IN ARBITRATION PROCEEDINGS PURSUANT TO THE CURRENT COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

IN THE MATTER OF A CONTROVERSY

BETWEEN

AMALGAMATED TRANSIT UNION
LOCAL UNION 1287

and

KANSAS CITY AREA TRANSPORTATION AUTHORITY
(Kansas City, Missouri)

FMCS 95-05109
Relating to Issue of the Subcontracting of Routes 33 & 35.

ARBITRATOR'S OPINION AND AWARD

This Arbitration arises pursuant to the Agreement between the **AMALGAMATED TRANSIT UNION, LOCAL UNION 1287**, hereinafter referred to as the "Union", and the **KANSAS CITY AREA TRANSPORTATION AUTHORITY**, hereinafter referred to as "KCATA", under which ROBERT V. PENFIELD was selected to serve as the neutral Arbitrator accordance with Article I, Section 1.14 (b). The Board of Arbitration was composed of the neutral Arbitrator, the Union Arbitrator (Marvin Shackelford) and the KCATA Arbitrator (Gayle Holliday). The parties stipulated that all procedural requirements had been compiled with and /or waived, so that the matter is properly before the Board of Arbitration for final and binding determination.

The hearing was held March 23 and 24, 1995 in Kansas City, Missouri. The parties were afforded full opportunity for examination and cross-examination of witnesses, the introduction of relevant exhibits, and for argument. All witnesses testified under oath. Post-hearing briefs were filed by the parties.

APPEARANCES:

On behalf of the Union:
Janae L. Schaeffer, Attorney with Jolley, Walsh & Hager, P.C. of Kansas City, Missouri;

Witnesses:
Javier M. Perez, Jr. President, Local Union 1287; and
Lloyd Walsh, Executive Board Member, Local Union 1287;
Bus Operator.

On behalf of the Company:
James R. Willard, Attorney with Spencer Fane Britt & Browne of
Kansas City, Missouri;

Witness:
Gayle Holliday, Deputy General Manager.

ISSUES

The primary issue can be stated as:

Did KCATA Violate Sections 1.44 and 5.13 of the Collective Bargaining Agreement when it subcontracted out the operation of Routes 33 and 35 to Laidlaw Transit Inc.?

If so, what should be appropriate remedy be?

However, a number of related issues need to be separately reviewed:

Did the Union timely file its grievance challenging the subcontracting of Routes 33 and 35?

Did KCATA violate the Section 13(c) Agreements by subcontracting Routes 33 and 35?

Did KCATA violate the January 19, 1989 Settlement Agreement by subcontracting Routes 33 and 35?

BACKGROUND

The KCATA provides transportation to the metropolitan region that includes the cities of kansas City, Missouri, North Kansas City, Missouri and Kansas City, Kansas. The KCATA was created by a congressional approved compact between Missouri and Kansas, and both states adopted identical enabling statutes in 1965.

The Union represents all employees who are within the job classifications set forth in Sections 7.1, 7.3, and 7.4 of the Agreement, namely bus operators, office-clerical employees and facilities and vehicle maintenance employees.

Mass Transportation Regulations

The KCATA receives regular grants of financial assistance from the U.S. government under the Urban Mass Transportation Act of 1964 (UMTA). One type of grant finances projects for capital purchases such as real estate, buses and other equipment. The second type of grant provides operating assistance such as employee wages and fuel for the buses.

As a part of each new grant under UMTA, §13(c) requires the U.S. Secretary of Labor to direct the Union and KCATA to negotiate an agreement with such provisions as will constitute "arrangements . . . to protect the interests of employees affected by [UMTA] assistance." 49 U.S,C. §1609(c). These are called "Section 13(c) Agreements."

The parties negotiate terms to apply to the **capital** projects granted in that year. (See the 1973 §13(c) Capital Agreement, Joint Exhibit 6). The most recent §13(c) Agreement for capital expentures was executed in 1973 and readopted with certin exceptions since that time. This §13(c) Agreement does not address subcontracting.

In July, 1975, the parties agreed to adopt the National or Model §13(c) Agreement for Transit **Operating** Assistance. (See 1975 National Section 13(c) Operating Assistance Agreement, Joint Exhibit 7). On May 26, 1987, the Union presented a proposed draft of a §13(c) **operating** agreement which, among other changes modified **paragraph 23**, the "sole provider clause". (Joint Exhibit 8). On March 4, 1988, the parties executed a §13(c) Agreement for **operating** assistance which included modifications to paragraph 23, the "sole provider clause". **Paragraph 23** was modified to provide for subcontracting if "...permitted by express terms and conditions of the then applicable collective bargaining agreement...." (Joint Exhibit 12, p. 12). The terms and conditions of the 1988 §13(c) Agreement have been made applicable to all subsequent grants of **operating** assistance to the KCATA. On April 22, 1988, the Department of Labor specified that the "1988 Agreement provides protection to employees represented by the union satisfying the requirements of Section 13(c) of the Act." (Joint Exhibit 14).

On September 2 and December 16, 1994, the Department of Labor certified the protective arrangements in **operating** assistance grants MO-90-X099 and MO-90-X112. The certified **operating** assistance grants provided **operating** assistance to the KCATA for calendar years 1993, 1994, 1995. (Joint Exhibits 15 and 16).

Subcontracting to Laidlaw Transit Inc.

A three-year agreement between KCATA and Laidlaw for the performance of fixed route transit service on Route 33 (Vivian-Antioch) and Route 35 (Winnwood, 69 Hiway and Belton) was entered into on December 1, 1994. (Union Exhibit 6).

The agreement requires KCATA to pay Laidlaw $754,425.71 to perform both routes. KCATA is to be given full credit for all farebox revenue received by Laidlaw. KCATA leased five small transit vehicles to Laidlaw at a cost of $1.00 per year per bus. Laidlaw is responsible for all maintenance and inspection of the vehicles. The five vehicles remain painted like and identified as KCATA buses. The Laidlaw drivers wear KCATA uniforms with KCATA insignia. KCATA passes and transfers are accepted on routes operated by Laidlaw. Laidlaw began performing Routes 33 and 35 on January 3, 1995.

The Union filed a grievance on November 23, 1994 grieving the subcontracting of Routes 33 and 35. The Union stated:

> .... The subcontracting violates Section 1.44 of the bargaining agreement, as well as those provisions of the bargaining agreement concerning wages, benefits (including pensions benefits), union security, bidding and work selection, successorship and recognition.
>
> The subcontracting of the two routes also violates the Section 13(c) Agreements by failing to preserve collective bargaining and failing to honor the substantive terms of the Section 13(c) Agreements and the collective bargaining agreement while using federal money for various capital and operating assistance projects. This grievance will be remedied by assigning the work on Routes 33 and 35 to employees covered by the bargaining agreement between KCATA and Local 1287, by making whole bargaining unit members who suffered lost wages or benefits as a result of the subcontracting of the routes, by reimbursing lost pension contributions, by restoring lost overtime opportunities for current full-time bargaining unit members and restoring lost full-time positions to part-time bargaining unit members.
>
> This grievance presumes that Laidlaw will not assume or honor Local 1287's collective bargaining agreement. . . .

KCATA "denied this grievance on the basis of Section 1.44 of the Collective Bargaining Agreement. Further, we know of no other relevant provisions or laws which prohibits the actions taken by the Authority." (Joint Exhibit 5).

The parties waived the first three steps of the grievance procedure and proceed to arbitration. (Joint Exhibits 3 and 4).

Pertinent Provisions of the Collective Bargaining Agreement:

....

> Section 1.44. Sub-Contracting.
>
> The Kansas City Area 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 of 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 that exceeds the work load capability of the existing employees may be contracted out if such contracting does not cause lay-off of employees of the Bargaining Unit.

. . . .

Section 5.13. Maintenance of Small Transit Vehicles.

The Authority's present Maintenance Seniority Unit shall maintain and service small transit vehicles as defined in this Agreement. See Section 3.18 of this Agreement.

Section 5.14. Restrictions on Use of Small Transit Vehicles.

(a) The Authority shall not replace any present bus line or lines with small transit vehicles or substitute small transit vehicles for larger buses, or run small transit vehicles parallel to and adjacent to larger bus lines, except as to provide for transfer connections. Nor shall the Authority in any way dilute the present bus service because of the use of the small transit vehicle, except the Authority may use small transit vehicles for charter work when specified by the customer, and further excepted as specifically provided in this Article.

(b) The Authority may replace any or all of the following named lines in whole or in part with small transit vehicles provided that no full-time regular operator shall be laid-off because of such replacement. To insure that this provision is followed, the Authority shall provide the Union a list, prior to the time a replacement is made, showing the positions which have been made available either through attrition or expansion or service.

Line which may be converted:

1. Route 21 - Cleveland
2. Route 23 - 23rd Street
3. Route 2 - Central (first year)
4. Red/yellow route - Independence
5. Route 26 - East 5th Street
6. Route 75 - 75th Street (third year)
7. Route 9 - 9th Street (third year)
8. Route 10 - Woodland/Brooklyn (third year)

All lines designated in this section shall not be subject to subcontracting during the term of this Agreement.

(c) (1) A small transit vehicle may be operated on any new service. Service shall be considered new if similar service has not been provided during the six (6) months preceding the establishment of the small transit vehicles service.

(2) New small transit vehicle service shall not be provided within the areas bounded on the North by Northeast 56th Street (Englewood Road) to Antioch Shopping Center then East on 69 Highway to I-35, on the South by 85th Street, on the West by State Line Road and on the East by I-435 except by mutual agreement between the Authority and the Union and further except for re-establishment of service on 55th Street in Kansas City, Mo., in a manner similar to that formerly provided by Route #155.

. . . .

UNION POSITION:

Grievance was timely filed

On June 8, 1994 the Union received a letter from the KCATA proposing conversion of large bus Routes 33 and 35 to small bus and if rejected by the Union the routes would be contracted. (Union Exhibit 3). The Union's response was unacceptable to KCATA. The first set of Requests for Proposals to subcontract the two routes was made in August, 1994. No bid were received. On September 7, 1994 the Union received "formal notice" that the KCATA was seeking bids for a contractor to operate Routes 33 and 35. (Company Exhibit 2). The "formal notice" was made by KCATA to "start the time limitations provided by Section 1.13, Step of the grievance procedure." The Union was warned that if it did not take action within the seven days allowed, the KCATA would take the position that a grievance would be untimely.

The second Request for Proposals was made on September 23, 1994. (Union Exhibit 5). KCATA's Board of Commissioners awarded the contract for the two routes to Laidlaw Transit Inc. at its November 16, 1994 meeting. (Company Exhibit 15).

The Union's grievance was filed seven day later, on November 23, 1994 (Joint Exhibit 2). The subcontracting agreement was not signed until December 1, 1994. Laidlaw started to perform Routes 33 and 35 on January 3, 1995.

The Elkouris noted in How Arbitration Works, 196 (4th Ed., 1985) that a party may "announce its intention to do a given act but does not do or culminate the act until a later date. ...arbitrators have held that the 'occurrence' for purposes of applying time limits is at the later date." The subcontracting occurred at the earliest on November 16, 1994 when Laidlaw's bid was accepted and a contract was awarded. Filing a grievance prior to that date would have been premature and speculative. The Union could not have know for sure that KCATA would have actually subcontracted the routes.

The Union filed its grievance within seven days of the Board of Commissioners' decision to award a subcontract to Laidlaw. The Union's grievance was timely under the collective bargaining agreement.

Subcontracting violates Section 13(c) Agreements

The purpose of §13(c) of UMTA was to replace the labor protective provisions previously provided to private sector employees by the National Labor Relations Act with labor protective provisions agreed to by the parties. It is a condition of the KCATA's receipt of federal funds from UMTA that it be a party to a protective arrangements in a §13(c) Agreement certified by the Department of Labor. Such protective arrangements must include:

> ...such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. [29 CFR §215.1(b)] (Union Exhibit 8, p. 112).

There are two separate §13(c) agreements in effect at any one time, one for federal capital assistance and one for federal operating assistance.

On March 4, 1988, the parties executed a modified §13(c) Operating Agreement. Paragraph 23 was modified providing what applies to the present case: (Joint Exhibit 12, p.12)

> The designated Recipient, as hereinabove defined, signatory hereto, shall be the sole provider of mass transportation services to the Project and such services shall be provided exclusively by employees of the Recipient covered by this agreement; provided, however, that services may be operated by providers other than the Recipient through contracts by purchase, leasing or other arrangements with the Recipient, or on its behalf, to the extent that such services are so operated at the time of the execution of this agreement or as may otherwise be permitted by express terms and conditions of the then applicable collective bargaining agreement between the Recipient, or other operator of the system and the Union, or, if no such agreement is currently in effect, the express terms and conditions of the most recently expired collective bargaining agreement. Whenever any other employer provides such services through contract by purchase, leasing or other arrangement with the Recipient, or on its behalf, the provisions of this agreement shall apply.

Such a provision on subcontracting has not been included in the 1973 §13(c) Capital Agreement.

The 1988 Operating Agreement was attached to the Request for Proposals issued by the KCATA and the §13(c) agreements were referred to in the KCATA-Laidlaw Agreement for subcontracting Routes 33 and 35.

The KCATA's behavior violated several paragraphs of the 1988 Operating Agreement, including ¶3 - the preservation of contract rights clause, ¶4 - the preservation of bargaining rights clause, ¶5 - the procedures governing changes in operation of the system, ¶6 - the displacement clause, and ¶23, the sole provider clause. Paragraph 27 makes clear that the §13(c) Agreement does not merge into the parties' collective bargaining agreement. Instead, each agreement is "independently binding and enforceable." Each agreement is enforceable in its own rights. However, if the KCATA is found to have violated §1.44 or §5.13 of the collective bargaining agreement, then it should also be found to have violated ¶3 and ¶23 of the 1988 §13(c) Operating Agreement.

Likewise the 1973 §13(c) Capital Agreement (Joint Exhibit 6) contains many provision similar to those found in the 1988 Operating Agreement. Paragraph 2 - the preservation of collective bargaining contract rights. ¶3 - preservation of bargaining rights, ¶16 - requires that written notice of any change in organization or operation necessitating a rearrangement of the working force be give to the Union and that within thirty days the parties shall meet for the purpose of reaching an agreement, ¶18 - union not to forego any rights or benefits under any other agreement between the parties; ¶21 - agreement is binding upon the successors, and ¶24 - provides that the §13(c) Agreement and the collective bargaining agreement are "independently binding and enforceable."

In summary, KCATA violated §13(c) Agreement by:

1. Depriving the bargaining unit operators from bidding on and performing the operation of the busses on Routes 33 and 35;

2. Depriving vehicle maintenance employees from right to perform maintenance on small transit vehicles;

3 Failing to bargain collectively with the Union and acting unilaterally in the subcontracting Routes 33 and 35;

4. Failing to give required written notice of proposed changes in the organization, operations, and services to the Union;

5. Failing to meet with the Union for purposes of reaching agreement with respect to the application of the terms and conditions of the §13(c) Agreements to the intended changes;

6. Violating the sole provider clause by contracting services to be provided by a provider other than the KCATA when there is no express terms to allow such in the collective bargaining agreement.

The <u>Bi-State Development Agency</u>, (1990) arbitration decision submitted by KCATA is of limited value because of the lack of a subcontracting clause in the bargaining agreement and the lack of any consideration of §13(c) Agreements.

Likewise, KCATA cited Transit Authority of River City, (1987) which involved a bargaining agreement which did not include a subcontracting provision. In 1980, an arbitrator upheld TARC's right to hire an outside contractor to perform new work without loss of work to the bargaining unit. The history of negotiations contained no language restricting subcontracting. Thus, it is not similar to the current case.

Two letters submitted by KCATA note that §13(c) of UMTA does not dictate whether or not service can be contracted out. But, clearly §13(c) Agreements and the parties' collective bargaining agreements may restrict or prohibit subcontracting.

The Union cited Transportation Management of Tennessee, Inc., (1987) in which the arbitrator ruled that TMT had violated the sole provider clause of the §13(c) Agreement by subcontracting the operation of Downtown Circulator vehicles. Likewise, Arbitrator Newman ruled for the Port Authority of Allegheny County, (1991). These cases were of limited value since the sole provider clauses differ from the clause in the KCATA and Local 1287's 1988 §13(c) Operating Agreement.

Subcontracting violated Collective Bargaining Agreement

The parties first agreed to add a subcontracting provision to their agreement during the negotiations which culminated in the 1986-89 contract. After a number of months the Union accepted on January 14, 1987 the KCATA's December 4, 1986 proposal. (Employer's Exhibit 7).

Section 1.44 of the collective bargaining agreement pertains to work "historically performed by members of the Bargaining Unit." The phrase refers to fixed route transit service, vehicle maintenance work and other types of work historically performed by union members. Prior to the subcontracting of Routes 33 and 35, bargaining unit operators drove the buses on these routes and bargaining unit vehicle maintenance employees performed all maintenance, service and inspection work on small transit vehicles.

The phrase "eliminate work performed by the Bargaining Unit" means work actually being performed by the bargaining unit immediately prior to the subcontracting. While all fixed route transit service work is work "historically performed by the bargaining unit", fixed route transit service work can only be subcontracted under two conditions: (1) if the work being subcontracted does not eliminate routes performed by the bargaining unit immediately prior to the subcontracting and (2) if the subcontracting of such work will not result in layoff of bargaining unit members while such contracting is in effect.

The KCATA ignores the first condition and takes the position that it can subcontract as long as it does not layoff any bargaining unit employees as a result. KCATA seeks to rewrite the parties' agreement by eliminating the phrase "if contracting of such work would eliminate work performed by the Bargaining Unit." KCATA provides no explanation of what this phrase means or why it is in Section 1.44. KCATA virtually ignores this key phrase.

Normally all words used in creating an agreement should be given effect. The use of a word or phrase indicated that the parties intended it to have some meaning. An arbitrator should use the interpretation which gives effect to all provisions. Elkouri and Elkouri, How Arbitration Works, 353 (4th Ed. 1985). Only the Union's interpretation gives effect to all of the language in §1.44 of the collective bargaining agreement.

The subcontracting of Routes 33 and 35 did eliminate work performed by the bargaining unit. Five operators who had previously performed the work had to bump onto other routes. The five runs previously available for operator selection at mark-up, were no longer available. The work performed by the five operators simply disappeared as far as the bargaining unit was concerned. Twenty operators were displaced through the seven levels of bumping which occurred.

Both parties agree that the KCATA cannot subcontract work historically performed by the bargaining unit if the subcontracting results in layoffs. However, the attrition rate among KCATA bus operators makes the layoff protection of questionable value. Without layoffs, half of the total part-time and full-time operators jobs could be subcontracted in less than seven and one-half years. Arbitrator Sembower in Buhr Machine Tool Corp., 61 LA 333 (1973) ruled that attrition could not be used to reduce the bargaining unit, while work customarily performed by its members was taken over by subcontractors.

The second paragraph of §1.44 specifies two circumstances when the KCATA may subcontract maintenance work: (1) when the work is substantially covered by manufacturer or contractor warranties, and (2) when the work exceeds the work load capability of the existing employees and the contracting does not cause layoff of bargaining unit employees. There is no evidence that either of these two circumstances were present when KCATA decided to subcontract the vehicle maintenance work to Laidlaw.

Section 5.13 provides that the Maintenance Seniority Units shall maintain and service small transit vehicles. Thus, small transit vehicle work may not be subcontracted it must be performed by the KCATA's Maintenance Seniority Unit employees. The five small transit vehicles leased to Laidlaw are still KCATA vehicles.

KCATA clearly violated §1.44 and §5.13 of the collective bargaining agreement when it subcontracted Routes 33 and 35 to Laidlaw Transit Inc.

Subcontracting violated January 19, 1989 Settlement Agreement

In August, 1988, the parties agreed to submit to arbitration the question of whether subcontracting Routes 32 and 35 was permitted under §1.44 of the collective bargaining agreement. (Employer Exhibit 12). In January, 1989, the parties entered into a Settlement Agreement which specified that: (Employer Exhibit 13)

Subcontracting of existing routes during the term of this Agreement shall be limited as follows:

1. Routes 32 and 35 may be subcontracted not earlier than April 1, 1989.
2. Routes 37 and 37X may be subcontracted not earlier than October 1, 1989.
3. No other route may be subcontracted by KCATA.
4. All subcontracting allowed by paragraph 1 and 2 above shall only be effected provided the protective provisions of §1.44 are fully satisfied, including the requirement that such subcontracting will not result in lay-off of members of the bargaining unit while §1.44 is in effect.

Route 35, one of the routes at issue in the current case, was one of two routes which the Settlement Agreement specified could be subcontracted on or after April 1, 1989. Route 33 is not mentioned in the Settlement Agreement. Thus, if the Settlement Agreement remains in effect, KCATA is free to subcontract Route 35. The Union maintains that the Settlement Agreement continues in effect and that Route 33 was subcontracted in violation of the Settlement Agreement. KCATA may not subcontract any existing routes other than the four routes specified in the Settlement Agreement.

Remedy

The Union asks for the following:

1. That the work of operating buses on Routes 33 and 35 and maintaining and servicing the five small transit vehicles be restored to its members;
2. That all employees whose compensation was adversely affected by the subcontracting be made whole, including those employees who lost over time opportunities;
3. That the bargaining unit be compensated for all hours worked by Laidlaw employees;
4. That lost pension contributions be restored; and
5. That lost full-time positions be restored to part-time bargaining unit members.

COMPANY POSITION:

KCATA maintains that the grievance should be denied. Section 1.44 of the collective bargaining agreement specifically authorizes subcontracting under the condition that no layoffs of employees result from the subcontracting. That condition was met in this case. The need to reduce costs was urgent. The subcontracting was a rational business decision for KCATA.

Timeliness of Grievance

Section 1.13 of the Agreement requires that a grievance be submitted "within seven day after same has come to his attention" in order to be processed to arbitration under §1.14. The Union was formally put on notice by a letter from the Company dated September 7, 1994. The Union was informed that it was seeking bids and that the notice was given for the express purpose of starting the time limits running as provided by §1.13 of the grievance procedures in the collective bargaining agreement. Section 1.13 provides for an initial series of oral or written communications with respect to the dispute. Section 1.14 (b) allows the dispute to be taken to arbitration "where collective bargaining does not result in agreement after all reasonable efforts to agree in good faith...." The Union responded on September 9, 1994 rejecting the KCATA offer to start the process. The Union was again advised on September 12 and on November 22nd the Union was advised that the time had expired for processing the contracting issue through the grievance and arbitration provision. (Employer Exhibit 2).

The Union did not seek collective bargaining as allowed by §1.14, but proceeded directly to arbitration. The Union is certainly barred from claiming now that it has a right to proceed. However, KCATA has waived the failure to file in a timely manner for the purpose of obtain a prospective determination, but not for the purpose of backpay. The §13(c) Agreements do not contain comparable time limitations.

Section 13(c) Agreements role in subcontracting

The §13(c) Capital Agreement does not address subcontracting. The Department of Labor has observed: "Section 13(c) of the Act does not dictate whether or not service can be contracted out." (Letter of March 29, 1993, Re: FTA Application South Bend Public Transportation Corporation, p. 3). This concept is further stated in a May 29, 1991 letter from the Department of Labor to the General Counsel for the Urban Mass Transportation Administration. There is nothing in the Urban Mass Transit Act or in the 1973 §13(c) Capital Agreement which addresses the subcontracting issue.

Paragraph 23 (the sole provider clause) of the 1975 Model Operating Agreement does address subcontracting. (Joint Exhibit 7). Some arbitrators have held it to bar subcontracting. Arbitrator Render in Transit Authority of River City, 20-21, (1987) determined that ¶23 of the National Model Agreement did not restrict subcontracting even when the collective bargaining agreement was silent. In the 1988 Operating Agreement, KCATA and the Union modified ¶23 to allow subcontracting when permitted by the local contract. Thus, the local collective bargaining agreement is the only contract which must be considered.

Consequently, the §13(c) Agreements have no application to KCATA in this subcontracting case. But the §13(c) Agreement issue should be addressed by the arbitrator only for the purpose of putting it to bed once and for all.

The Collective Bargaining Agreement and subcontracting

Prior to 1986, the collective bargaining agreement was completely silent on the issue of subcontracting. In the absence of contractual language, most arbitrators will permit subcontracting where it is a reasonable business decision. (Thomas J. Erbs, Bi-State Development Agency, [1990]). That case involves the KCATA's counterpart in St. Louis, Mo with a contract silent on subcontracting, but which is otherwise comparable to the present case.

During the 1986 contract negotiations, the Union initially proposed language which would prohibit any subcontracting which eliminated or reduced work in the bargaining unit. (Union Exhibit 14, Union response to KCATA proposal of October 23, 1986). Finally, on January 14, 1987 the parties reached agreement on language when the Union dropped "reduce", and which would prohibit contracting that would "eliminate work" but allowed contracting so long as it would not result in layoff of members of the bargaining unit. (Employer Exhibit 7). Prior to that time the parties had reached agreement containing a specific prohibition on subcontracting routes which were converted to small busses under provision of §5.14.

The KCATA's understanding of the language of §1.44 concerning subcontracting was stated in a letter to the City of Kansas City: "The Authority shall not contract out work historically performed by the bargaining unit if it would result in the lay-off of members." (Employer Exhibit 8). It was also noted in the same document, that lines converted to small bus operation could not be subcontracted.

The Union's view is that no subcontracting is permitted except by mutual agreement with the Union. The Union's view would eliminate the sentence in §1.44 which states: "Contracting of such work will not result in lay-off of members in the bargaining unit while such contracting is in effect." The Union would also make the prohibition on subcontracting small bus routes contained in §5.14. surplus.

Elkouri & Elkouri, How Arbitration Works, 353 (4th Ed. 1985) notes:

> If an arbitrator finds that alternative interpretations of a clause are possible, one of which would give meaning and effect to another provision of the contract, while the other would render the other provision meaningless or ineffective, he will be inclined to use the interpretation which would give effect to all provisions.
>
> .... The fact that a word is used indicates that the parties intended it to have some meaning, and it will not be declared surplusage if a reasonable meaning can be given to it consistent with the rest of the agreement.

The reasonable construction to be given to the first paragraph of §1.44 is that KCATA is free to subcontract work if in doing so no layoffs result. The Bargaining history is instructive to the interpretation of §1.44. The parties understood how to prohibit subcontracting. They did so in §5.14 with respect to small bus routes. But they did not so in §1.44.

Section 1.44 provides the appropriate standard, and that is whether or not the subcontracting can be accomplished without layoff of current employees. (See Arbitrator Erbs in Bi-State Development Agency and Elkouri & Elkouri, How Arbitration Works, pp. 540-544). The subcontracting of Routes 33 and 35 did not result in the layoff of any employees. KCATA used attrition to adjust its work force consistent with §1.12 the management rights clause.

There is no dispute concerning the fact that KCATA made a rational business decision in subcontracting Routes 33 and 35. It was facing a major financial crunch as its revenues continue to decline. The low bid was some $150,000 per year under the cost of continuing to provide large bus service on Routes 33 and 35. (Employer Exhibit 15). Thus, subcontracting was a rational option. Today the major revenue sources are roughly divided into farebox 21%, federal 12%, local share 64%, and miscellaneous revenue 3%. (Employer Exhibit 14). The largest part of the cost of bus operation is the wage rate of operators. (Employer Exhibit 14).

The Union was offered several opportunities to continue to operate Routes 33 and 35 if the service could be converted to small bus. The Union took the position that the service either had to be operated by large bus operators or not operated at all. Section 5.14 of the agreement prohibits subcontracting of routes converted to small transit vehicles. But the agreement does not give the Union the right to insist that the service be operated by large bus operators or not at all. With an average daily ridership of 13, the use of the large bus (capacity of 42) is unnecessary.

The Union's position that senior operators were deprived of certain work is not accurate if viewed in terms of dollars earned. In each instance cited by the Union the operator could have used his seniority to select work which would have paid more than the work that had been subcontracted. (Union Exhibits 22 and 23). This is simply an argument that some operators would prefer to drive those routes even if it paid a little less money.

Subcontracting and the January 19, 1989 Settlement Agreement

In 1988 the KCATA sought to subcontract certain routes, and the Union maintained that subcontracting was not permitted by the contract. The issue was submitted to arbitration on stipulation (Employer Exhibit 12). The parties agreed to a settlement that was to resolve any subcontracting issues for the remainder of the existing contract as of January 20, 1989. The Union attorney wrote that "If the subcontracting language remains unchanged in the next contract, the Union then can grieve its understanding of the original intent of the present provision if the authority subcontracts additional routes." (Employer Exhibit 13). The language relating to subcontracting has remained unchanged from the previous agreement. The 1989 settlement refers only to the collective bargaining agreement language. No claim was made at that time by the Union that any §13(c) agreement restricted KCATA's right to subcontract.

KCATA prefers to operate its routes with its own employees. The subcontracting issue was not faced again until the fall of 1994. At this time, it was initiated because of economic pressures and the Union's refusal to operate Routes 33 and 35 as small transit vehicle routes with small transit vehicle operators.

DISCUSSION AND ANALYSIS:

The major issue which divides the parties in this case is whether or not KCATA has the right under sections 1.44 and 5.13 of the Collective Bargaining Agreement to subcontract out the performance of fixed route transit service on Routes 33 and 35. Subcontracting disputes poses the difficult problem of equitableness, that of maintaining the proper balance between the employer's legitimate interest in an efficient and economic operation on the one hand and the union's legitimate interest in protecting the job security of its members and stability of the bargaining unit on the other hand.

Careful review was made of the Collective Bargaining Agreement, the bargaining history relating to the development of §1.44, testimony and exhibits presented in the arbitration hearing, and the position summaries presented by the parties in their post hearing briefs. As explained in the analysis described below, it has been determined that the KCATA violated Sections 1.44 and 5.13 of the current Collective Bargaining Agreement.

Timeliness

KCATA maintained that the Union is barred from claiming that it has the right to proceed with the arbitration of this agreement since it failed to file a grievance within seven (7) days of the date on which KCATA had provided the Union with a "formal notice." Assuming that position, the Union would have been required to file a grievance concerning this issue within seven (7) days of September 7, 1994.

However, KCATA waived this alleged failure to file in a timely manner in order that the issued could be brought to arbitration to seek a resolution of the issue of subcontracting based on the merits. But KCATA was not willing to waive the alleged failure to file in a timely manner for purpose of backpay. For that reason alone, it is necessary for the Board of Arbitration to make a determination of the timeliness issue.

The expression of *intention* to subcontract is not an "action of the Authority" within the meaning of the Grievance Procedure which necessarily triggers the start of the time period of seven (7) day for filing a grievance under §1.13. To so require the Union to grieve over such an expression of intent in order to protect themselves from a claim of untimeliness would significantly disrupt the grievance procedure by imposing upon the parties an obligation to administratively discuss disputes which might not actually occur at a time when their effect upon the bargaining unit might not be ascertainable. A notice that something is to take place in the future cannot be construed as an "action of the Authority" requiring an employee or the Union to respond within seven days.

Clearly, hindsight shows that two separate Request for Proposals had to be sent out by KCATA, before it received a bid. It was not until November 16, 1994 that a contract was approved by the KCATA's Board of Commissioners and actually awarded the operation of Routes 33 and 35 to Laidlaw Transit Inc. This was some seventy-one (71) days after the Company had sent its September 7th "formal notice" telling the Union that the KCATA was seeking bids for such a contract. The Company claimed that the notice was "given ... for the express purpose of bringing the matter to your attention and start the time limitations running as provided by Section 1.13, Step 1 of the grievance procedure..." (Employer Exhibit 2). Bringing to the attention of the Union that the KCATA was contemplating subcontracting is an honorable gesture, for it would be useful for the parties to bargain over the possibility for resolution of their differences. But the Collective Bargaining Agreement does not require such a notice to be given. The responsibility is present for the parties to seek reasonable resolutions through collective bargaining. And the Union needs to recognize the impact of the economic pressures affecting the KCATA at all times.

The KCATA's argument with respect to the procedural defect of the untimeliness of the filing of the grievance is thus without merit.

Merits

Subcontracting under the Collective Bargaining Agreement

The essence of this case is the interpretation of §1.44 of the collective bargaining agreement. Each party has a separate and distinct understanding of the language in §1.44. It is the expectation that the Board of Arbitrator is to give meaning to the contract provisions in the disputed section.

KCATA interprets the first paragraph of §1.44 to mean that "The Authority shall not contract out work historically performed by the bargaining unit if it would result in the lay-off of members." (Employer Exhibit 8).

While the Unions interprets this paragraph to mean that KCATA can subcontract out "work historically performed by members of the Bargaining Unit" only if (1) the work being subcontracted does not "eliminate work performed by the Bargaining Unit," and (2) the work being subcontracted "will not result in lay-off in the Bargaining Unit members while such contracting is in effect."

It is clear to see that the KCATA did not consider the phrase "if contracting of such work would eliminate work performed by the Bargaining Unit." One of the more appropriate means used in attempting to reach the proper interpretation for §1.44 is to search for the intent of the parties as it might be illustrated through the history of the bargaining process which resulted in the agreed upon present construction of §1.44.

Prior to the 1986-89 collective bargaining agreement, the contract was silent on the issue of subcontracting. During the negotiations for this agreement, the Union presented the first proposal concerning subcontracting on October 16, 1986. (Union Exhibit 12).

> Section 1.43. Sub-Contracting.
>
> The Kansas City Area Transportation Authority, any agents therefor or successors thereof, shall not contract out work historically performed by members of the Bargaining Unit if the contracting of such work eliminates or reduces the normal work load of the Bargaining Unit. They also shall not contract with any company, person or public agency to provide transit facilities or services or acquire any existing system, or part thereof, whether by purchase, lease, condemnation or otherwise. It is understood that all contracts existing on November 14, 1986, which involve the type of work performed by the Bargaining Unit are an exception to the Agreement. However, the Authority, agents or successors shall bargain with the Union before entering into any commitment which renews or extends or extends these contracts or establishes new service.
>
> The Authority, agents or successors will not sub-contract any work if the number of employees represented by the ATU falls below the number of such employees on the property on November 14, 1986. This is estimated to be 661.

The Union's initial proposed language would prohibit any contracting out of work " historically performed by members of the Bargaining Unit if the contracting of such work eliminates or reduces the normal work load of the Bargaining Unit. It further proposed that KCATA be prohibited from subcontracting work if the number of employees represented by the Union fell below 661. The Union testified that "normal workload" meant the total number of hours worked by the bargaining unit. The KCATA proposed that the language read: (Union Exhibit 13)

Section 2.27 Subcontracting
The Kansas City Area Transportation Authority shall not contract small or large bus line-haul transit service, historically performed by members of the bargaining unit, if the contracting of such work results in the layoff or termination of any member of the bargaining unit. It is understood that all contracts existing on November 14, 1986, are exceptions to the Agreement.

The Union made no changes to its previous proposal in submitting its October 23rd proposal (Union Exhibit 14). The Union presented a proposal on November 12th which did differ from its earlier proposals. The Union deleted the "agents and successors" language and decreased from 661 to 631 the number of bargaining unit members required to be employed by the KCATA before KCATA could subcontract work. (Union Exhibit 15).

KCATA presented its next proposal on November 25th (Union Exhibit 16). This modification read as follows:

Section 1.43 - Subcontracting
The Kansas City Area Transportation Authority shall not contract services historically performed by members of the bargaining unit, if the contracting of such work results in the layoff or termination of any member of the bargaining unit. It is understood that all contracts existing on January 1, 1987 are exceptions to the Agreement. However, the Authority shall notify the Union regarding certain contract renewals and extensions.

This KCATA proposal placed the subcontracting provision in Article I, changed the date for the exemption of existing contracts from the restrictions, and added language requiring the KCATA to notify the Union of certain contract renewals and extensions.

Only the first sentence of the Union's earlier proposals remained unchanged in it essentially new December 4th proposal. (Union Exhibit 17). This proposal read as follows:

Section 1.43 Sub-Contracting
The Kansas City Area Transportation Authority shall not contract out work historically performed by members of the Bargaining Unit if contracting of such work would eliminate or reduce the normal workload of the Bargaining Unit. Contracting of such work will not result in lay-off, transfer or demotion of members in the Bargaining Unit while such contracting is in effect.

Maintenance work substantially covered by manufacture or contractor warranties may be performed by the supplier or contractor while such warranties are in

> effect. Maintenance work requiring special tools and/or equipment not reasonably available to the employer may be contracted out if such contracting does not cause lay-off, transfer or demotion in classification of employees of the Bargaining Unit.

The Union deleted the language requiring a specified number of employees to be in the bargaining unit before the KCATA could subcontract any work. It added the second paragraph relating to subcontracting of maintenance work.

KCATA's response eliminated the word "reduce" from the first sentence in the first paragraph and replaced the second sentence in the second paragraph to read "Maintenance work that exceeds the work load capability of the existing employees may be contracted out if such contracting does not cause lay-off of employees of the Bargaining Unit." (Union Exhibit 18).

Finally, on January 14, 1989 the parties agreed to this KCATA proposal. (Employer Exhibit 7). The agreement came after the Union dropped the work "reduce" from the language. The subcontracting provision in §1.44 of the current agreement contains this negotiated language.

The KCATA's present interpretation of §1.44 appears to resemble its November 25th negotiation proposal when it sought to have the agreement state that KCATA *"shall not contract services historically performed by members of the bargaining unit, if the contracting of such work results in the layoff or termination of any member of bargaining unit."* Based upon the Union's December 4th proposal, the KCATA then sought to remove the work "reduce" from the phrase stating that KCATA could not contract out work *"... if contracting of such work would eliminate or reduce the normal workload...."* KCATA succeeded in getting the word "reduce" removed from the phrase which then stated that KCATA could not contract out work *"if contracting of such work would eliminate work performed by the Bargaining Unit."* The parties also agreed to include the statement that "(c)ontracting of such work will not result in lay-off of members in the Bargaining Unit while such contracting is in effect."

Both parties referred to the authority of Elkouri and Elkouri, How Arbitration Works, 4th Ed. 1985, p. 353 to support each of their positions. This citation provides good logical direction for the Board of Arbitration.

> Ordinarily all words used in an agreement should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning, and it will not be declared surplusage if a reasonable meaning can be given to it consistent with the rest of the agreement....

To KCATA, the word "reduce" has such meaning as to make it seek its removal from the written language. But when it was removed from the agreement, that left the word "eliminate" in the agreement because the Union desired it to be left in the agreement and KCATA had not sought to remove it. Webster's New Collegiate Dictionary suggests that the appropriate definition for "reduce" is to imply being diminished or lessened. Likewise, the word "eliminate" refers to getting rid of or losing something.

Clearly, the first sentence in §1.44 which reads that the KCATA *"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"* has meaning which cannot be ignored. The proper interpretation of the first paragraph in §1.44 come through the use of all of the words written into the language by the parties through negotiations. This meaning, as the Union maintains, that the KCATA can not subcontract out any work if in doing so, any of the historic work actually being performed by the bargaining unit immediately prior to the subcontracting is eliminated and/or if the *"contracting of such work would result in layoff of members in the Bargaining Unit while such contracting is in effect."* The subcontracting of Routes 33 and 35 did eliminate fixed route transit service work that had been performed by bargaining unit bus operators and vehicle maintenance personnel.

The KCATA's interpretation does not make sense in relation to the wording of the first sentence of the first paragraph in §1.44. KCATA violated both sections 1.44 and 5.13 of the agreement by subcontracting out the services (bus operation and maintenance) for Routes 33 and 35.

The KCATA asked why the need to place restrictive language prohibiting subcontracting of small bus routes in §5.14 if the Union's interpretation of §1.44 is correct. First, of all this provision deals with the unique and very specific issue of conversion and this protective language was negotiated prior to the language negotiated for the more general and broad issue of §1.44.

Role of Section 13(c) Agreements

Section 13(c) of the Urban Mass Transportation Act (now the Federal Transit Act) was designed to replace the labor protective provisions of the National Labor Relations Act (NLRB) with labor protective provisions agreed to by the parties in the public sector. KCATA is required to be a party to the protective arrangements in a §13(c) agreement as certified by the Department of Labor as a condition of receiving federal funds. (Union Exhibit 8, 29 CFR Part 215 -Guidelines, Section 13(c)...).

It is clear that the KCATA is bound by §13(c) agreements. The provisions of the two different §13(c) agreement affecting the KCATA are similar, but not identical. There is nothing in the 1973 §13(c) **Capital** Agreement which addresses the issue of subcontracting. The Department of Labor observed that: Section 13(c) of the Act does not dictate whether or not service can be contracted out." (Letter of March 29, 1993, p. 3, South Bend Public Transportation Corporation certification IN-90-X166).

Moreover the Department of Labor further conveyed the position in that letter that "it preserves existing collective bargaining rights during the term of a contract without precluding the parties from negotiating subsequent agreements." (Ibid). The §13(c) agreements primarily preserves all collectively bargained rights, privileges and benefits of employees covered by §13(c) agreements. In doing so, the bargaining rights of the employees are preserved. And they provide for dealing with changes in the organization or operations which result in rearrangement of its working forces. Furthermore, section 13(c) agreement and collective bargaining agreements are considered as "independently binding and enforceable."

The pertinent reference to subcontracting is found in ¶23 of the §13(c) **Operating** Agreement as agreed to by the parties in 1988. Paragraph 23 is the sole provider clause. It provides that subcontracting may "be permitted by express terms and conditions of the then applicable collective bargaining agreement". It is clear that both §13(c) agreements and the collective bargaining agreement may or may not restrict or prohibit subcontracting. However, the collective bargaining agreement is the controlling document relative to the subcontracting issue in this case.

In general, §13(c) agreements provide protective labor guidelines for the parties to deal with in their collective bargaining agreement. They provide for the protection and preservation of all rights, privileges, and benefits provided to the employees under the collective bargaining agreement. Moreover, two arbitration awards presented by the Union illustrated that arbitrators do hold the employer to the requirement of §13(c) agreements. (See Jack Clark, <u>Transportation</u>

Management of Tennessee, Inc., [1987] and Elliot Newman, Port Authority of Alleghney County, [1991]). Consequently, a failure of the KCATA to abide by the collective bargaining agreement between it and the Union must be considered as a violation of various paragraphs of the §13(c) agreements. A violation of sections 1.44 and 5.13 of the current collective bargaining agreement would, as a minimum, also be a violation of paragraphs 3, 4, and to a lesser extent 23 of the §13(c) **Operating** Agreement.

The January 19, 1989 Settlement Agreement

In 1988, the parties agreed to submit to arbitration the issue of whether or not the subcontracting of Routes 32 and 35 was permitted under §1.44 of the collective bargaining agreement. However, the parties were able to reach a Settlement Agreement to resolve the subcontracting issue at that time. (Company Exhibits 12 and 13). The Settlement Agreement restricted the subcontracting of existing routes *"during the term of this Agreement"* Routes 32 and 35 (on or after April 1, 1989) and routes 37 and 37x (on or after October 1, 1989). *"No other routes may be subcontracted by KCATA."*

One of the routes involved in the present case, Route 35, had been allowed to be subcontracted under the Settlement Agreement on or after April 1, 1989. On the assumption that the Settlement Agreement remains in effect at this time, KCATA would have been free to subcontract Route 35. No length of time for the coverage of the Settlement Agreement was specified. The Settlement Agreement was accepted by the parties "for the purpose of resolving the grievance embraced by the Stipulation for Submission to Arbitration...and all other disputes involving the KCATA's ability to subcontract routes routes under §1.44...." (Company Exhibit

The Union's January 20, 1989 letter accepting the KCATA's settlement language, stated "*that the settlement is entered with an understanding by both sides that the Union preserves its position concerning the limits of the existing contractual language in the event the contractual language is not changed in the next negotiation.*" The Settlement Agreement was designed to "*resolve any subcontracting issues for the remainder of the existing contract.*" (Company Exhibit 13). The language in §1.44 was not changed during the negotiations for the 1989-95 collective bargaining agreement. The Settlement Agreement allowed that "*the Union then can grieve its understanding of the original additional routes.*" The KCATA did not challenge the wording of this letter from the Union.

As previously noted, the language of the Settlement Agreement did not contain a provision for its duration. Hints from reading portions of the Union's letter suggest that it was intended to resolve the issue of subcontracting for the duration of the 1986-89 collective bargaining agreement. Then depending on the results of the negotiations for the new 1989-95 agreement regarding the language of §1.44, the parties would react accordingly. Thus, the Settlement Agreement was not intended to continue beyond the 1986-89 contract duration. Since if the language were not changed during the negotiations for a new agreement, the Union would be free then to grieve its understanding of the original language of §1.44.

SUMMARY:

The conclusion that the Board of Arbitration has arrive at from the above analysis, is that: (1) The grievance was filed in a timely manner and hence, provides no bar to further analysis;

(2) The KCATA violated sections 1.44 and 5.13 of the collective bargaining agreement in subcontracting Routes 33 and 35 to Laidlaw Transit Inc.;

(3) In subcontracting these routes, KCATA violated the purposes of Section 13(c) of the Operating Agreement to protect the collective bargaining rights of the covered employees as expressed in paragraphs 3, 4, and 23 particularly; and

(4) The January 19, 1989 Settlement Agreement did not effect the outcome of this issue since it was primarily written to resolve subcontracting disputes under the previous collective bargaining agreement.

Remedy

The remedy is designed to make the affected bargaining unit employees as whole as possible as if the subcontracting of these two routes had not taken place. Thus, because of the violation of sections 1.44 and 5.13 of the current collective bargaining agreement:

(1) The work of operating the buses on Routes 33 and 35 and the maintenance and servicing of the five small transit vehicles be restored to the appropriate bargaining unit members at the earliest possible time;

(2) All employees whose compensation was adversely affected by the subcontracting be made whole on the basis of straight time wages; and

(3) If any part-time operator lost the opportunity to become a full-time operator as a result of the subcontracting, they are to be made whole for any wages lost.

There is insufficient evidence to justify the compensating the bargaining unit for all hours worked by Laidlaw employees.

AWARD

On the basis of the forgoing analysis, the grievance if hereby sustained.

The KCATA is directed to carry out the above listed remedies at the earliest possible date.

DATE May 23, 1995
Columbia, Missouri

Robert V. Penfield
Robert V. Penfield, Neutral Arbitrator

Gayle Holliday
Gayle Holliday, KCATA Arbitrator

Comments: Dissent

Marvin Shackelford
Marvin Shackelford, Union Arbitrator

Comments: Concur