

JACKSON PUBLIC SCHOOLS
ARBITRATION

Therefore, it is hereby further ordered that the Union is to pay two-thirds of the Arbitrator's total charges, while the Company is to pay one-third. Any unresolved differences regarding interpretation or application of this Award will be settled by the undersigned upon written request of the parties.

Arbitrator's fees and expenses

Arbitrator's fees and expenses shall be divided equally between union and school system, where confusion caused by placement and construction of contract clauses that give rise to arbitration is equally fault of both parties.

JACKSON PUBLIC SCHOOLS -
Decision of Arbitrator

In re JACKSON PUBLIC SCHOOLS and JACKSON EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, MEA/NEA, AAA Case No. 54-89-1308-91, Grievance No. 2-90- Arbitrator: William P. Daniel

SUBCONTRACTING

Ambiguous collective-bargaining contract - Notice #117,3873 #117,386

School system that used subcontractors to replace ceiling tiles was required to discuss with union before any subcontracting was done, despite employer's reliance on contract provision permitting subcontracting that does not cause layoff or prevent recall, since union-discussion provision is not to be read simply as modifying provision cited by employer, but rather requires employer to notify union on each occasion of potential subcontracting; once notice is given, union has responsibility for requesting information needed to determine presence of any contractual factors that might require appropriate circumstances, union may invoke contract provision authorizing "special conferences for important matters."

REMEDY

Ambiguous collective-bargaining contract - Mistaken interpretation - Monetary award #117,386 #117,171 #24,15

Union is not entitled to monetary award despite employer's failure to comply with contract provision requiring notice to placement work, where collective-bargaining contract was so ambiguous as to be easily misunderstood by both parties and there is no evidence that employer acted in

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Appearance: For the employer - Bruce J. Ams, director of personnel. For the union - Chuck Corella, unit serv director.

CONTRACT AMBIGUITY

Facts

DANIEL, Arbitrator: - In the summer of 1990, in the process of asbestos removal at two schools, the employer used subcontractors to replace ceiling tiles. When a maintenance worker observed this, he complained to his steward and union president believing it to be contrary to the contract. Subsequently a grievance was filed. The contract language pertaining to this grievance has been essentially the same since 1979 when a provision relating to discrimination against students or employees was added to section 22-10-2. The language that was in effect in 1986 when a prior arbitration award was made stated:

22-10 SUB-CONTRACTING

The employer agrees that it will not subcontract any bargaining unit work performed by the employees in the regular course of their employment if the same will in the bargaining unit, unless:

- 22-10-1 The work or services cannot be performed in accordance with regulatory or standard specifications.
- 22-10-2 The employer does not have the manpower, proper equipment, skills capacity, or which would be made economically impractical by contracting out. However, subcontracting cannot be used if it disparately impacts on students or employees so as to discriminate on the basis of age, sex, marital status, race, color, creed, national origin, height, weight, handicap, ethnic group, religion, arrest record, union, or political affiliation.
- 22-10-3 The employer agrees to discuss the potential of any subcontracting through the provisions of Article 12 before any sub-contracting is done.

The president of the union, Frazier testified and acknowledged that the

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discretion to the employer in regard to subcontracting. He admitted that in this case the subcontracting did not cause a layoff or prevent recall. He complained that the unit members his primary claim of violation was the failure of the employer to comply with section 22-10-3 by notifying the union ahead of time and discussing the matter. He pointed out that the specific vehicle for such notification and discussion is found in the special conference language of the contract which could be used either by the employer or the union. He and other union witnesses testified that they had no idea that the employer had numerous such subcontracting. If they had known a grievance would have been filed if the proper procedures had not been followed, Frazier noted that special conferences had been used regarding unit jurisdiction and special youth programs and student work programs and that details had been worked out between the parties to the satisfaction of the union in those instances. He testified that when this matter was first taken up with Hunter, the superintendent of operations, he simply told the union that the employer had no duty whatsoever to discuss the matter because the language of the contract required that only if a layoff or failure to recall might result.

Hunter in his testimony confirmed exactly that—that he believed a proper interpretation of the contract language did not require the employer to notify or discuss its decision.

The employer's argument centers around the construction of the clause and the conclusion of the first introductory paragraph with the words "if the same will cause a layoff or prevent recall of anyone in the bargaining unit, unless;" and then goes on to list three conditions prefaced by "unless" set forth in 22-10-1, 22-10-2, and 22-10-3. This position of the employer was maintained throughout the grievance process as reflected in the step two answer:

Section 22-10 provides that there will be no subcontracting if subcontracting will cause a layoff or prevent a recall of anyone in the bargaining unit unless certain conditions are satisfied. However, no layoffs were caused nor were any recalls prevented by the work in question.

Furthermore, there is a long history of identical work being done in the past with no adverse effects on layoff or recall of bargaining unit members. Therefore, on the basis of timeliness and merit the grievance was denied.

Introduced in evidence was a prior arbitration award issued in 1986—grievance #208. In #208 the erection of a fence around a school was subcontracted. It would appear from the award that although some discussion took place between the parties about prices for such fence, the union complained that no special conference was held and that the work which normally could be done by bargaining unit members should not be subcontracted. That arbitrator found that any initiation of a special conference under Article 12 required "direct action by the potentially injured party." He went on to find that it would not be the responsibility of the board in a subcontract case to initiate a special conference. The arbitrator also found that the board had wide latitude to subcontract that time, which limited that time, and that the only circumstances, at that time, which limited that right were either to cause layoff or affect recall. The grievance was denied. The employer asserts this prior decision is binding in this case.

Other Pertinent Contract Language

ARTICLE 12 - Special Conferences

12-1 Special Conferences for important matters will be arranged between the President or their designee and the Director of Plant Planning at the request of either party. There shall be at least two (2) representatives from each, the union and the Board, in attendance at the meeting. Arrangements for such Special Conferences shall be made in advance and an agenda provided in writing, prepared by the party requesting the conference listing the items to be discussed at the special meeting and shall be presented at the time the conference is requested. Matters taken up in Special Conferences shall be confined to those included in the agenda. Special Conferences may be convened within twenty (20) days after the request is submitted. This meeting may be attended by a representative of MEA/NEA. When the conferences involves policy grievance, a written reply will be issued within ten (10) days.

Should such a conference result in a mutually acceptable amendment to the Agreement, the amendment shall then be subject to ratification by the union and the Board, before implementation.

If an emergency dismissal concept involves changes in routes or drivers, then the emergency dismissal will be subject to this article.

Positions of the Parties

Union: The employer reads Article 22-10 erroneously. The word "unless" is intended to be followed by or read only with paragraphs 22-10-1 and 22-10-2—that makes sense. However, attempting to read 22-10-3 as being part of that series makes no sense at

all and clearly the parties intended the obligation to discuss the matter beforehand to apply in every case. That is the key to this grievance. The union does not contend that the employer violated any other conditions of the contract which limit its right to subcontract. But because it did not follow proper procedures, the grievance should be granted and the subcontracting be held a violation of the contract and employees be made whole for wages lost for the work which they could have performed.

Employer. Subcontracting such as has gone on for years under the broad language of the contract that accords great discretion and wide latitude to the employer. In 1986 an arbitrator clearly confirmed the employer's right to do this and spoke on the subject of the union's demand that some conference or discussion had to be held beforehand. That arbitrator found that that was not an area of contract violation then nor should it be in this case because the circumstances are exactly the same as is the contract language. The contract language is very clear in the three paragraphs that followed the word "unless"; each must be given meaning in the common English usage. There was no layoff and no recall problems here and hence no obligation to discuss.

From a practical standpoint to have a special conference every time some decision as to subcontracting has to be made would clearly be contrary to the intent of the parties and a mind numbing process. For these reasons the grievance must be dismissed.

Issue

Did the employer violate the contract by failure to comply with Section 22-10-3 by discussing the proposed subcontracting with the union beforehand and, if so, what is an appropriate remedy?

Discussion

This case clearly concerns itself with the technical aspect of writing a contract and putting it together in an appropriate form. For many years the language which is key to this dispute has been unchallenged and had been repeated in one contract after another in the same form as it is now. The word "unless" was in the same position as were the subsection clauses that followed below. Indeed, the numbering of the clauses below 22-10 would lead one to believe that because of their 1, 2, 3 designation they were all to be considered to be equally subparagraphs modifying or explaining

the main paragraph. Now the union argues that this is not so and that any logical or realistic reading of it in an English sense would reveal that while the first two sub-paragraphs indeed are properly modifiers the third one that obliges the employer "to discuss the potential" is a different matter altogether. The employer contends that traditionally arbitrators viewing the unambiguous written provision of a contract feel compelled to adopt the normal sense of the language that a reasonable person would.

The arbitrator is convinced that in this case the union's analysis is correct. If as the employer says each one of these three paragraphs were a true modifier of the obligation to subcontract then it should be possible to read each separate subparagraph without reference to either of the other two and make sense of it alone. This is true if one were to read paragraph 22-10 with 22-10-1 or 22-10 with 22-10-2, omitting the other two paragraphs in each case or even to read both paragraphs 22-10-1 and 22-10-2 along with the main introductory paragraph. However, when paragraph 22-10-3 alone is added as a modifier, it reads:

The employer agrees that it will not subcontract... If the same will cause a layoff or prevent a recall of anyone in the bargaining unit, unless the employer agrees to discuss the potential of any subcontracting through the provisions of Article 12 before any subcontracting is done.

It is obvious that paragraph 22-10-3 is not the equivalent in any respect to the two paragraphs above it and is not a modifier which would enable the employer, because of special circumstances as addressed in the other two paragraphs, to avoid notice and discussion with the union. In other words, the main clause 22-10 permits subcontracting even if it will cause a layoff or prevent recall or if the unit cannot perform the work in accordance with regulatory or standard specifications (22-10-1) or the employer lacks manpower or equipment or skills economically necessary and taking into consideration possible discriminatory impact on students or employees (22-10-2). But if the situations or conditions set forth in those two clauses do not pertain, the employer may not, simply by agreeing to discuss "potential" be thereafter free to subcontract causing a layoff or preventing a recall. And so it is obvious that the language of 22-10-3 has a different purpose altogether and that any subcontracting or bargaining unit work must first be discussed with the union.

Now the former arbitrator seemed to place a great deal of emphasis on the

fact that the 'injured party' is the one that must demand use of the special conference procedures. This arbitrator is not convinced that is so. That clause clearly indicates that either party may act.

Special conferences for important matters will be arranged between the local President or their Designee or the Director of Plant Planning at the request of either party (emphasis added).

The only obligation is that the party that requires the conference should initiate it and should provide the agenda for that meeting. The question is: whose obligation is it to raise an issue such as subcontracting? Obviously, if the union is unaware of the subcontracting it can hardly initiate a special conference before the subcontracting has begun. The knowledge in such case is wholly that of the employer's. And so it must be found that in such a case the employer is obliged to make sure the union is properly informed beforehand. Once the union is informed it then may make the decision as to whether it wants a special conference or has any questions regarding the matter.

Indeed, it is the very questions that the union might have about a particular subcontracting that supports the conclusion of the arbitrator. The union, as the representative of the employees, has the obligation to decide whether proposed subcontracting meets the qualifications or limitations as set forth in 22-10 or 22-10-1 and 22-10-2.

For example, the union once it was informed of subcontracting, would have the right to ask the employer whether any layoff might result or whether there were any employees on layoff whose recall rights might be affected. Furthermore, the union would have a right also to consider whether the work might not be performed "in accordance with regulatory and standard specifications by the staff." Additionally, 22-10-2 might require a discussion as to whether the employer had the manpower, proper equipment, skills capacity, or whether it was in fact "economically practical" to subcontract out. These are points that the union has a right to speak to the employer about and perhaps attempt to convince the employer to change its mind or at least get a detailed explanation. The parties in recent years, have added references to discrimination incorporating all the standard statutory bases along with a couple of others.

In each instance, the union has the right to discuss with the employer the impact of such factors if it believed such would come into play. All of this

these matters, raise questions about them or fulfill its legal obligation if in fact it is not made aware of what is going on until the subcontracting actually starts. Now, this bargaining duty of the union is a statutory one and requires that in fulfilling its duty to its members. The union has to enforce the collective bargaining agreement and protect the rights of members of the unit to the work known as "bargaining unit work." The right of the union in this respect includes the right to complain—that is to file a grievance—and in that respect the law is well developed both by the NLRB and MERC that the employer must provide to the union such information as is necessary for the administration of the contract and the processing of grievances. That statutory obligation and the obvious need of the union to be informed of potential subcontracting so as to discuss the various aspects under the subcontracting provisions in the contract is quite compelling.

The arbitrator finds that the employer is obliged to notify the union on each occasion of potential subcontracting of bargaining unit work. Once that is done it becomes the responsibility of the union to request such information from the employer as to determine whether there are any contractual factors involved which might restrict the employer's right to act. The arbitrator does not believe that such information has to be provided in a formal fashion such as a special conference but rather can be set forth in a written notification to the union such as:

This subcontracting will not result in layoff nor have any impact on the recall of any unit member and has no discriminatory effect on any student or employee. It is undertaken because of regulatory or standard specifications and because the employer lacks the necessary equipment to carry out the work economically.

This above, of course, is simply an example of the type of language which might be used. Once such notification is received by the union it could still informally ask for other pertinent information but this should be in a reasonable way and not to harass or impede the employer. In most subcontracting cases, when furnished with this information, the union should be satisfied and not pursue the matter further. However, there may be those cases where a legitimate issue still exists as to regulatory standards or specialized equipment. Or there might even be some question as to the actual economics of a particular proposed subcontracting. Where there is a legitimate and reasonable question

with the provisions of the contract relating to special conferences which, indeed, are to be used for "important matters." Certainly subcontracting is an important matter and may, under appropriate circumstances, be the subject of such a conference. To arrange and call for such a conference is the obligation of the union, once informed. The arbitrator points out consistent with the employer's observation, that needless use of special conference procedures in subcontracting cases will undermine the intent and purpose of the contract.

AWARD

The grievance is granted in part. The contract language must be interpreted as claimed by the union to require that any subcontracting may be subject to special conference discussion between the parties. Certain procedures must be imposed as a practical matter such as informal notification to the union of planned subcontracting and exchange of information. The violation in this case is of a technical nature and there is no evidence that the employer acted in bad faith or that the unit work force was actually deprived of work or earning opportunities. The arbitrator also notes that until this ruling the contract language has been so ambiguous as to be easily misunderstood. For that reason there is no monetary remedy granted here.

The contract provides that the loser pays the full amount of the arbitrator's fees and expenses. In this case, the arbitrator finds that the confusion caused by the placement of clauses in the contract and the construction to be afforded them is equally the fault of both parties. Each bears responsibility for the necessity of this arbitration hearing and should also bear an equal share of the costs. Therefore, the arbitrator's fees and expenses are to be divided equally between the parties.

LAYOFFS

Recall rights — Seniority — Mutual mistake *117,125 *117,232

Company did not violate laid-off janitor's recall rights when union that operates hiring hall referred laid-off co-worker with less seniority, where union incorrectly asserted that co-worker was next qualified person in seniority order, and company depended on union to send right person, but referral should have gone to another laid-off janitor with more seniority than grievant's; grievant's seniority rights do not extend to being selected in error.

ARBITRABILITY

Constructive waiver — Estoppel by conduct *94,59 *94,57 *117,125

Grievance concerning company's failure to recall laid-off grievant is arbitrable, where collective-bargaining contract states that either party may request arbitration within five days following period "when the Adjustment Board can meet," and company failed to establish when this period was; company's failure to reserve matter of arbitrability constitutes constructive waiver and estoppel by conduct.

Appearances: For the employer — Greg Passanti, consultant. For the union — Stewart Weinberg (Van Bourg, Weinberg, Rogger & Rosenfeld), attorney.

RECALL RIGHTS

Contract Provisions
CONCEPTION, Arbitrator: — [The contract provisions are: —]

Section 3
Union Membership & Hiring

3.3 (a) When new or additional employees are needed, the Employee shall notify the Union of the number and classifications of employees needed. Applicants for jobs shall be referred by the Union to the Employer for employment on a non-discriminatory basis, without reference to their Union membership or lack of such membership provided that such referral shall not be affected in any way by Union rules, regulations, bylaws, constitutional provisions, or any other aspect or obligation of Union membership, policies or requirements. (b) Each Employer shall have the right at its sole discretion to reject any person referred to it for the first time. After such rejection, the Union will not refer that person to the Employer who rejected him/her. (c) There shall be a thirty (30) shift probationary pe-

Decision of Arbitrator

CLEAN-A-RAMA —

In re CLEAN-A-RAMA and BUILDING SERVICE EMPLOYEES UNION, LOCAL 87, SERVICE EMPLOYEES INTERNATIONAL UNION, Arbitrator's Case No. 07-09-92, Union Grievance No. 91-RD-946, July 20, 1992
Arbitrator: David A. Conception

riod for a new employee. This probationary period shall be applicable to each Employer for which the employee works until the new employee works more than thirty (30) shifts for one Employer. Thereafter, the new employee's probationary period shall be five (5) shifts for every other Employer for whom the new employee works. (d) There shall be a five (5) shift probationary period for all employees who have worked at least one shift for any employer prior to the signing of this Agreement. This probationary period shall be applicable to each Employer for which the employee works. However, an employee shall not have a probationary period with any Employer for whom the employee worked six (6) or more shifts prior to the signing of this Agreement. (e) During the probationary period, the Employer may discharge the employee without cause and without recourse to the grievance procedure. Any employee so discharged will not thereafter be referred by the Union to the Employer who discharged that employee.

3.4 The Employer agrees within seven (7) days of the date of hiring to notify the Union of the name or names and addresses of the persons hired and the buildings to which such persons were assigned.

3.5 In hiring, the Employer shall give preference to applicants previously employed in the Building Service Industry in the local labor market area, which shall be defined to mean the City and County of San Francisco.

3.9 Should any dispute arise concerning the rights of the Employer, the Union, the employees or applicants for employment under this Section, the dispute shall be submitted to a neutral arbitrator in accordance with the arbitration procedure provided in this Agreement. Such decision shall be final and binding on the said Employer, Union, employees, or applicants for employment.

6.1 Seniority is the right accruing to employees through length of service which entitles them to appropriate preference in layoffs, rehiring and vacation.

6.3 In a case of layoff, the Employer shall give a minimum of five (5) days' notice to the affected employee(s) or pay the employee an amount equivalent to the employee's wages for one (1) week, based on the employee's normal wage, in lieu of such notice.

6.4 Employees on layoff shall receive preference over all new hires in the event the Employer hires employees.

20.1 Any difference between the Employer and the Union involving the meaning or application of the provisions of this Agreement shall constitute a grievance and shall be taken up in the manner set forth in this Section. A grievance need not be considered unless the aggrieved party serves upon the other party a written statement setting forth the facts constituting the alleged

grievance. For a discharge case grievance, such notice must be served within ten (10) days from the date of discharge. Such written statement concerning any other type of grievance must be served within fifteen (15) days of its occurrence or the discovery thereof by the aggrieved party. It is the intent of the parties that reasonable filing of alleged grievances so they may be adjusted or dismissed without undue delay. The Employer and the Union agree to use their best endeavors by informal conferences between their respective representatives to settle any grievance within ten (10) days after service of such written statement. Upon receipt of a timely written request, there shall be an Adjustment Board consisting of two (2) representatives designated by the Union who have not participated in earlier steps of the Grievance Procedure and two (2) representatives designated by the Employer who have not participated in earlier steps of the Grievance Procedure. The Adjustment Board shall meet as required and shall consider fully all aspects of the issue presented. Any decision by the majority of the four (4) members of the Board of Adjustment shall be final and binding upon all parties, subject to limitations of jurisdiction and authority contained in the contract. If during the period that the Adjustment Board can meet, no majority decision can be reached, either party may, within five (5) days following such period, request in writing that the matter be referred to arbitration. If the parties cannot agree upon a person to act as an impartial arbitrator within five (5) days after service of such demand, then an impartial arbitrator shall be named by agreement from a list of five (5) arbitrators supplied by the State Conciliation Service. Either party may reject in its entirety any list of arbitrators supplied by the State Conciliation Service and thereafter request a new list. The decision of the arbitrator shall be final and binding on both parties hereto. In the event of a willful failure by either party to appear before the Arbitrator, the Arbitrator is hereby authorized to render his/her decision upon the evidence produced by the party appearing. Each party shall bear all costs of presenting its case to the Arbitrator. The Arbitrator's fee and all incidental expenses of the arbitration shall be borne equally by the parties hereto. Proposals to add to or change this Agreement shall not be arbitrable. Neither an arbitrator nor a panel of representatives shall have any authority or power to add to, alter or amend this Agreement.

C.1 The Union shall establish and maintain open and non-discriminatory employment lists for the use of working people desiring employment on work covered by the various Collective Bargaining Agreements and such working people shall be entitled to use such lists without charge.

C.2 The Employer shall first call upon the Union for workers as they may from time to time need, and the Union shall furnish the Employer the required number of qualified and competent workers in the classifications needed by the Employer.

Section 6
Seniority

6.3 In a case of layoff, the Employer shall give a minimum of five (5) days' notice to the affected employee(s) or pay the employee an amount equivalent to the employee's wages for one (1) week, based on the employee's normal wage, in lieu of such notice.

6.4 Employees on layoff shall receive preference over all new hires in the event the Employer hires employees.

20.1 Any difference between the Employer and the Union involving the meaning or application of the provisions of this Agreement shall constitute a grievance and shall be taken up in the manner set forth in this Section. A grievance need not be considered unless the aggrieved party serves upon the other party a written statement setting forth the facts constituting the alleged

Section 20
Grievance Procedure

In re CLEAN-A-RAMA and BUILDING SERVICE EMPLOYEES UNION, LOCAL 87, SERVICE EMPLOYEES INTERNATIONAL UNION, Arbitrator's Case No. 07-09-92, Union Grievance No. 91-RD-946, July 20, 1992
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Exhibit C
Job Dispatching and Hiring Hall Procedures

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C.2 The Employer shall first call upon the Union for workers as they may from time to time need, and the Union shall furnish the Employer the required number of qualified and competent workers in the classifications needed by the Employer.