IN THE MATTER OF ARBITRATION

Kansas City Area Transportation Authority

Employer

and

Amalgamated Transit Union,
Local 1287

Union

Before

Gail P. Anderson
Arbitrator

FMCS No. 060426-03225-7

Dated this 21st. day of May, 2007

By _____

Gail P. Anderson

Statement of the Case

The Arbitration hearing was held January 19, 2007 in Kansas City, Missouri in accordance with the provisions of Article 1.13 of the Agreement between the parties dated August 25, 2005.

The Union filed a grievance on December 2, 2005 asserting that the Kansas City Area Transportation Authority had violated the procedures outlined Agreement when it contracted out work to an outside contractor and failed to follow the terms of the Agreement related to that process. The Union and management attempted to resolve the grievance and failing to resolve the grievance, the Union requested arbitration. The parties agreed that the matter is properly before the Arbitration Board for final and binding determination.

Both parties appeared and we were represented by counsel, had opportunity to testify, to examine and cross-examine witnesses, and to present relevant evidence in support of their respective positions.

At the conclusion of the hearing, the parties indicated their desire to file post hearing briefs. The undersigned subsequently received the briefs and they were duly considered in reaching a decision in the matter.

Background

The Kansas City Transportation Authority is a large bi-state authority providing mass transit services to the Kansas City metropolitan area. The Authority is funded by federal, state and city tax revenues, as well as by bus fares. The KCATA is staffed by approximately 650 employees.

Amalgamated Transit Union, Local 1287 is the exclusive bargaining agent for most of the hourly employees working for the Authority.

Issue

The Union's statement of the issue is:

> " Did the Authority violate the Agreement when it subcontracted out certain maintenance work in November and December 2005, under the facts and circumstances of the case? If so, what shall be the appropriate remedy be?" (Emphasis added)

The Authority's statement of the issues is:

> " Did the Authority violate the Agreement when it subcontracted out certain work in November and early December 2005, related to a scheduled special event; and if so, what shall the appropriate remedy be?" (Emphasis added)

The independent Arbitrator has restated the issue to be:

> " Did the Authority violate the terms of the Agreement in November and December 2005 by subcontracting out certain work. If so, what is the appropriate remedy?"

Pertinent Contract Provisions:

Article 1
General Provisions

Section 1.1. Purposes of Agreement

The purposes of this Agreement are: to assure adequate and dependable local transit to the public without interruption or impairment by labor disputes or controversies, it being recognized by the parties hereto as a fundamental principle of public utility operation that the public interest is paramount and is not to be adversely affected by any dispute or controversy which may arise hereunder between the parties hereto; to provide procedures for the adjustment of all grievances and disputes arising hereunder, including final resort to arbitration if necessary, to recognize the Union as the duly certified bargaining agency for the classifications of employees in the collective bargaining unit and to provide for its security; to prescribe the wage rates, hours of work, working conditions and other conditions of employment for said classifications of employees; and to set forth various other provisions relative to the rights, privileges, duties and obligations of the contracting parties hereto and of those affected hereby; all upon the terms and conditions hereinafter stated.

It is recognized by the contracting parties that the welfare of the employees depends upon the welfare of the authority which in turn is dependent upon the good will and patronage of the public in the communities served; and , since these mutual advantages can only be gained by serving the highest type of service, the Union agrees to exert every reasonable effort to raise the standard of ability and efficiency of the employees in order that they may become increasingly proficient in their duties and make the service more desirable and attractive to the public; and the Authority agrees to cooperate in these efforts.

Section 1.3 Nondiscrimination

(a) There shall be no discrimination by either party because of membership in any labor organization and neither party shall exert any pressure on or discriminate against any employee with regard to such membership. There shall be no discrimination against any employees acting as a Union representative.

(b) The Authority and the Union agree to abide by all applicable State and Federal laws regarding nondiscrimination. Neither party will discriminate against an

employee on account of race, color, religion, creed, sex, sexual orientation, age, disability, citizenship, national origin or ancestry.

Section 1.4 Past Practices.

A past practice is an agreement either oral or written, to handle a particular factual situation in a given manner. In order for such past practice to exist, it must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertained over a reasonable period.

All past practice agreements between the parties that have not been reduced to writing and signed by the parties shall be considered void as of July 1, 1979

No past practice may be established after the execution of this contract unless reduced to writing at the time of the establishment of the practice

Section 15. Employees to Whom Applicable.

This Agreement shall apply to all present and future employees of the Authority who are within the job classifications set forth in 8.1, 8.3 and 8.4 of this Agreement and to no other employees.

The term "temporary employees", as used herein, shall mean those who are hired for a maximum of ninety (90) days, whereupon they must either become permanent employees or be released; and it is understood that when such temporary employees are hired it will be for a definite job or program in mind and that they will be assigned in good faith thereto and will be used on that program exclusively while weather or operating conditions permit and will be only assigned to other work when weather interferes with said definite job or program or when such action is required in good faith for proper operations. Such temporary employees shall not be so used as to deprive permanent employees of normal work or to result in layoffs or permanent employees. (Emphasis added)

The Union shall be notified when a temporary employee is hired. Such notification shall include the specific job that will be assigned and the date of hire.

Section 1.12. Management - Discipline.

(a) The Union recognizes that the management of the business, including the right to direct the working forces, to prescribe, effectuate and change service and work schedules consistent with and not contrary to any specific provisions contained in this Agreement, to plan and control corporate operations, to introduce new and improved facilities or operating methods, to relieve employees from duty because of lack of available work or other legitimate reasons, to transfer them, to determine the minimum qualifications of experience, health and physical and mental fitness for any job covered hereby and to appraise the qualifications of any individual thereof, is vested exclusively in the Authority; subject, however, to the seniority rules and grievance procedure hereinafter set forth as concerns any employee to whom this Agreement is

applicable and who may be relieved from duty or transferred or whose qualifications may be questioned.

Section 1.13. Grievances

Any employee to whom this Agreement is applicable and who claims to be aggrieved by such action of the Authority or its officials, whether occasioned by discharge, suspension or other discipline or whether because of alleged unjust treatment or failure to apply to him any of the benefits of this Agreement to which he believes himself entitled, may proceed in accordance with the following grievance procedure (except that when an employee has been discharged, suspended or otherwise disciplined after an investigation under the final paragraph of the proceeding Section hereof, may go directly to his Superintendent, Lead Foreman, Manager or Director when none of the others exist as in Section 1.12(f) provided). Saturdays, Sundays and holidays will not be considered in computing time in the following step..

4. If the Director's decision is not satisfactory, then the dispute may be referred to arbitration by the Union by delivering a notice of intent to arbitrate to the Deputy General Manager within five(5) days of the Union's receipt of his decision. Arbitration shall be invoked only by the Union and, if it is not, the dispute shall be resolved according to the last answer in the grievance procedure. The Union may intervene and participate in the handling of a grievance or dispute at any level of the grievance procedure and no settlement may be reached between the Authority and an employee at Step 2 or above without the Union's knowledge and approval. The Union and Authority may mutually agree to settle, compromise, dismiss or resolve any dispute, disagreement, claim, controversy or problem at any time or at any grievance step before the Arbitration Board issues its final and binding decision. The matter may be submitted to regular or expedited arbitration. Expedited arbitration must be by mutual consent.

4 (b) Regular Arbitration. Each party shall, within five (5) days of the Union's notice of, intent to arbitrate, appoint a member of said Arbitration Board and deliver written notice thereof to the other party or otherwise forfeit its case. The two (2) members thus appointed shall forthwith proceed to select an additional member of the Board (who shall be an impartial and disinterested person): but should the two (2) members first selected fail to agree upon the other member within (10) days after being appointed, they shall request the American Arbitration Association to furnish a list of seven (7) members of the National Academy of Arbitration or a list of seven (7) arbitrators from the Federal Mediation and Conciliation Services, at the discretion of the party initiating arbitration, from which the third member shall be selected. Within five (5) days after receipt of the list, the two (2) members shall determine by lot the order of elimination, and thereafter each shall in that order alternately eliminate one name until one name remains. The remaining person on the list shall be the third member of the Arbitration Board. Any vacancy in the Arbitration Board shall be filled in like manner as the predecessor member is selected. Multiple grievances may be submitted to the same arbitrator only if they arise out of the same factual

situation, involved the same contract clause or work rule, or with the consent of the parties.

The Arbitration Board as thus constituted shall promptly proceed to hear the case and render a decision thereon and the decision of the majority thereof shall be final; provided, that the party appealing to the Arbitration Board shall bring the case on for hearing within ninety (90) days after the third member has been appointed, unless extended by mutual agreement, else the appeal shall be deemed abandoned and the case closed. The Arbitration Board shall make every reasonable effort to render its decision within thirty (30) days from the date of the completion of the hearing in the proceedings, or within such longer period as the parties to the proceedings may mutually agree upon in writing. All decisions of the Arbitration Board shall be in writing in triplicate, signed by al least a majority thereof, and the originals thereof shall be filed with the Authority, the employee and the Union.

5. All costs for the hearing and services of the arbitrator shall be borne by the parties jointly. Each party will bear the expense of its representatives and for the presentation of its own case.

Section 1.16. Layoffs of Employees.

(a) When it becomes necessary to layoff employees because of insufficient work, such layoffs shall be made in the inverse order of seniority held by such employees in their respective Seniority Units. When it becomes necessary to put additional employees to work, the employees so laid off will be returned to service in their respective Seniority Units in the inverse order in which laid off.

Section 1.29. Supervisors Working With Tools and on Union Jobs.

All supervisory personnel will use such tools as they deem necessary, only when demonstrating a method to an employee, in an emergency, and in inspection, research or experimental work which would not be classed as production and maintenance work. Supervisory personnel will be allowed to work in an emergency situation when all appropriate overtime lists have been exhausted.

Section 1.34. Call-outs.

A call-out shall mean a direction to an employee, given at his home or any place except his place of employment or the immediate vicinity, to report for work at any time other than the reporting time for the start of his regular assignment. Notification given to an employee that he is needed for an interview or investigation, whether notification is given at his home, place of employment or elsewhere, shall not be deemed a call-out.

An employee who is called out shall receive one (1) hour travel time at his straight hourly rate for each such call-out.

An employee called out or directed to report for work before his regular shift will be guaranteed at least three (3) hours of extra work at time and one-half, unless such work extends into the time of his regular shift in which event time and one-half will be paid from the starting time until the time of his regular shift and the balance at his regular rate.

An employee called out or directed to report for work after his regular shift will be guaranteed at least three (3) consecutive hours of extra work at time and one-half unless such work immediately follows his regular shift in which event time and one-half will be paid for the actual time engaged.

Section 1.45. Sub-Contracting.

The Kansas City Transportation Authority shall not contract out work historically performed by members of the Bargaining Unit if contracting of such work would eliminate work performed by the Bargaining Unit. Contracting of such work will not result in layoff of members in the Bargaining Unit while such contracting is in effect.

Maintenance work substantially covered by manufacturer or contractor warranties may be performed by the supplier or contractor while such warranties are in effect. Maintenance work that exceeds the workload capability of the existing employees may be contracted out if such contracting does not cause lay-off of employees of the Bargaining Unit.

Article III
Maintenance Seniority Unit

Section 3.5. Extra Work.

(a) Completion of Piece of Work at End of Shift. An employee working on his regularly assigned work day on an assignment of work at the end of his regular shift, and that piece of work is to be continued on overtime that day, shall have preference for such overtime over all other employees. Overtime worked I this event shall not affect the employee's position in the rotation of extra work.

(b) Completion of Assignment on Days Off. An employee working on any assignment requiring one or more days to be completed, and to be continued on that employee's regular days off, shall have preference for such overtime. The Overtime worked in this event shall not affect the employee's position in the rotation of extra work.

(c) Regular Day Off and Prior to Shift. Extra work, not assigned under provisions of (a) or (b), will be offered on the basis of seniority and qualifications, and such work will be offered first to employees on their regularly assigned days off on their assigned work shift (where such work will amount to four (4) hours or more). Work of less than four

(4) hours duration, prior to the start of a shift, will first, be offered to qualified employees, within the job classification, scheduled to work on the shift. Such work will be rotated insofar as reasonably practicable.

(d) Voluntary Extra Work Lists. Extra Work not filled in accordance with the above procedure will be offered on the following basis:

1. The Authority will establish voluntary extra work lists (day and night). There will be lists for vehicle Class A Mechanics, Bodymen, Air Conditioning Mechanics, Serviceworkers, Mark-Out Hostlers, Facilities Maintenance Mechanics, Facilities Serviceworker and Stockworkers.

   Upon mutual agreement between Labor and Management, the number of lists may be changed, from time to time.

2. The overtime lists shall be posted at the main time clock area or in the appropriate work are and be brought up to date every day by 12 noon (Saturday, Sunday and holidays excluded). Lists with name changes will be posted the first day of the month.

3. An employee may have his name on the lists (within the appropriate grouping) for which he is eligible. An employee's status on one list will have no bearing on his status on the other list.

   Eligibility will be determined by the employee's holding a job according to the work groups referenced in Section 3.9 (a). The employee may only be on lists included in the same work group and the employee must have held the job to be eligible to work the extra work list.

4. Overtime of less than four (4) hours will not affect an employee's position in extra work rotation.

5. An employee may add to, or remove his name from the overtime list on the first of each month only. The employee must submit his name to his immediate Supervisor prior to the 25th of the proceeding month. Any names removed or added will be placed at the bottom of the list in seniority order.

6. If an employee has been on duty sixteen (16) consecutive hours he will not be eligible for further work until his next regular shift. Any employee who has been on duty sixteen (16) consecutive hours shall be excused, on request, from working any regular shift which begins within eight (8) hours of the completion of sixteen (16) consecutive hours on duty.

7. If an employee is working the date and shift an overtime assignment is offered, he will be considered unavailable for the assignment and will remain in regular rotation.

8. When called or asked to work overtime the employee will be told what job vacancy he is to work.

(e) In the event that questions arise with regard to any portion of this Section, it is agreed that the President of the Union, or his representative, and the General Manager of the Authority, or his representative, will meet at the request of either party to resolve such questions on a fair and equitable basis for all concerned as soon as possible.

Union Position

The Union contends that the Authority (KCATA) violated the Agreement when it contracted out work that should have been offered to regular full-time maintenance employees as extra work in the same manor as it had been offered to employees of the Facility Maintenance Department. The Union asserts that when the Authority failed to offer this work in connection with a special project as extra work, it violated both Sections 1.45 and 3.5 of the Agreement.

The Union asserts that Section 3.5 mandates that when "extra work" or work performed on an overtime basis that cannot be completed by employees of the Facilities Maintenance Department must be offered to other Maintenance employees who have signed up on the voluntary overtime lists to perform the work on an overtime basis. The core of the Union's argument is that when Management failed to follow the voluntary overtime lists and offer the employees on those lists the "extra work" or at least a portion of the work, the Authority violated the Agreement. It claims that had management made this offer to work to employees on the voluntary overtime lists, as it had made the offer to employees in the Facilities Maintenance Department, the grievance would not have been filed. The Union further argues that there should be no argument that the work contracted out was clearly "extra work" within the meaning of Section 3.5 and further that the work that has been performed "historically" by bargaining unit members.

The Union contends that when the Authority failed, for whatever reason, to make the work available to other employees on the voluntary overtime lists outside the Facilities Maintenance Department, it violated Article 3.5. It asks that those employees who were on the voluntary overtime lists who were not called and given the opportunity to perform this "extra work" be "made whole for the lost overtime opportunity. The Union contends that it was only after none of those employees had accepted the opportunity to perform this "extra work" was the Authority entitled to subcontract out the work claiming that the work "exceeded the workload capability of the workforce."

In addition, the Union further argues that the Authority's failure to exhaust the voluntary overtime lists contributed to the Authorities' violation of Section 1.45. The Union asserts that members of the bargaining unit have historically performed the work that was contracted out.

The Union asserts that the Section 1.45 provides that the Authority may only subcontract if (1) the work being subcontracted does not eliminate work performed by members of the bargaining unit: (2) the work being contracted out "exceeds the workload capability of the existing employees, and (3) the subcontracting out of work does not result in the lay off of any members of the bargaining unity. The Union asserts that these conditions must be met before the Authority can contract out work. The Union charges that since the Authority contracted out work it eliminated work historically performed by members of the bargaining unit. The Union asserts that a previous decision in the *Route 33 & 35 Subcontracting Arbitration (Penfield 1995)* case (FMCS 95-05109) supports its argument that the work contracted out in that case in constituted an elimination of work performed by bargaining unit member and was thus a violation of the Agreement.

The Union acknowledges that it is should not be implied that all of the work that was contracted out "exceeded the workload capability of the existing employees." Inasmuch, the Union suggests that the Agreement should not be interpreted so narrowly or applied on such a strict conservative basis that would cause the arbitrator to miss the intent of the Agreement and contends that the Agreement be considered broadly and on the it's entirety in order to accomplish the aim of the Agreement. The Union suggests that Section 1.45 and 3.5 must be read together and applied in such a way as to give effect to both sections together. In addition, the Union asserts that only after the Authority had exhausted all of the voluntary overtime lists, could the Authority claim that the work being subcontracted "exceeded the workload capability of the existing employees in the workforce".

The Union argues that Section 1.45 does not grant the Authority the latitude of contracting out "whenever management determines, in its judgment, that it is appropriate to do so." It argues that although management may have used its best judgement, the use of its best judgement does not preclude the possibility that the use of "best judgement resulted in a contact violation. It claims that the language of Section 3.5 must be followed before contracting out work that has previously been performed by members of the bargaining unit. The Union argues that the Authority must also follow language of Section 1.12 wherein it must do so "in a manner that is consistent with and not contrary to specific provisions of the Agreement." The Union also contends that the Authority failed to meet with Union representatives prior to contracting out the work and suggests that perhaps a meeting prior to the decision being made could have resolved the issue.

Lastly, the Union recognizes perhaps that had the Authority exhausted the voluntary overtime lists prescribed by Section 3.5, some contracting out would have been required to complete the project in a timely manner. It suggests that the Arbitration Board determine that the Authority violated the Agreement when it contracted out some of the work and then rule that the Authority did not violate the Agreement in contracting out "other "portions of the work. The Union in conclusion asks that the Arbitrator determine that the Authority violated sections 1.45 and 3.5 of the Agreement and award a make whole remedy to employees who had signed the voluntary overtime lists and who were not contacted for the extra work.

Authority Position

The main thrust of KCATA's (Authority) argument is that the right to subcontract or contract out work has been contractually reserved to management restricted only by Article 1.Section 1.45. The Authority points out that members of the bargaining unit perform all overtime work on a voluntary basis and that no overtime work can be required. Management asserts that a special project and effort were determined to be necessary, on short notice, to prepare for and ready the facilities for a special meeting being held in the facilities in approximately four (4) weeks by a team of officials responsible for funding the organization. The Authority's witness, the Director of Plant Management, testified that this special project effort was the largest single project ever undertaken on short notice and within a compressed period in his job experience. Due to the urgency the work, the short time frame, and the circumstances, the Authority determined a special effort was necessary due to the importance of the project. The witness testified that following the meeting with his management in which he was advised of the project requirements, he met with his staff to determine what critical steps would be required to be completed to accomplish its project goals. He testified that he directed his staff to make an assessment of the requirements of the project, and the work to be accomplished coupled with an assessment of the capability of his staff to complete the assignment.

The Director of Plant Management testified that after learning of the special project, he immediately adjusted the workload of the Facilities Maintenance personnel by deferring some scheduled projects, canceling less critical projects and by offering overtime work assignments to members of the Facilities Maintenance staff before and after regular shifts in order to start the work on the project immediately. In addition, he testified that he did not follow the voluntary overtime lists and offer overtime opportunities to employees on those lists.

Following the project work requirement assessment conducted by his staff, a decision was made to seek approval to subcontract part of the work because the KCATA employees did not have the equipment necessary, some of the skill sets necessary, or time necessary to complete the entire project requirement by the project deadline. Thus, Plant Management recommended that KCATA personnel perform a major portion of the project requirements utilizing bargaining unit personnel. In addition, management determined that outside contractors would be needed to perform the work that bargaining unit personnel did not have the equipment, necessary skills, or time complete by the project deadline. He testified that, even with the use of contractors as a supplement, the work was eventually completed just short of the project deadline time.

Management argues that nine (9) of the tasks of the project were contracted out. Six (6) of the tasks were determined to require tools or skills not possessed by bargaining unit personnel and three (3) of the project requirements went beyond the workload capability of the workforce in the opinion of the Authority management. The six (6) functions never performed by bargaining unit personnel included:

- Stripping and waxing floors utilizing high speed equipment
- Repairing the exterior of the building

- Painting wallpaper
- Steam cleaning carpets
- Steam cleaning work panels and furniture
- Cleaning and coloring tile grout utilizing special equipment not normally used by the KCATA.

The Authority contends that the following three (3) tasks, which had been historically performed by bargaining unit personnel, were contracted out because sufficient time did not exist to accomplish the work with employees represented by the bargaining unit in the limited time period. Those functions were:

- Replacing cove molding,
- Cleaning and paining HVAC diffusers, and
- Painting doors and doorframes.

The Authority argues that since the majority of the work contracted out and performed by outside contractors was not work historically performed by members of the bargaining unit that no contract violations occurred. The Authority further argues that since the remaining work that had been historically performed by the bargaining unit members exceeded the workforce's capability that no contract violation occurred.

The Authority acknowledges that KCATA personnel could have cleaned and painted the diffusers, repainted the door and door frames and replaced the cove molding had sufficient time existed for those tasks to be accomplished internally by bargaining unit personnel. The Authority also acknowledges that this type of work has historically been performed by KCATA personnel. However, the Authority argues that the necessary time did not exist in the project to complete those tasks with bargaining unit personnel and as such, it went beyond the workload capabilities of the workforce.

The Authority asserts that during the period of November 7 through December 3, 2005 Facilities Maintenance personnel worked in excess of 930 hours of overtime and further argues that this, fact standing alone, proves that the work of the project clearly exceeded the workload capability of the workforce. The Authority further asserts that the Union is attempting to erase the contract provisions that allow the Authority to contract out work that exceeds the capability of the workforce and thus modify the Agreement. The Authority argues that the Union's thrust by way of this case is an attempt to limit the ability of the Authority to subcontract that was not intended in the Agreement.

The Authority argues that Article 111, Section 3.5 is not related with contracting out and that further that contracting out is addressed only in Article 1.Section 1.45. The Authority argues that the provisions of Section 3.5 govern KCATA's decisions only when overtime work to be performed by bargaining unit members when jobs run over the regular shifts, vacancies occurred due to absent employees or increased staffing is required because or regular or manageable increases in workload. It further asserts that KCATA has followed the provisions of Section 3.5

to staff open assignments in those occasions. The Authority asserts that the voluntary lists for November 4, 10, 14, and 22, (Joint Exhibit 5) and on December 2, 15, 28, (Joint Exhibit 6) proves that KCATA is not ignoring the lists. The Authority references Elkouri & Elkouri's **HOW ARBITRATION WORKS,** 6th ed., 2003 at 469-470 which provides in part " unless contrary intention appears from the contract interpreted as a whole, or from relevant extrinsic circumstances, more specific provisions should restrict the meaning of a general provision" and 121 LA 90.

The Authority argues that Section 3.5 should not be interpreted to mean that all potential work that will not be performed on a straight time basis, will be considered "extra work". It argues that Section3.5 address only work that will not be completed on a straight time basis by bargaining unit personnel and how that work will be distributed. It further argues that only work performed by members of the bargaining unit and not completed on an "overtime" basis is "extra work" under the terms of Section 3.5. The Authority further contends that any and all work that exceeds the workload capability of the existing workforce cannot simply be construed and "extra" work.

Finally, the Authority contends that any conversations taking place between the Unions local President and management following the decision to utilize a subcontractor for the work in question are not relevant and should have no influence on the question before the Arbitration Board. It contends that the Union is simply raising the subject of the conversations to misdirect the question of whether or not the Authority had the authority to contract out the work in question.

Discussion and Analysis

The singular question to be decided in this case is:

> " Did the Authority violate the terms of the Agreement in November and December, 2005 by subcontracting out certain work. If so, what is the appropriate remedy?"

The language of Article 1, Section 1.5 addresses subcontracting in a very clear manner. It reads:

> "The Kansas City Area Transportation Authority shall not contract out work historically performed by members of the Bargaining Unit if contracting out of such work would eliminate work performed by the Bargaining Unit. Contracting of such work will not result in layoff of members of the Bargaining Unit while such contracting is in effect".
>
> Maintenance work substantially covered by manufacturers or contractor warranties may be performed by the suppliers or contractor while such warranties are in effect. Maintenance work that exceeds the workload capability of the existing employees may be contracted out if such contracting does not cause lay-off of employees of the Bargaining Unit." (Emphasis added)

The Union contends that when the work in question was contracted out, it "eliminated work

performed by the Bargaining Unit" resulting in a contract violation. The Union cites a previous case concerning the Union and the Authority, FMCS 95-05, 109 (Penfield) which addressed contracting out in which the arbitration panel ruled that the Authority had violated the Agreement when it subcontracted certain bus routes. In that case, the contracting out of the work eliminated work previously performed by members of the Bargaining Unit and appeared to result in employees exercising their "bumping rights" in order to displace employees with less seniority eventually leading a reduction of personnel through attrition. The case was an excellent reference and provided an extremely helpful analysis of the Agreement and background of subcontracting history under the Agreement. However, the facts of that case are abundantly different from the facts of the instant case. As noted, in the referenced case, work was eliminated and personnel eliminated. In the instant case, those circumstances do not exist. The work remains and no positions were eliminated, no one was laid-off and no employee has lost their job.

As noted in the Penfield case, the Union first raised the issue of subcontracting in October 1986. Prior to that time the contract was silent of the issue. During that particular set of negotiations, which were succinctly laid out in Penfield, proposals and counter proposals were exchanged until the language that currently exists was included in that Agreement. The Board in the Penfield case also detailed the inclusion and exclusion of the word "reduce" from the language proposed by the Union and suggested that KCATA was successful in having the word "reduce" eliminated or deleted from the language of the Agreement. With that change in language KCATA was left with the situation it was faced with in November 2005 in that the Authority could not contract out work historically performed by bargaining unit members if such contracting out of work would eliminate work performed by members of the Bargaining Unit. There was no question, as stipulated by the parties in the instant case, that some of the work contracted out had been historically performed by members of the Bargaining Unit. KCATA's management takes the position that inasmuch as no employees were laid off, there was no contract violation. The Union pleads in its case that the work contracted out did not exceed the workload capability of the workforce and, as such, should have been distributed in accordance with Article 111, Section 3.5. It argues that since there is no definition of what "exceeds the workload capability" in the Agreement that no qualifier or limitation of the terms should be read into the Agreement by the arbitrator. In addition, the Union asserts that if the parties had intended to place a qualifier or limitation on the language, that the parties could have placed those limits in the Agreement.

Those limitations or qualifiers are not included in the Agreement. Rather, the Agreement provides management the responsibility of determining those the limits in Article 1, Section 1.12, Management Discipline wherein it provides in part:

> (a) The Union recognizes that the management of the business, including the right to direct the workforce, to prescribe, effectuate and change service and work schedules consistent with and not contrary to any specific provisions contained in this Agreement"

This responsibility includes the right to determine when the work exceeds the workload capability of the existing workforce. Of course that determination can be questioned by the

Union. However, KCATA argues that since there is no limitation in the Agreement, one cannot or should not be imposed by the arbitrator.

The Union argues that the work performed by the contractor should have been distributed in accordance with Article 111, Section 3.5, Extra Work. Many agreements, in fact the majority of labor agreements, contain definitions of key words in order to set out the meaning of those critical words. In this Agreement, the parties identified only three critical words in Article 1, General Provisions, Section 1.2. However, the word "extra" was not among those highlighted outlining the intent of the parties when relying on the word "extra".

The use of a dictionary is not this arbitrator's favored method of defining the meaning of words included in any agreement. Agreements should be drafted which have clear meaning to management and the employees. The agreements should not become "word craft" documents in which the parties are in disagreement merely over words. As an example, Webster's Third New International Dictionary, unabridged defines the word "extra" as follows:

a) beyond or greater than what is due.
b) usual, expected, necessary, or essential
c) something extra or additional
d) to a degree or extent beyond the usual

However, the language of the Agreement Article 111, Section 3.5, Extra Work reads in part:

> (a) Completion of Piece of Work at end of Shift. An employee working a regularly assigned workday on an assignment or work at the end of his regular shift , and that piece of work is to be continued on overtime "that day"(Emphasis added)
>
> (b) Completion of Assignment on Day off. An employee working on any assignment requiring one or more days to be completed, and to be continued on that employee's regularly days off shall have preference for such overtime. (Emphasis added)
>
> © Regular Day Off and Prior to Shift. Extra work, not assigned under the provisions of (a) or (b), will be offered on the basis of seniority and qualifications, and such work will be offered first to employees on their regularly assigned days off on their assigned work shift (where such work will amount to four (4) hours or more). (Emphasis added)
>
> (d) Voluntary Extra Work Lists. Extra work not filled in accordance with the above procedure will be offered on the following basis: (Emphasis added)
>
> (e) In the event that questions arise with regard to any portion of this Section, it is agreed that the President of the Union, or his representative, and the General Manager of the Authority, or his representative, will meet at the request of either party to resolve such questions on a fair and equitable basis for all concerned as soon as possible.

Extra work as referenced in this Article simply refers to work that is current, regular and on-

going that cannot be completed on a regular basis. It does not mention, infer or imply that "extra work" is all possible or potential work that may be contemplated, completed or undertaken by the Authority. The Union has been designated the exclusive representative of the members of the bargaining unit. KCATA's management and it is charged with distributing the work normally performed by Bargaining Unit personnel in accordance with the Agreement, including any subcontract limitations if they exist.

Much of the project work undertaken by the KCATA to complete the overall special project was work, according to the Director of Plant Management, that either required special equipment not existing in the Authority's normal equipment supply, or required skills not used on a previous or regular basis by employees of the Authority. The remaining work, although undisputedly work that could be completed by the Maintenance personnel of the Authority, was work that could not be completed within the necessary time frame, in his best judgement, before the deadline for project completion.

The union's frustration is perceivable when the KCATA's management provides overtime work opportunities to some employees yet denies those same opportunities to fellow employees on the basis that management believes that the remaining workload requirements exceeds the workload capability of the workforce. If the workload capability exceeds the capability of the workforce does it exceed the capability of the entire workforce or just some of the workforce? The Union has the right to question decisions and judgement with which it does not agree. The Union suggests that had the Authority chosen to involve the Union and met to the review the project and attempt to resolve concerns, that perhaps th grievance could have been avoided. Of course, the possibility to request a meeting was also available to the Union. Article 111, Section 3.5, (e) is equally applicable to both parties. Had a meeting been held, perhaps this grievance could have been avoided, and some avenue followed to avoid the grievance. The arbitrator is limited in his right to substitute his judgment for either party and impose his own particular brand of industrial jurisprudence to resolve issues. He is limited only to interpreting the facts of the case and applying the terms of the Agreement. In this case, the arbitrator believes that the meeting should have been held to simply inform the Union representative of the Authority's plans.

The language of Article 1, Section 1.45 is clear. It provides the latitude to management to make subcontracting decisions provided it makes those decisions in concert with and is consistent with the Agreement it has with the Union that represents the Bargaining Unit personnel. It is a well understood principle in arbitration that even when the contract is ambiguous, and the terms of one provision conflicts with another term, that Arbitrators have generally followed the approach that will lead to a reasonable result for the parties. Unless the contract limits management's right to subcontract, that right is reserved to management subject only to restrictions agreed to in the Agreement.

It is clear that the decision to subcontract the work in this case has been questioned by the Union as being unfair to the employees that were not given the same opportunity as other Bargaining Unit members to perform work they considered to be "extra work" and receive the compensation associated with that effort. However, the arbitrator is limited to interpreting the terms of the

Agreement and applying those terms to the question. He is constrained to the terms of the Agreement just as the parties are themselves and the arbitrator is limited to the "four corners" of the Agreement in determining if any contractual violation occurred. I am fully aware that denial of this grievance, while required on contractual grounds, may not resolve in the question of equity that has been inferred. My authority as arbitrator does not extend to a Solomon-type solution to be imposed on the parties as a final and binding resolution. My authority is limited to deciding whether the grievance has contractual merit. The ruling of the arbitrator is the it does not for the following reasons:

- The majority of work subcontracted out was work that had not been historically performed by bargaining unit members.
- The work that was subcontracted that had historically been performed by bargaining unit members exceeded the workforce capability of the current workforce, and
- The subcontracting of work did not result in work being eliminated.

Award

On the basis of the foregoing and the testimony, the grievance is denied.

Dated May 21, 2007

Gail P. Anderson, Neutral Arbitrator