

ed, the grievant is to be reimbursed for same. A copy of this decision is to be placed in the grievant's personnel records.

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**CFS CONTINENTAL — LOS ANGELES —**

**Decision of Arbitrator**

In re CFS CONTINENTAL — LOS ANGELES and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 595, FMCS Case No. 84K/06383, September 5, 1984

Arbitrator: E. Lad Sabo, selected by parties through procedures of Federal Mediation & Conciliation Service

**BARGAINING UNIT**

— Exempt position — Confidential secretary position ▶24.57 ▶120.06

Under contract stating that broadly defined, exempt classifications include executives who formulate or administer management policies and their confidential and private secretaries and any person charged with full responsibility of determining actual profit and loss of employer's business, employee who filled vacancy in confidential secretary classification is exempt from union jurisdiction, notwithstanding her expressed desire to remain within union jurisdiction. Clear meaning and language of contract is subject to enforcement even though results are harsh and may be contrary to general expectations of one of parties.

Appearances: For the company — James M. H. Ball, attorney. For the union — Dennis J. Twohig, employee relations director.

**CONFIDENTIAL SECRETARY**

**Issue**

SABO, Arbitrator: — [The issue is:—]

Under the terms and conditions of the Labor Agreement, is the Job Position occupied by Rachel Marmolejo exempt from the Jurisdiction of the Union?

**History, Allegations & Facts**

Pursuant to the terms of the Labor Agreement and Addendum, the Parties agreed and stipulated that the

matter relating to the status of the Secretarial Job, as alleged and subject to the terms spelled out under Article 29 of the Labor Agreement, be submitted to the Arbitrator for Adjudication.

Beginning in 1975, the Company grew to its present size by the merger and consolidation of four (4) distinct companies. It was a stipulated fact that at the time there existed three (3) Confidential Secretaries or positions which were not considered part of the Bargaining Unit. Three years later an opening in one of the Non-Bargaining Unit positions became available and a Secretary employed within the Jurisdiction of the Union filled the opening for the Non-Union Jurisdictional, Confidential, Secretarial Job. However, the terms of the Labor Agreement were not enforced relative to an Employee being promoted to an Exempt Job Classification, since the Employee continued to do some Union Jurisdiction work even though the Employee was holding down a basically qualified Exempt Secretary position with the Company.

In 1981, the Employee replaced an Exempt Secretary and upon accepting the position complied with the terms of Article 29 by relinquishing the affiliation with the Union and therefore fully qualifying for the Exempt Secretarial Job.

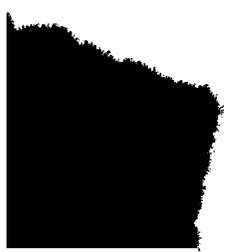
As a result of the above action, the Company sought to fill the resultant vacancy. The Incumbent applied for and was appointed to the vacancy. It is alleged that she did not and is not currently performing the Union Jurisdictional work that the prior Employee had performed while occupying the subject position.

The Parties pursuant to Negotiations agreed to submit certain Classifications to Arbitration, as to whether or not they were exempt from Union Jurisdiction pursuant to the Bargaining Agreement. Two of the four jobs have been mutually agreed to as settled by the Parties. One job in dispute is the subject of another Arbitration before another Arbitrator. The only job classification before this Arbitrator is the so called Confidential Secretary's job currently being filled by Rachel Marmolejo.

**Summary & Argument of Union's Position**

The National Labor Relations Board looks at five (5) general factors in determining whether or not a community of interest exists between the target job and the bargaining unit.

1. The extent and type of contribution of the bargaining unit to the



2. The bargaining history in the industry as well as with respect to the Company in question.

3. The similarity of duties, skills, interest, and working conditions of the employees.

4. The organizational structure of the Company.

5. The desires of the employees in question.

With respect to the above criteria, the Union feels that the target job qualifies in all aspects. In particular, it is stipulated and agreed that the Incumbent desires to remain a member of the Union and receive all benefits thereto as provided under the terms of the Labor Agreement.

Based on the Record, the issue of confidentiality is questionable and is asserted by the Company to direct the Arbitrator's attention away from the clear community of interests the Incumbent on the target job shares with the other bargaining unit employees. Therefore, it is requested that the Arbitrator sustain the Union in its position that the target job should not be exempt from Union Jurisdiction on the basis of Article 29 of the Labor Agreement and the Wage Rates and Classifications Addendum.

#### Summary & Argument of Company's Position

At the time of the merger the Company had three (3) Confidential Secretaries in the Secretarial Pool and none of them belonged or were subject to the Jurisdiction of the Union. This remained a fact for three years. In 1978 an opening occurred at which time an Employee under the Jurisdiction of the Union was permitted to perform the Confidential Secretarial Work and in conjunction with the duties continued to perform a portion of Union Jurisdictional work. As a result the Employee was not asked to comply with provisions of Article 29 requiring said Employee to withdraw from the Union. The Company does not consider the failure of enforcement of Article 29 as a waiver of its rights under the terms of the Labor Agreement.

In 1981, the above referred to Employee, as a result of a vacancy, replaced the main Confidential Secretary and complied with the provisions of Article 29, regarding withdrawal from the Union and the Union's Jurisdiction.

The Incumbent applied for the vacant position, however the duties did not include the partial Bargaining Unit Work performed by the previously mentioned herein Employee. However, the Company did not waive the contractual right to have confidential work done by Non-Union Employees.

It should be noted that during the ensuing period of time, whenever possible, confidential work was routed to the previously promoted Non-Union Secretary. As time went on, it became more difficult to segregate the work.

In accordance with contractual procedure, the Parties agreed to submit the Jurisdictional Dispute to Arbitration and submitted evidence to support its position. Specifically, the Company is of the opinion that the contract does not provide any restrictive formulas or quotas with respect to Exempt Confidential Positions. The Company's Testimony and Exhibits support the confidentiality of the work and that it is no longer possible to segregate the confidential material from the Incumbent's workload.

The Company notes that at the time the Incumbent was offered the job in the office pool she was afforded the opportunity to remain under the Jurisdiction of the Union at her request and it was suggested that she would not have accepted the job had she been subject to the provisions of Article 29, which would have meant losing her Union benefits.

The Company argues that "the rule of reason" must apply in this decision regarding the targeted job.

In summation, the Company is of the opinion that within the terms of the Labor Agreement and the evidence before the Arbitrator, its position should be upheld. Further, that the Company did not at any time waive its negotiated rights under Article 29, even though it may have blurred the true meaning of Article 29, when in the past it had transferred the herein referred to two Employees to the Exempt Confidential Job. It is also noted that this request of the Company is in no way related to any dissatisfaction with the performance of the Incumbent and the Company has the highest respect for the work of the Incumbent. The Company is convinced that based on the Evidence and Exhibits presented at the Hearing, that the Arbitrator will uphold the Company's position pursuant to its rights under Article 29 of the Labor Agreement.

#### Discussion and Opinion

Pertinent Contract Provisions: (Emphasis added.)

##### ARTICLE 1 — EMPLOYEES COVERED AND BARGAINING AGENCY

A. This Agreement shall cover and apply to employees of the Employer employed in jobs classified in the schedule attached hereto at the Employer's place or places of business within the geographical jurisdiction of the Union.

##### ARTICLE 29 — EXEMPTIONS, DEVIATIONS AND WITHDRAWAL CARDS

A. It is hereby mutually agreed by both parties that certain classifications of employees are exempt from the jurisdiction of the Union. In order to designate the aforesaid employees, the Employer and the Union shall confer and mutually determine the exemptions. In case any dispute arises as to any exemption which cannot be settled between the Employer and the Union, said dispute shall be submitted to the arbitrator.

B. Broadly defined, the exempt classifications are: Executives who formulate or administer management policies and their confidential and private secretaries; department heads and buyers who devote eighty percent (80%) or more of their time to such duties; those engaged in professional or scientific duties; and any person charged with the full responsibility of determining the actual profit and loss of the Employer's business.

C. When an employee is promoted by the Employer to any classification as herein above exempted, The Union agrees that said employee shall be given a Withdrawal Card and said employee shall relinquish his affiliation with the Union, provided said employee is in good standing with the Union at the time of such request, and provided further that said employee requests such Withdrawal Card.

#### ADDENDUM (Page 40)

#### WAGE RATES AND CLASSIFICATIONS

1. The parties agree that the CFS Continental Proposal #11 Office Jurisdiction involving exception from Union Jurisdiction for the following jobs:

Payroll Clerk

Rebate Clerk

Secretary

Credit Policy Administrator

shall be resolved by submitting the matter to arbitration under the provisions of Article 29 of the Labor Agreement. It is further stipulated that collective bargaining history shall not be a consideration in the Arbitrator's decision.

#### ARTICLE 14 — GRIEVANCE AND ARBITRATION PROCEDURE

B. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, or any other terms made supplemental hereto, or to arbitrate any matter not specifically provided for by this Agreement or to enter any new provisions into this Agreement; nor shall the arbitrator's authority exist or extend in any way beyond the expiration of Agreement except as regards grievances timely reduced to writing before the expiration of this Agreement. The arbitrator shall confine his decision to a determination based upon the facts presented.

C. The decision of the arbitrator shall be final and binding upon all parties.

E. The expense of the arbitrator and all mutually agreed upon facilities and services shall be shared equally by the Union and the Employer.

#### ARTICLE 15 — WAGE RATES AND CLASSIFICATIONS

C. If necessary to determine the classification of employees, the Employer shall meet with a committee of the Union to effectuate same. Provided any employee's classification cannot be agreed upon, either the Employer or the Union shall have the right to submit said disputed matter an arbitrator. Both parties agree to abide by the decision

handed down in such matter by said arbitrator.

The purpose of the Arbitration Procedure is to seek the truth of the matter and to adjudicate the rights and privileges of the parties as spelled out in the Labor Agreement and on the Total Record, as presented by the Parties.

Parties to a contract are charged with full knowledge of its provisions and the significance of its language (7 LA 708, 711; 3 LA 229, 232) and the clear meaning of the language is generally enforced even though the results are harsh or contrary to the general expectations of one of the parties (28 LA 557, 558; 20 LA 756, 758 759; 13 LA 110, 114).

The primary goal of the Arbitrator is to determine and carry out the mutual intent of the Parties. Sometimes an ambiguity may mean that there never was a meeting of the minds. In such a case one must determine what was probably the closest thing to the intent of the Parties. It is said that the "primary rule in constructing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of the questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions" (Riley Stoker Corp., 7 LA 764, 767, Platt, 1947).

There is no question in the Arbitrator's mind that the Labor Agreement was the result of Collective Bargaining and a "give and take" proposition, or put in another way, "We will do thus and thus, if you in turn will do thus and thus for us." A Promise for a Promise.

It is also a well-accepted axiom that one cannot and should not attempt to gain through Arbitration that which one was not able to gain through negotiations.

A written contract consummating oral and written negotiations is deemed under the Parol Evidence Rule to embrace the entire Agreement and when the writing is clear and unambiguous, Parol Evidence will not be allowed to vary the Contract (Wigmore, Evidence). This is a rule of Substantive Law which when applicable defines the limits of a Contract (Williston, Contracts).

Therefore, as Arbitrator, it is necessary to examine all of the documents, evidence, and testimony of the Witnesses on the Record in order to arrive at a decision on the Issue before me. Further, this Award is limited to the Issue as framed by the Arbitrator for adjudication and within the limita-

tions imposed upon my powers as set forth in the Labor Agreement.

Preponderance or weight of evidence has been defined as, "It rests with that evidence which when fairly considered produces the stronger impression and has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition thereto." (S. Yamamoto v. Puget Sound Lumber Co., 84 Wash. 411, 146, pp. 861, 863).

The Arbitrator must consider whether conflicting statements ring true or false; he will note the witness' demeanor while on the stand; and he will credit or discredit the testimony according to his impression of the witness' veracity. In summary, he must determine the truth respecting material matters in controversy, as he believes it to be based upon a full consideration of the entire Record, and after he has accorded each witness and each piece of documentary evidence the weight, if any, to which he honestly believes it to be entitled.

Based on the criteria set forth above, a complete and thorough review was made of the Exhibits and Testimony of Record.

During the course of the Arbitration, the Parties entered into numerous stipulations thereby removing from the Arbitrator's consideration a necessity to make determinations on certain non-disputed facts.

It is to be noted that the five (5) general National Labor Relations Board factors are not consistent with the last sentence of Paragraph 1 of the Addendum negotiated by the Parties. To Wit: "It is further stipulated that collective bargaining history shall not be a consideration in the Arbitrator's decision." Therefore, the Arbitrator's consideration is a value judgment based on the Testimony and the Exhibits.

The Contract language is clear and unambiguous, "... Executives who formulate or administer management policies and their confidential and private secretaries; ..."

The Testimony and Exhibits identify the work being performed for "... Executives who formulate or administer management policies..." and therefore meets the criteria of Article 29 in exempting the Incumbent's position from Union Jurisdiction.

Joint Exhibit IV and Company Exhibits "A" through "I" substantially support the Company's position. It is to be noted that there is a substantial difference between "... collective bargaining history..." and "... history of the confidential secretarial pool and the work interrelationships between

the prior holder, who is now a confidential secretary, and the Incumbent that replaced this person on the job."

Article 5 — Plant Management and Direction of Personnel and Grievances, establishes the Company's right to the operation of the Plant and the direction of personnel provided that such rights as exercised do not infringe on the rights of any Employee under the Agreement. It was stated supra, that one cannot get and should not attempt to gain through Arbitration that which one was not able to gain through Negotiations. The Record is clear that the Parties, pursuant to the terms of their Labor Agreement, submitted to the Arbitrator for Adjudication the Issue herein, since they were not able to settle the matter through Negotiations. In this instance, Arbitration was the proper form.

It was stipulated that the Incumbent expressed a desire to remain within the Union's Jurisdiction. The Arbitrator was not asked to rule upon the affect upon the Incumbent in the event it was his finding that in accordance with Article 29 of the Labor Agreement the job classification in question was found to be Exempt from Union Jurisdiction. Therefore, again as stated supra, the clear meaning and language of the Contract is subject to enforcement even though the results are harsh and may be contrary to the general expectations of one of the Parties. However, when Parties Negotiate Labor Agreements it should be anticipated that enforcement of the terms may require adjustments by one or both of the Parties.

Thus, a finding that the job in question is Exempt from the Jurisdiction of the Union makes it subject to all of the provisions of Article 29 of the Labor Agreement.

#### AWARD

Pursuant to the terms of the Labor Agreement and in accordance with the Jurisdiction conferred on the Arbitrator, the job classification currently occupied by the Incumbent, Rachel Marmolejo, is found to be a Confidential Secretarial Classification that is Exempt from Union Jurisdiction under the provisions of and subject to the provisions of Article 29 — Exemptions, Deviations and Withdrawal Cards, of the Labor Agreement.