and Miller Pipeline called for the Company to repair approximately 60 loop detectors in ODOT District 8 from July 18, 1988 to December 1, 1988 and April 17, 1989 to July 7, 1989. The cost of the contract was $147,700.

Signal Electricians in ODOT District 8 were of the view that the contract with Miller Pipeline Co. violated the

Collective Bargaining Agreement then in effect. In order to protest the awarding of the contract they filed a grievance. It was not resolved in the procedure of the parties and they agree it is now properly before the Arbitrator for determination on its merits.

Position of the Union: The Union is of the that what must occur in this situation is a judgement over the right of the employer to manage the enterprise including a determination of the method in which services are to be provided and the right of the Union to share in the determination of the terms and conditions of employment. The standard treatise on arbitration, Elkouri and Elkouri, How Arbitration Works, at pages 540-542 of the 4th edition sets forth an itemization of factors traditionally considered by arbitrators in subcontracting disputes. When evaluating this dispute, the Arbitrator is governed by the Agreement of the parties with respect to subcontracting. Article 39 of the Contract provides that the State "intends to use bargaining unit employees to perform work with they normally perform." The State has retained the right to contract out work "because of greater efficiency, economy, programmatic benefits or other related factors." In the opinion of the Union the State did not meet the tests of "greater efficiency, economy, programmatic benefits or other related factors" in this situation.

As the Union relates the history of the loop repair in District 8 in 1988 the District possessed the necessary equipment to perform the work. It could have purchased the supplies needed for the work at a price no greater than that paid by Miller. In reviewing the criteria of "economy" the Union determined that the labor cost of Miller performing the loop repair versus ODOT employees performing the work amounted to approximately $33,000. That is, ODOT could have done the work for about $34,000 less than what was paid to Miller. Included in that amount is the salary of an ODOT Project Inspector. That person was required to supervise the work of Miller Pipeline. According to the Union's computations his salary for the work performed on the loop repair project amounted to $13,345. Mileage expense attendant upon his visits to the various sites totalled $2051. Had ODOT employees done the work those expenses would not have been incurred by the State. Miller paid its employees at hourly rates well above those paid to State employees. On average for the entire project the rates were $14.73 per hour for hourly employees and $19.53 for supervisory personnel. At the same time Signal Electrician 1's in State service were earning $10.37 per hour and Signal Electrician 2's were paid at the rate of $14.72. Adding these various rates and then comparing the results indicates the State out-of-pocket cost for Miller was approximately $34,000 more than if ODOT

employees had performed the work. Hence, the State cannot justify its action in this case on the contractual standard of economy in the opinion of the Union

Nor can the State meet the standard of efficiency. At the hearing the Employer claimed it was unable to organize the employees in the signal shop to perform the loop repair work. Hence, the claim of increased efficiency made by the State. The Union asserts the State should have been able to organize the signal electricians to perform the work. They had done so in the past. As the Union views this dispute, the State should have managed the work and the work force. Instead, it took the easy way out and subcontracted.

In pointing to the mechanics of the loop repair project the State has claimed that flaggers were required at the work sites. Flaggers are unskilled employees who work elsewhere. ODOT asserts the scheduling of flaggers is difficult. Miller Pipeline used skilled employees for most of the flagging tasks associated with the project. Had the State chosen to do so, it could have done likewise and used the Signal Electricians for flagging duties. The hourly cost of the signal electricians is less than the hourly cost of the personnel utilized by Miller. They could have performed the necessary flagging less expensively than Miller employees.

The State cannot plausibly claim that repair of broken loops is an emergency, requiring immediate attention. Loops

function even when broken. Traffic signals are changed according to a pre-set time when loops become inoperative. Repair work can be scheduled. The State knows which loops are defective. Just as the Employer schedules other sorts of tasks to be performed by its employees it can schedule loop repair. ODOT District 8 has the necessary equipment and employees to perform the work. It can schedule the work in the same manner in which it schedules other needed work. Any claim of increased efficiency made by the Employer must be balanced against the increased cost to the State of having Miller Pipeline, rather than ODOT employees, perform the loop repair according to the Union. In the final analysis the Union argues that the State cannot show that the contract at issue in this proceeding was more economical, more efficient or more programmatically beneficial. Hence, the grievance should be sustained the Union claims.

The Union asserts that the State has violated other provisions of Article 39 of the Agreement by its conduct in the course of this dispute. No notice of the contract with Miller Pipeline was provided to the Union. The State claims that no notice is required as no employees were "displaced" by the contract. That is, no employees were laid off. The Union claims that this represents too narrow a reading of the contract language. In AFSCME v. The Private Industry Council of Trumbull County, 748 F. Supp 1232 (N.D. Ohio, 1990) the

Employer attempted to fill vacancies in bargaining unit positions with federally subsidized Summer Youth Employment Training Program personnel. The relevant statute prohibits employers from terminating or otherwise reducing its workforce and replacing employees with Summer Youth Employment Training Program enrollees. The Court determined that the language prohibiting an otherwise reduction of the workforce was broad enough to include a reduction of the workforce through attrition. It was the view of the Court that "prolonged passive conduct which demonstrates a pattern and practice of behavior designed to produce the same ultimate result as active displacement of regular employees" constituted workforce reduction within the meaning of the statute. In this case, ODOT transferred necessary equipment out of District 8. It failed to hire employees to bring District 8 up to its staffing quota. It had not filled a vacant Signal Electrician 1 position as of January 1988. This history represents a "reduction of the workforce "within the meaning of Private Industry Council and should fall within the meaning of Article 39 according to the Union. It is not necessary to layoff in connection with a contract to reduce the workforce. Rather, a pattern of not hiring or operating the District a below authorized strength suffices to meet the contractual test the Union asserts.

In this situation, the State did not provide the Union

with advance notice of the loop repair contract. The Union had no opportunity to present alternatives nor its cost calculations. The passive nature of displacement of bargaining unit employees in this situation mandates that the State provide the notice contemplated in the Agreement in the opinion of the Union.

There have been identified several factors used by arbitrators to determine whether or not a decision to subcontract is correct. These factors include:

1. Did the Employer act in good faith in determining to subcontract? The Union asserts the State did not act in good faith in this instance. It had the requisite equipment on hand but transferred it. Then the State used a lack of equipment to justify its action in this situation. Similarly, the State did not fill vacancies. Hence, the requisite good faith is lacking in this situation according to the Union.

2. Were bargaining unit employees displaced as a result of the subcontracting? In this situation, the passive displacement referenced above occurred. Vacancies were not filled. Rather, contractor's employees performed work that might have been done by members of the bargaining unit.

3. Is loop detector repair work to be considered bargaining unit work? That question must be answered affirmatively the Union insists. Such work is regularly performed by members of the bargaining unit. In Mobil Chemical 51 LA 363 arbitrator

Whitney placed great weight upon the fact that the work at issue was included in the position description of bargaining unit employees. They would have subjected themselves to discipline had they refused to perform work if directed to do so by the Company. In this situation the Position Descriptions reference maintenance and repair of traffic signals. Loop repair is an integral part of that task. It has routinely been performed by Signal Electricians 1 and 2. The State cannot simply remove that work and give it to employee's of a contractor the Union insists.

4. Does ODOT possess the necessary equipment and sufficient numbers of skilled, available employees to perform the work? In this situation the needed equipment was located in District 8. it was transferred from Traffic to other divisions within the District but was available for loop repair in the Union's opinion. In this case the employees possessed the requisite skills. They had done the work on numerous occasions in the past. Some arbitrators have held that employers must offer overtime opportunities to bargaining unit members before subcontracting. See Hugo Neu-Proler 50 LA 1270, Bailer, 1968. The Union notes that in this instance employees of Miller Pipeline performed 162.48 hours of overtime on the project. In this case, ODOT employees were available and could have performed the work at issue.

5. Whether or not there existed an emergency? There existed

in ODOT District 8 a backlog of loop repair work. That backlog existed because the State did not assign the work to ODOT employees. In Pacific Oil Co. 52 LA 173, Moran, 1969, the Arbitrator found that the Agreement did not make reference to emergency conditions with respect to subcontracting. Pacific Oil was shortstaffed. It considered that to constitute an emergency and subcontracted. The arbitrator disagreed and held lack of employees did not constitute an emergency to supersede contractual restrictions on subcontracting. In this case, vacancies existed which were not filled by the State. It cannot now use a staff shortage to justify subcontracting when that shortage was of its own doing. Furthermore, no emergency existed as the signal controllers run on a pre-set time if a failure occurs.

6. Did the Employer substantiate its subcontracting decision with a compelling business or economic justification? There is no economic justification whatsoever for the subcontracting decision at issue in this proceeding according to the Union. It has demonstrated that the contracting out cost the State more than if ODOT employee performed the disputed work.

7. Is there a past practice with respect to the subcontracting at issue? The converse is true in this case. Employees of ODOT have done the work. It has never agreed to permit subcontracting of the nature at issue in this

proceeding. It has never acquiesced in the type of contracting at issue in this case. No practice exists to support the employer in this instance.

8. What is the duration of the subcontract? The Miller Pipeline contract lasted two years. The same work was performed in District 8 by Wagner-Smith in 1990. A firm known as W.G. Fairfield will perform the work in the future. In essence, the loop repair has become subcontracted on a permanent basis. This is not contemplated anywhere in the Agreement according to the Union.

9. What is the effect of the subcontracting on the bargaining unit or the Union? The contracting at issue in this dispute has produced fear among unit employees that they will lose their jobs. At citizens of the State, they are concerned at the unnecessary expenditure of state funds for contractors.

The Union is of the view that there are issues raised by this dispute that go beyond the contracting out of the loop repair project in ODOT District 8. At Section 25.08, the Union may request specific documents, records and witnesses that might be available from the Employer. The State may not unreasonably deny such materials. In this case the Union requested documents in August, 1992 to prepare for the hearing which was held in November, 1992. In response, the State indicated that it would cost the Union $900.00 to secure the documents. That figure was subsequently reduced to

$400-500. This fee was to pay copying cost. Later in its preparation for this case the Union came to learn that ODOT has a reference volume, ODOT Summary of Contracts Awarded which contains the information it sought. Additionally, the Union was charged for copying costs in an invoice dated November 12, 1992. It did not receive the requested material until November 16, 1992, the date of the hearing. On November 10, 1992 the Employer's advocate in this dispute informed the Union it would not supply certain information it had requested. Taken together, these events placed the Union at a disadvantage in preparing for and presenting its case. After the oral hearing ODOT supplied the Union with documents it had asked for well in advance of the hearing. The Employer made certain decisions concerning which documents it regarded as being important to the Union's case and which were not. That is not permitted by the Agreement and the Union urges that the State be directed to comply with document requests.

In the recognition clause of the Agreement, Article 1, the State has agreed not to erode the bargaining unit. In this instance there occurred what may be termed passive erosion of the unit according to the Union. There existed vacant Signal Electrician positions at the time of the contracting out. By contracting out at a time when vacancies existed the Union asserts unit erosion occurred. In the final analysis, the Union urges that a cease and desist order be

entered in this dispute and that the Employer be directed to reimburse affected employees for any lost compensation.

Position of the Employer: The State asserts that the contracting out at issue in this dispute is permitted by the Agreement. Article 39 indicates that the Employer:

> reserves the right to contract out any work it deems necessary or desirable because of greater efficiency, economy, programatic benefits or other related factors.

The State may contract out work it deems either "necessary" or "desirable." When it does so, it must consider certain items such as economy, efficiency or "other related factors." In this case, the catch all, "other related factors" phrase permits the Employer to act as it did in this instance it asserts.

The State notes that this dispue arose in 1988. The initial document request from the Union was received in 1992. Some relevant records were properly destroyed in the interim. The Employer has furnished to the Union all documents in its files that might bear upon this dispute and which might contain information relevant to the Union's effort to prepare its case. As that is the case, no contract violation occurred in the State's opinion.

The Agreement does not require the Employer to provide advance notice to the Union of its intention to contract out. Article 39 indicates that if the Employer "considers" that contracting out would displace state employees it must notify

the Union. That did not occur in this situation. Employees were not displaced in this instance. Hence, notice was not required.

No erosion of the bargaining unit occurred in this situation. Two additional positions are in the Traffic Department today compared with 1988. In District 8 there are fewer employees than was the case in 1988. This is due to the fact that there occurred an administrative reorganization of the District. One county was transferred from District 8 to District 7. District 8 lost approximately 100 positions. They were not lost to the Department. Rather, they were moved to District 7.

In the opinion of the State the contract to Miller Pipeline met the contractual criteria of economy. Contract employees are paid only for their actual hours worked. State employees would be paid for the entire week. The State would not have to maintain a parts inventory. Nor would it have to coordinate work of signal electricians with that of other State employees. As the State urges the Agreement be read, it can contract out "any work it deems necessary....." This allows it wide latitude to contract out. It exercised that latitude in this case. The Agreement permits it to act as it did in this instance. No violation of the Agreement occurred. Consequently, the Employer urges the grievance be denied.

Discussion: The first sentence of Article 39 provides that

"The Employer intends to utilize bargaining unit employees to perform work which they currently perform." That sentence represents a committment 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. It also represents the agreement of the parties to limit subcontracting. The word "utilize" imposes upon 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 have performed in the past.

The record in this case includes the Position Descriptions for Signal Electrician 1's and 2's. Signal Electrician 1's "troubleshoots and performs electrical work in field on traffic signals." Included in those tasks are the duties of "installing, maintaining and repairing signal heads, poles (and) detectors...." Signal Electrician 2's "repair signal controllers including...actuated and traffic density types." The Grievants in this dispute regularly worked on loop dectectors as part of their duties. As the tasks at issue in this proceeding have been regularly performed by bargaining unit members attention must turn to the second sentence of Article 39. That sentence provides that "However the Employer reserves the right to contract out any work it deems necessary or desireable because of greater

efficiency, economy, programatic benefits or other related factors." Given the committment of the State to utilize bargaining unit employees to perform work they were performing the second sentence of Article 39 places upon the State the burden of demonstrating to the Arbitrator that the Contract with Miller Pipeline Co. met the Contractual criteria of "greater efficiency, economy, programatic benefits or other related factors."

At the hearing and in its brief the Union calculated that the contract with Miller Pipeline Co. cost the State approximately $34,000 more than if members of the bargaining unit had done the work. Review of the methodology employed by the Union in arriving at this estimate shows it to be sound. Included in the $34,000 figure are salary payments to an ODOT Project Inspector amounting to $13,345 (rounded). To this must be added mileage costs of $2,051. These costs are not disputed by the State. Had the loop repair project been completed by State employees rather than contractor employee those costs would not have been incurred.

Further supporting the claim of the Union that the State is unable to satisfy the "economy" standard established by the Contract is the fact that the contractor paid its employees more per hour than the rate paid to State employees. It is not controverted by the Employer that Miller Pipeline employees were paid about $18,000 more than if ODOT

employees had done the work. It is obvious that Miller did not undertake the loop repair contract as a civic duty. It sought a profit and priced the work accordingly. The total amount paid by the State is approximately $34,000 more than if ODOT employees had performed the loop repair work. The State cannot satisfy the test of economy. More accurately, it meets the standard of diseconomy.

The second standard established by the Agreement is "efficiency." That is not as objective a criteria as is economy. At the hearing testimony was received from a veteran management employee of ODOT indicating that the immediate supervisor of the people who would have performed the loop repair found it "impossible" to coordinate the employees and equipment. That it was easier for the Department to contract out the work than to deploy its own resources does not satisfy the contractual test of efficiency. The Department permitted some 200 loops to function improperly before determining to contract their repair. If 200 loops were defective it is possible to schedule their repair in systematic fashion. Moveover, that such a large number of loops were permitted to function at less than their full capabilities indicates that there existed no element of emergency that required the immediate attention of the contractor. The State may not correctly claim that an emergency of any sort existed, requiring the immediate repair

of the loop detectors. It may have been easier or more convenient for the Employer to repair the loops using contractor personnel. That does not satisfy the criteria of efficiency established by the Agreement. Even if it were to be determined that the backlog of loops requiring repair were to constitute an emergency, which is specifically not done in this situation, the Agreement does not reserve to the State the authority to contract absent satisfaction of the tests set forth in Article 39.

A major component of the Employer defense of its actions in this situation is the fact that no employees were laid off as a result of the contracting out. Thus, no erosion of the bargaining unit occurred according to the State. There is a long line of arbitration decisions holding that actual layoff of bargaining unit members does not have to occur in order for an employer to be found to have compromised the integrity of the bargaining unit. Even a small amount of removal of work from bargaining unit members may be considered to be a threat upon job security. (See for instance Municipal Theatre Association and Treasurer and Ticket Sellers Union Local 774, IATSE, 90-1 ARB 8057, Flaten, 1989). In Ticket Sellers the Arbitrator adopted the view that actual displacement of employees did not have occur for a violation of the Agreement to have occurred. Work that had been customarily performed by members of the bargaining unit was performed by an outside

contractor. No layoffs of bargaining unit personnel had occurred. In the view of the Arbitrator, the removal of work that had previously been performed by members of the bargaining unit constituted a threat to their job security. The situation in Ticket Sellers is analogous to that in this dispute.

Similarly, at least one court in Ohio has adopted the view that actual displacement of bargaining unit employees does not have to occur in order for the employer to be in violation of a statute providing for its integrity. In AFSCME v. The Private Industry Council of Trumbull County 748 F. Supp. 1232 (N.D. Ohio, 1990) the employer filled vacancies with summer youth employment training program participants. The Court found this to be in violation of the relevant statute which prohibits a reduction of the workforce as a result of employment of summer youth training participants. No layoffs of bargaining unit employees had occurred. In spite of that fact, the court was of the view that "passive conduct" designed to replace regular employees with trainees violated the statute. In this situation there exists the sort of passive reduction of the bargaining unit as occurred in Private Industry Council. The Employer removed equipment from the Traffic Signal Department. It remained in District 8. Vacancies were not filled. Union Exhibit 6 in this proceeding is an ODOT interoffice memo dated April 24, 1992. It

recapitulates staffing levels in ODOT District 8 from 1987 through 1991. The Exhibit reveals that the District was consistently staffed below authorized levels. The figures range from five below authorized strength in 1987 to thirty below authorized strength in 1989. It is not possible to conclude that the contracting out of the loop repair which is the subject of this dispute was entirely responsible for that situation. It is possible to conclude that the contracting of the loop repair was a factor in the understaffing. The failure to fill vacancies raises the question of erosion of the bargaining unit. This is a practice which is prohibited by Article 1, Section 1.03. In this situation the bargaining unit was eroded by the contract with Miller Pipeline Co. which called for it to perform work that had historically been performed by State employees and which they were capable of performing during the lifetime of the contract with Miller.

Both at the hearing and in its post hearing brief the Union raised the claim that the Employer was in violation of Section 25.08 of the Agreement by allegedly failing to produce documents requested by the Union. The text of Section 25.08 provides that the Union may request from the Employer documents and witnesses and that such a request "shall not be unreasonably denied." When the Union asserts that a cost from the State of $500.00 for documents is prohibitive it is

incorrect. Five hundred dollars is a large sum but if that is what it costs the State to generate documents for the Union that is what must be paid. Of more concern is the fact that relevant information sought by the Union is readily available in the ODOT Summary of Contracts Awarded which is published on a yearly basis by ODOT District 4. Only when the Union was well advanced in its preparation for the arbitration hearing did it come to learn that the ODOT Summary existed. It is incumbent upon the Employer to inform the Union that information arguably relevant to the dispute is available, albeit in a form unknown to the Union.

In the course of preparation for the arbitration hearing the Union requested certain documents that it regarded as relevant to the proceeding. These included overtime summaries for the signal shop. These were not provided. Similarly, Union Exhibit 3 is the rejection by the Employer of a portion of the Union's document request. It is not within the province of the Employer to determine which documents are necessary for the Union to make its case. Should the State be able to unilaterally withhold evidence that the Union regards as relevant to its case the grievance and arbitration procedure will be fatally compromised. In this situation it was not until after the close of the oral phase of the arbitration proceeding that the State provided documents that had been requested by the Union. The behavior of the State

throughout the immediate pre-arbitration stage of the hearing and extending to the period after the hearing itself is in violation of Section 25.08 of the Agreement.

Award: The grievance is sustained. The Employer is to produce documents requested by the Union in order to process grievances and prepare for arbitration proceedings. The Employer is to cease and desist from contracting loop repair work in ODOT District 8 without making a careful assessment of the factors of economy and efficiency. It is to fully comply with the terms of Article 39 which require it to meet with the Union at the Union's request to discuss proposed contracting out and to provide to the Union an opportunity to present alternatives.

The Union and the Employer are to meet to determine any overtime payments that may be due to Signal Electrician 1's and 2's for work that was performed by employees of Miller Pipeline Co.

Signed and dated this 16th day of February, 1993 at South Russell, OH.

Harry Graham

Harry Graham
Arbitrator