ARBITRATION DECISION NO.:
514

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Office of Collective Bargaining for
Department of Transportation
District 11

DATE OF ARBITRATION:
October 4, 5, and 29
November 8 and 9, 1993

DATE OF DECISION:
February 10, 1994

GRIEVANT:
James C. Eckardt

OCB GRIEVANCE NO.:
31-11-(90-08-03)-0035-01-07

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
Anne Light Hoke, Asst. Gen. Counsel
Kim A. Browne, Arbitration Clerk

FOR THE EMPLOYER:
Thomas A. Durkee, Labor Relations Officer
Rachel Livengood, Chief of Arbitration Services

KEY WORDS:
Subcontracting
Bargaining Unit Erosion
Displacement
Staffing
Overtime
1000 Hour Assignment

ARTICLES:
Article 1 - Recognition
    § 1.03 - Bargaining Unit Work
Article 2 - Non-Discrimination
    § 2.01 - Non-Discrimination
    § 2.02 - Agreement Rights
Article 5 - Management Rights

Article 12 - Special Task Force on Staffing Concerns
Article 13 - Work Week, Schedules and Overtime
§ 13.07 - Overtime
Article 14 - 1000 Hour Assignment
§ 14.01 - ODOT
Article 17 - Promotions, Transfers, and Relocations
§ 17.03 - Promotional/Lateral Transfers Probationary Period
Article 39 - Sub-Contracting

FACTS:

The grievant, a Project Inspector 2 in the construction department of ODOT District 11, grieved the State's contracting out of project inspection work on four construction projects to non-bargaining unit consultant inspectors. Initially the Union and the State disagreed over which party bore the burden of going forward and the burden of proof in an arbitration involving Article 39. In the preliminary decision (see summary 514A), the Arbitrator described the burden of proof as follows: first, the Union had to prove that the subcontracted work was work that bargaining unit employees "normally perform", by a preponderance of the evidence. Then the State had to prove that its decision was rationally based on greater efficiency, greater economy, greater programmatic benefits or other related factors. Next the Union had to prove that the State's decision was erroneous, based in bad faith or against public policy, by clear and convincing evidence.

The parties proceeded to decide the following issues: (1) Was the project inspection work which was contracted out work that bargaining unit inspectors normally performed? (2) Did ODOT contract out project inspection services because of greater efficiency, economy, programmatic benefits or other related factors pursuant to Article 39? And if not, did the violation of Article 39 also violate Article 1.03? (3) Was ODOT obligated to notify the Union of its decision to subcontract project inspection services pursuant to Article 39? (4) Did ODOT's decision to subcontract project inspection services violate bargaining unit overtime opportunities?

UNION'S POSITION:

ODOT violated Article 39 of the Contract by subcontracting approximately 20 project inspector positions on four different construction projects in District 11 without notifying the Union in advance. Through the testimony of the grievant and the District Construction Engineer, the Union proved that the work ODOT hired consultant inspectors to perform was work normally performed by bargaining unit project inspectors. Also, the Union claimed that ODOT did not contract out project inspection services because of greater efficiency, economy, programmatic benefits or other related factors pursuant to Article 39. In fact, the Union proved that ODOT spent in excess of $1,000,000 by rising consultant project inspectors instead of bargaining unit inspectors.

The Union also argued that bargaining unit inspectors were displaced as a result of ODOT's decision to subcontract. This displacement occurred because ODOT refused to fill numerous vacancies within the construction department and instead hired consultant inspectors to perform that work. Therefore, the Union maintained that Article 39 guaranteed it advance notice and an opportunity to present alternatives to ODOT. Finally, the Union argued that consultant inspectors were given overtime opportunities which properly belonged to bargaining unit project inspectors.

EMPLOYER'S POSITION:

Much of the disputed project inspection work was work that the bargaining unit inspectors were not qualified to perform. ODOT maintained that the consultant's expertise and advanced training was a primary reason for contracting out the work. ODOT also argued that it had a shortage of project inspectors, and the agency's personnel ceilings prohibited it from hiring additional project inspectors. Aside from the personnel ceilings, ODOT argued that the short planning period was insufficient to hire and train the 40 new bargaining unit project inspectors needed District-wide. Therefore, ODOT had no choice but to subcontract out the project inspection work. ODOT claimed that its decision to contract out was based upon greater efficiency,

programmatic benefits and other related factors, not economy.

ODOT contended that the term "displacement" was limited to situations involving actual layoff or job abolishment. Because no bargaining unit employees were laid off as a result of ODOT's decision to subcontract, the Union was not entitled to any advance notice. Lastly, ODOT argued that bargaining unit employees received plenty of overtime opportunities and that consultant inspectors did not take overtime opportunities from the bargaining unit.

ARBITRATOR'S OPINION:

The Arbitrator held that ODOT improperly subcontracted inspection services on District 11 construction projects. Also, the Arbitrator held that the vast majority of the disputed work was work "normally performed" by bargaining unit employees.

ODOT bore the burden of proving that its rationale was consistent with Article 39. The Arbitrator was unpersuaded by the argument that ODOT did not have sufficient time to hire and train new inspectors. Evidence revealed that from project conception to actual "dirt moving" usually took 8 years, yet ODOT only required 6-7 months to hire and train new inspectors. Moreover, ODOT's Human Resource Administrator admitted that ODOT had exceeded its personnel ceilings from time to time in the past. The Arbitrator was also concerned that, on two of the four projects, the company which designed the project also inspected the construction work.

The fact that those who were ultimately responsible for the subcontracting decision had never undertaken a comparison of the cost of contracting out versus performing the project inspection work in-house, called into question the legitimacy and degree of good faith of ODOT's stated reasons for subcontracting.

Ultimately, the Arbitrator concluded that the Contract required ODOT to show that use of consultant project inspectors would result in greater economy, efficiency or programmatic benefits (i.e., to consider different options such as 1000 hour transfers and/or hiring to fill existing vacancies). ODOT failed to meet its burden of proof; therefore, the Arbitrator held that the subcontracting of project inspection services was improper. In short, the Arbitrator concluded that the decision to subcontract project inspection services was contractually inappropriate.

AWARD:

The grievance was sustained. In addition, the Arbitrator ordered ODOT to make the Union whole by reimbursing the Union for its expenses in maintaining and arbitrating the grievance.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

State of Ohio, Office of
Collective Bargaining for
the Ohio Department of
Transportation

Employer.

Grievance No.:
31-11-(90-08-03)-0035-01-07
Grievant:
James C. Eckardt
Hearing Dates:
October 4, 5, 29
November 8, 91 1993
Brief Date:
December 31, 1993
Award Date:
February 10, 1994

Arbitrator:
R. Rivera

For the Employer:
Thomas E. Durkee, Labor Relations Officer
Rachel Livengood, Chief of Arbitration Services

For the Union:
Anne Light Hoke, Assistant General Counsel
Kim A. Browne, Arbitration Clerk

Preliminary Matters

The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. All witnesses were sworn. The parties jointly agreed to furnish a written record of the proceedings to the Arbitrator. Neither party was to receive a copy. The sole purpose of the. written record was to refresh the Arbitrator's memory. The record shall not serve as a formal evidentiary record.

Joint Exhibits

1. 1986 Contract
2. 1989 Contract
3. Grievance Trail
5. Union 1989 Bargaining Notes
6. Management 1986 Notes
7a. Union 1986 Proposals
7b. Management 1986 Proposals
8. Management 1989 Notes
9a. Union 1989 Proposals
9b. Management 1989 Proposals

Employer Exhibits

0. Opening Statement

1. District 11 Construction Projects Sold 1984-1992

2. District 11 Construction Department Staffing 1988-1993

3. District 11 Active Consultant Inspectors (all projects) by Month July, 1990 through June 1993

4. District 11 Full Time Permanent Employees Compared to Personnel Ceiling by Quarter January 3, 1986 through October 9, 1992

5. District 11 Construction Department Payroll Rosters July 5, 1985 through June 26, 1993

6. Cost Comparison Statewide & District 11 Consultant Inspection Program (all projects) R.Y. 1991 and F.Y. 1992

7. Construction Inspection Program Source Data Differences Stipulated Projects , F.Y.E. 6/30/91 and 92

8. District 11 Consultant Inspection Program Stipulated Projects, F.Y.E. 1991 and 1992

9. Employer's Document Request to the Union late June early July, 1993

10. Union's Response to the Document Request July 2, 1993

11. District 11 Construction Department Overtime Report for Pay Period Ending April 7, 1990

12. District 11 Construction Department Overtime Report for Week Ending March 30, 1991

13. District 11 Construction Department Overtime Report for Week Ending March 31, 1992

14. Overtime Reports for Projects 602(90), 543(90) and 8008(90) dated July 11, 1993 for Week Ending July 4, 1993

15. Chapter 4733-35 Code of Ethics for Engineers and Surveyors

16. Labor Charges for District 11, Work Unit 351 (Construction Department) F.Y. 1992, Pay Periods 6/29/91 through 6/13/92 for Fourteen Employees

17. Comparison of Full Time Permanent Employees by Bargaining Unit and Fiscal Year, Fiscal Years 1985 - 1993 District 11 Construction Department Work Unit 351 (Ledger)

18. Comparison of Full Time Permanent Employees by Bargaining Unit and Fiscal Year, Fiscal Years 1985 - 1993 District 11 Construction Department Work Unit 351 (Graph)

Union Exhibits

0. Opening Statement

1. New Jersey Department of Transportation, Construction Inspection In-House vs. Consultant Cost Comparison

2. New Jersey Department of Transportation, Bridge Evaluation In-House vs. Consultant Cost Comparison

3. BNA Government Employee Relations Report

4. Engineering News Record Article on New York Department of Transportation

5. Project Inspector Classification Specification

6. Classification Training Manual, Fall 1991

7. Memo to Brunot regarding Density Gauges March 20, 1990
8 Project Inspector Position Description for R. Mass, Grievant, M. Mlynek and J. Rothel

9. Specifications for Consultant Services

10. List of Active Prequalified Consultants dated November 5, 1991

11. Agreement No. 6124 with MS Consultants, Inc. F.Y. 1991

12. Agreement No. 6543 with MS Consultants, Inc. F.Y. 1992

13. Agreement No. 6123 with Hammontree & Associates F.Y. 1991

14. Agreement No. 6542 with Hammontree & Associates F.Y. 1992

15. Agreement No. 6125 with W.E. Quicksall and Associates F.Y. 1991

16. Agreement No. 6544 with W.E. Quicksall and Associates F.Y. 1992

17. Agreement No. 6122 with G.P.D. Associates F.Y. 1991

18. Agreement No. 6541 with G.P.D. Associates F.Y. 1992

19. W.E. Quicksall and Associates First Modification order (6544-1)

20. Hammontree & Associates First Modification Order (6542-1)

21. MS Consultants, Inc. First Modification Order (6543-1)

22. W.E. Quicksall and Associates Second Modification Order (6544-2)

23. MS Consultants, Inc,. Second Modification Order (6543-2)

24. Total Labor Hours by District FY 88-02 Consultant Construction Inspection prepared by ODOT Bureau of Program Review and Evaluation

25. Review of Consultant Proposals FY 90 Construction Inspection Program

26. Consultant Qualification Questionnaire

27. Total Labor Hours by District FY 88-92 Consultant Construction Inspection prepared by Grievant

28. Grievant's Work Record at ODOT from 6/1/90-- Present
29. Union Second Opening on Economy

30. Letter from T. E. Durkee to Anne Light Hoke dated July 19, 1993

31. Financial Analysis prepared by John Vagnier, CPA, on all projects in District 11 for FYE 1991 and 1992

32. Resume of Elliot D. Sclar, Ph.D.

33. Construction Inspection Summary of Claimed Hours & Costs FY 91 District 11 for all projects

34. Construction Inspection Summary of Claimed Hours & Costs FY 92 for all projects by District 1 through 12

35. W.E. Quicksall Invoice May 9, 1991

36. Classification and Pay Range Schedules for 1991 and 1992

37. Memo from Dan Cores dated July 14, 1993 and September 7, 1993 on Indirect and Fringe Cost Rates

38. No. of Consultant Project Inspectors by Consultant

29. Article in State and Local Government Review, Winter 1990

40. Letter from T.E. Durkee to Anne Light Hoke dated September 21, 1993

41. Memo from Pete Applegarth to Rachel Livengood dated August 8, 1991

42. Financial Analysis prepared by John Vagnier, CPA, on Four Projects in District 11 for FYE 1991 and 1992

43. No. of Consultant Project Inspectors on Four Projects in District 11 by Consultant

44. Letter from T.E. Durkee to Anne Light Hoke dated July 19, 1993

45. OMB Circular A-76 (Revised) dated August 4, 1983

46. Union Opening on Displacement

47. ODOT Position Roster of Vacancies for District 11 Construction Department

48. District 11 Construction Department Table of Organization dated December, 1990

49. Position Control Roster for District 11 Construction Department dated October 6, 1993
50. Active Consultant Inspectors by Month in District 11 for All Project versus Four Projects

51. Union Opening Statement on Erosion

52. Arbitration Decision G-86-1107

53. Arbitration Decision G-86-0335

54. Grievance Settlement Agreement dated February 25, 1992

55. Arbitration Decision 23-08-900516-0422-05-02

56. Arbitration Decision In re Sunbelt Transportation Services versus Teamsters, General Drivers, Warehousemen and Helpers, Local 968

57. Arbitration Decision In re Douglas Aircraft Company, Inc. versus International Brotherhood of Electrical Workers, Local 584

58. Position Roster of Filled Positions District 11 Construction Department dated July 15, 1993

59. Summary Report of Filled Positions District 11 Construction Department prepared by Kim Browne

60. Report of Total Overtime Hours prepared by Kim Browne

61. Sample Documentation used to prepare U-60

62. Memo on Overtime Policy from William Lindenbaum dated May 11, 1992

63. Memos from Nancy Fisher on Nuclear Density Gauge Training dated May 24, 1989 and March 27, 1991

64. ODOT Policy on Nuclear Density Gauges and Radiation Safety

65. Summary Report of Overtime Worked and Claimed on Project 398(90) prepared by Grievant

66. Labor Charges for the Four Stipulated Projects in District 11 for FYE 1991 and FYE 1992

67. Labor Charged for District 11, Work Unit 351 (Construction Department) for F.Y. 1991, Pay Periods July 14, 1990 Through June 15, 1991

68. Modified Overtime Summary Report on Project 398(90)

Stipulated Facts

1. This Grievance involved four (4) projects in District 11 project no. 543(90) [state job no. 116641], 8008(90) [state job no. 115522, 398(90) [state job no. 110470] and 602(90) [state job no. 115524], and does not include any other grievances.

2. In FYE 1991, there were four (4) subcontractors performing project inspector work in District 11 -- W.E. Quicksall, Hammontree, Mosure & Syrakis, and G.P.D. Associates.

3. In FYE 1992, there were 3 subcontractors performing project inspector work in District 11 -- W.E. Quicksall, Hammontree and Mosure & Syrakis (MS Consultants).

4. OCSEA was not given notice of the subcontracting out of the four (4) projects in District 11 -- project no. 543(90), 8008(90), 398(90) and 602(90). This stipulation in no way establishes that the Employer had a duty to give notice.

5. The work performed by MS Consultants on project no. 8008(90) which involved the inspection of precision blasting pertaining to a tie-back wall and construction of any component related to this tie-back

[1]

installation and the inspection of the drainage tunnel is work not normally performed by project inspectors.

6. In the first sentence of Article 39, the Arbitrator's express use of the words "work that would have been 'normally' done by bargaining unit members at the time that the parties entered into the contract" means the type of work that bargaining unit employees perform which is identified in the classifications and position descriptions.

7. For purposes of this proceeding only, the parties stipulate that John Vagnier's report is based on invoices provided by the Employer on the four (4) projects for F.Y.E. 1991 and F.Y.E. 1992, project no. 543(90), 398(90), 602(90) and 8008(90).

Issues Presented

I. Was the project inspector work subcontracted normally performed by bargaining unit members at the time the parties entered into the contract?

II. Under Article 39, did the Employer contract out work on Project Nos. 398(90) [State Job No. 110470], 543(90) [State Job No. 116641], 602(90) [State Job No. 115524] and 8008(90) [State Job No. 115522] because of greater efficiency, economy, programmatic benefits or other related factors?

Did the violation of Article 39 also violate Article 1.03?

III. Was it necessary for ODOT to provide notice to the Union of the contracting out of project inspection services pursuant to Article 39?

IV. Did the Employer's decision to sub-contract violate section 13.07 -- Overtime?

Relevant Contract Sections (1989-1991)

ARTICLE 1 - RECOGNITION

§ 1.03 - Bargaining Unit Work

Supervisors shall only perform bargaining unit work to the extent that they have previously performed such work. During the life of this Agreement, the amount of bargaining unit work done by supervisors shall not increase, and the Employer shall make every reasonable effort to decrease the amount of bargaining unit work done by supervisors.

In addition, supervisory employees shall only do bargaining unit work under the following circumstances: in cases of emergency; when necessary to provide break and/or lunch relief; to instruct or train employees; to demonstrate the proper method of accomplishing the tasks assigned; to avoid mandatory overtime; to allow the release of employees for union or other approved activities; to provide coverage for no shows or when the classification specification provides that the supervisor does, as a part of his/her job, some of the same duties as bargaining unit employees.

Except in emergency circumstances, overtime opportunities for work normally performed by bargaining unit employees shall first be offered to those unit employees who normally perform the work before it may be offered to non-bargaining unit employees.

Further, it is the intent of the Employer in the creation and study of classifications to differentiate between supervisors and persons doing bargaining unit work. Whenever possible, such new and revised classifications will exclude supervisors from doing bargaining unit work.

THE EMPLOYER RECOGNIZES THE INTEGRITY OF THE BARGAINING UNITS AND WILL NOT TAKE ACTION FOR THE PURPOSE OF ERODING THE BARGAINING UNITS.

ARTICLE 2 - NON-DISCRIMINATION

§ 2.01 - Non-Discrimination

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio or Executive Order 83-64 of the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, handicap or sexual orientation. Nor shall either party discriminate on the basis of family relationship. The Employer shall prohibit sexual harassment and take action to eliminate sexual harassment in accordance with Executive Order 87-30, Section 4112 of the Ohio Revised Code, and Section 703 of Title VII of the Civil Rights Act of 1964 (as amended).

The Employer shall not solicit bargaining unit employees to make political contributions or to support any political candidate, party or issue.

§ 2.02 - Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be made for these purposes.

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in The Ohio Revised Code, Section 4117.08(C), Numbers 1-9.

ARTICLE 12 - SPECIAL TASK FORCE ON STAFFING CONCERNS

A. The Union and the State mutually desire that staffing levels in State institutions are sufficient to insure safe, high quality, effective delivery of institutional services, and desire as well that staffing levels in non-institutional State agencies are sufficient to insure timely, high quality, effective provision of services to the public.

B. To accomplish this, the Union and the State agree to establish a Staffing Study Committee no later than August 1, 1989, to study the following:

1. For institutional agencies: such indicators as numbers of shifts which are at or under minimum staffing levels; numbers of staff and patient/client/inmate/youth injuries; level of mandatory overtime; disability/OIL/worker's compensation leaves; denial of vacation leave for reasons of operational need; and staffing-related deficiencies cited in surveys by such external agencies as the Health Care Finance Authority (Medicaid and Medicare), the Joint Commission on the Accreditation of Hospitals, and the American Corrections Association;

2. For non-institutional agencies: such indicators as backlogs in claims processing, case investigations, project inspections, and similar quantifiable tasks; denials of vacation leave for reasons of operational need; levels of mandatory overtime; and disability/worker's compensation leaves;

3 Such other factors as may be mutually agreed to.

C. Based on these studies, the Staffing Study Committee will develop recommendations no later than December 31, 1990. The Union and the State will jointly seek sufficient funds to implement any committee recommendations that involve increased staffing levels.

D. The Staffing Study Committee will have an equal number of Union and State representatives, including state representatives from the Governor' s Office, Office of Budget and Management, office of Collective Bargaining, the Division of Personnel of the Department of Administrative Services, as well as from institutional and non-institutional agencies. The committee will meet at least quarterly.

ARTICLE 13 - WORK WEEK, SCHEDULES AND OVERTIME

§ 13.07 - Overtime

Employees shall be canvassed quarterly as to whether they would like to be offered overtime opportunities. Employees who wish to be called back for overtime outside of their regular hours shall have a residence telephone and shall provide their phone number of their supervisor.

Insofar as practicable, overtime shall be equitably distributed on a rotating basis by seniority among those who normally perform the work. Specific arrangements for implementation of these overtime provisions shall be worked out at the Agency level. The Agency Labor-Management Committees shall meet within ninety (90) days of the effective date of this Agreement to discuss such arrangements. Absent mutual agreement to the contrary, overtime rosters will be purged at least every twelve (12) months. Such arrangements shall recognize that in the event the Employer has determined the need for overtime, and if a sufficient number of employees is not secured through the above provisions, the Employer shall have the right to require the least senior employees who normally performs the work to perform said overtime. The overtime policy shall not apply to overtime work which is specific to a particular employee's claim load or specialized work assignment or when the incumbent is required to finish a work assignment.

The Agency agrees to post and maintain overtime rosters which shall be provided to the steward, within a reasonable time, if so requested. The rosters shall be updated every pay period in which any affected employee earned overtime.

Employees who accept overtime following their regular shift shall be granted a ten (10) minute rest period between the shift and the overtime or as soon as operationally possible. In addition, the Employer will make every reasonable effort to furnish a meal to those employees who work four (4) or more hours of mandatory or emergency overtime and cannot be released from their jobs to obtain a meal.

An employee who is offered but refuses an overtime assignment shall be credited on the roster with the amount of overtime refused. An employee who agrees to work overtime and then fails to report for said overtime shall be credited with double the amount of overtime accepted unless extenuating circumstances arose which prevented him/her from reporting. In such cases, the employee will be credited as if he/she had refused the overtime.

An employee who is transferred or promoted to an area with a different overtime roster shall be credited with his/her aggregate overtime hours.

An employee's posted regular schedule shall not be changed to avoid the payment of overtime.

ARTICLE 14 - 1000 HOUR ASSIGNMENT

§ 14.01 - ODOT

When fluctuations in workload or weather conditions necessitate the temporary transfer or employees, the Director of the Ohio Department of Transportation or designee may temporarily assign such personnel to duties other than those specified by their classification. Such transfers shall first be done through the solicitation of volunteers in classification series seniority order among available employees. When the workload situation is such that the voluntary list is not adequate, temporary transfers shall be made among available employees on the basis of inverse classification series seniority. For the purpose of this Article for construction personnel, "available" means those employees whose construction assignment has been terminated for the construction season.

When an employee is temporarily transferred, the transfer will be to a classification for which the employee is qualified. An employees shall suffer no loss of pay benefits or seniority as the result of a temporary transfer. Where such temporary transfers will be to a higher paying classification, the employee will receive the pay of the higher paying classification.

An employee temporarily transferred by this Section shall be notified in writing at least two (2) weeks in advance of the transfer. Job assignments to employees on temporary transfers pursuant to this Article shall be offered on the basis of classification series seniority giving first choice of selection among available assignments to the most senior employee within the work area on temporary transfer.

The duties of a temporarily transferred employees shall not unduly alter the regularly scheduled

assignments of permanently assigned employees. Any employee who is on a temporary transfer shall not be considered for an overtime assignment until all appropriate permanently assigned employees have been asked to work the overtime pursuant to this Agreement.

No employee temporarily transferred by this Section will be transferred in excess of one thousand (1000) hours within a twelve (12) month period, unless mutually agreed to by the employee and the Agency Head or designee. An employee shall not be transferred from one project to another to circumvent the provisions of this Article. The, implementation of this Article is an appropriate subject for discussion at Labor-Management Committee meetings.

ARTICLE 39 - SUB-CONTRACTING

THE EMPLOYER INTENDS TO UTILIZE BARGAINING UNIT EMPLOYEES TO PERFORM WORK WHICH THEY NORMALLY PERFORM. HOWEVER, THE EMPLOYER RESERVES THE RIGHT TO CONTRACT OUT ANY WORK IT DEEMS NECESSARY OR DESIRABLE BECAUSE OF GREATER EFFICIENCY, ECONOMY, PROGRAMMATIC BENEFITS OR OTHER RELATED FACTORS.

IF THE EMPLOYER CONSIDERS CONTRACTING OUT A FUNCTION OR SERVICE WHICH WOULD DISPLACE STATE EMPLOYEES THE EMPLOYER SHALL PROVIDE ADVANCE NOTICE IN WRITING TO THE UNION. IN THE EVENT OF MINOR CONTRACTING OUT THE EMPLOYER SHALL PROVIDE REASONABLE ADVANCE NOTICE AND IN THE EVENT OF MAJOR CONTRACTING OUT THE EMPLOYER SHALL PROVIDE NOT LESS THAN NINETY (90) DAYS NOTICE PRIOR TO DISPLACING ANY EMPLOYEE AS A RESULT OF THE CONTRACTING OUT WHICH IS UNDER CONSIDERATION. UPON REQUEST THE EMPLOYER SHALL MEET WITH THE UNION DURING THE NOTICE PERIOD AND DISCUSS THE REASONS FOR THE PROPOSAL AND PROVIDE THE UNION AN OPPORTUNITY TO PRESENT ALTERNATIVES.

If the Employer does contract out, any displaced employee will have the opportunity to fill existing equal rated permanent vacancies as his/her work location or other work locations of the Agency. In the event an employee needs additional training to perform the required work in such other position, which can be successfully completed within a reasonable length of time, the Employer shall provide the necessary training during working hours at the Employer's expense.

Except for government employees from other jurisdictions who are part of a state agency's organizational structure, non-state employees will not ordinarily serve as supervisors (as defined by Ohio Revised Code Section 4117.01(F)) of any bargaining unit employees. Bargaining unit employees will not be responsible for training contract workers, except bargaining unit employees may be required to provide orientation and training related to agency policies, procedures and operations.

PROCEDURAL HISTORY

Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO (the Union) filed an issue grievance number 31-11-90/08/03-0035-01-07 dated July 25, 1990. The grievance cited violations of ARTICLE 12 -- SPECIAL TASK FORCE ON STAFFING CONCERNS, ARTICLE 14 1000 HOUR ASSIGNMENTS, SECTION 14.01 -- ODOT, ARTICLE 17 - PROMOTION AND TRANSFERS, SECTION 17.03 -- VACANCY and ARTICLE 39 -- SUB-CONTRACTING and was filed at Step 1 on July 25, 1990. The Employer denied the grievance at Step 1 on July 30, 1990, and the Union presented the grievance at a Step 2 on August 3, 1990, which was subsequently denied in the response issued August 6, 1990. The grievance was advanced to Step 3 and added alleged violations ARTICLE 2 -- NON-DISCRIMINATION, SECTION 2.01 -- NON-DISCRIMINATION, SECTION 2.02 -- AGREEMENT RIGHTS and ARTICLE 13 -- WORK WEEK, SCHEDULES AND OVERTIME, SECTION 13.07 -- OVERTIME. The Step 3 meeting was held September 25, 1990 and subsequently denied in a responses issued October 9, 1990. The Union having advanced the grievance to Step 4 on October 19, 1990 and receiving a denial dated October 30, 1990 requested arbitration on November 13, 1990. Subsequently, based upon an agreement between the parties, OCSEA amended the grievance to include a violation of Article 1.03, Bargaining Unit Work.

The parties convened a pre-arbitration hearing held August 19, 1993, to determine which party carried

the burden of going forward and the burden of proof in arbitrations which require an interpretation of Article 39. The meaning of the first paragraph of Article 39 was central to this disagreement. Specifically, the paragraph reads "[t]he Employer intends to utilize bargaining unit employees to perform work which they normally perform. However, the Employer reserves the right to contract out any work it deems necessary or desirable because of greater efficiency, economy, programmatic benefits or other related factors."

This Arbitrator concluded that the work "intends" was less than a "commitment." Instead, she held that the word "intends" meant that, at the time the Contract was entered into, the Employer planned to use bargaining unit employees to perform the work they were currently performing. Thus, within the Employer's good faith intention to use bargaining unit employees, the Employer still reserved the right to contract out work.

This Arbitrator further determined that the State did not possess an arbitrary or unfettered right to subcontract and that to hold otherwise would have rendered the rest of the first paragraph meaningless. This Arbitrator concluded that the second sentence of the first paragraph gave the Employer the right to contract out work normally performed by bargaining unit employees when the Employer had a good faith belief that contracting out was necessary or desirable because the end result would be greater efficiency, greater economy, greater programmatic benefits or greater related factors.

As a result, the burden of proof was allocated as follows: First, the Union bore the burden of proving that the subcontracted work was work that bargaining unit employees "normally perform" by a preponderance of evidence. Then, the burden shifted to the State to prove that its decision was rationally based on greater efficiency, greater economy, greater programmatic benefits or greater related factors. Then, the burden again shifted to the Union to prove by clear and convincing evidence, that the Employer' s decision was erroneous, based in bad faith or not in the public interest.[2]

The Arbitration Hearing on the substantive issues was held in Columbus, Ohio on October 4, 5, 29, November 8 and 9, 1993.

On the first day of hearing, the Union carried the burden to prove that the work being sub-contracted was work that bargaining unit employees "normally performed." Both parties presented testimony and evidence. Grievant testified for the Union, and Messrs. John Audet and William Lindenbaum testified for the Employer.

On the second day of hearing, the issue of "work which they normally perform" was concluded, and the burden shifted to the Employer, "to show that its decision was rationally based on greater economy, greater efficiency, greater program benefits, or other related factors." In order to establish the reason of the Employer for the necessity of sub-contracting, Messrs. John Audet and William Lindenbaum testified. "Once a rational basis of either efficiency, economy, etc. is shown, the burden then shifts to the Union to overcome by a clear and convincing evidence that the decision of management was erroneous or based in bad faith or not in the public interest." The Union presented testimony from Grievant, Messrs. Jim Graham, Jay Cole, James Brunot, Robert Mass, Michael Mlynek, David LaRoche and Ms. Michelle Hooper.

On the third day of hearing and continuing into the fourth day of hearing, the Union presented evidence on the economic impact of the Employer's decision to sub-contract with the testimony of John R. Vagnier, CPA. The Employer presented rebuttal testimony from Mr. Steve Spann on the economic argument and rebuttal testimony from Messrs. Don Bennett, Dan Edwards, and William Lindenbaum. Included in day four of the hearing, Mr. Bruce Wyngaard testified as to his role in negotiations preparation for the 1989-1991 contract, and Mr. Harold Bumgardner testified on Table of Organizations and vacancies as listed on the District 11 Personnel Roster.

On the last day of hearing, the Union presented evidence and testimony on the issue of overtime through Kim Browne and Grievant. The Employer presented its' last rebuttal testimony through Messrs. Dan Edwards, William Lindenbaum, and Thomas E. Durkee.

Briefs were filed by the parties reaching the Arbitrator on December 31, 1993.

STATEMENT OF FACTS

Because of the nature and quantity of "facts" in this case, the Arbitrator shall not attempt a

comprehensive fact statement. Rather, relevant facts as found by the Arbitrator shall be discussed in connection with each issue. The Arbitrator shall make no reference to particular transcript pages as the transcript was solely a mechanism to refresh the Arbitrator's memory.

I. WAS THE PROJECT INSPECTOR WORK SUBCONTRACTED NORMALLY PERFORMED BY BARGAINING UNIT MEMBERS AT THE TIME THE PARTIES ENTERED INTO THE CONTRACT?

The Employer and Union agreed that with the exception of two (2) instances, the project inspector work that was contracted out was work "normally performed" by bargaining unit employees. The two areas of disagreement are (A) the construction of a sanitary lift station and (B) the construction of a large tie back wall etc.

A. WERE THE INSPECTION DUTIES ASSOCIATED WITH THE CONSTRUCTION OF THE LIFT STATION THOSE DUTIES WHICH ODOT PROJECT INSPECTORS NORMALLY PERFORM?

Facts

The Grievant, an ODOT Project Inspector 2 with over 13 years experience, testified for the Union on this issue. The Grievant testified that in the past ODOT Project Inspectors had inspected at least one sanitary lift station, albeit a smaller station than the one under consideration. The Grievant was asked to provide a description of the general nature and function of a sanitary lift station. He did so. The Grievant referred to the Classification Series on Project Inspector. (Union Exhibit 5) The series purpose reads: "The purpose of the project inspector is to monitor contractors working on state highway construction projects for compliance with project plans, proposals and state and federal specification." The primary function of the Project Inspector 2 reads: "Inspects construction projects to ensure contractor compliance with state specifications, plans, and or proposals (e.g. roadway, drainage, pavement, waterworks, electrical, traffic control, signing, topsoil removal, demolition and clearing, foundations for embankments, subgrades, piles, guardrails and/or median barriers, landscaping slope protection, detours, temporary roads, bridge painting), verifies plan quantities and calculations with blueprints, tests concrete for air, slump and yield, operates nuclear gauges or embankment kit to test compaction and density and collects material samples to be forwarded to district or central office." The Grievant testified that project inspectors inspected the installation of sanitary sewers, sanitary equipment, sanitary lines, etc. According to the Grievant, such items would fall under the general categories in the classification specification (Union Exhibit 5) of waste water lines, drainage, and water line work. He agreed that when inspecting "structures" as listed in the classification specification that the "structures" were primarily related to highway construction.

Mr. William Lindenbaum, ODOT Construction Engineer for District 11, testified for the Employer. Mr. Lindenbaum admitted that ODOT Project Inspectors had inspected a sanitary lift station in the past and have done inspection work on sanitary lines. Moreover, he stated that the Grievant's description of a sanitary lift station was accurate. Mr. Lindenbaum said that the lift station at issue worked on the same theory but was considerably larger. He maintained that the largeness made the project more complex and, therefore, beyond the ability of ODOT Project Inspectors. Mr. John Spencer Audet also testified for the Employer. Mr. Audet is a Human Resources Administrator I and, in that capacity, was responsible for rewriting ODOT classification specifications. He was responsible for the classification specification of ODOT Project Inspectors. (Union Exhibit 5) He said that he understood "structures" to mean "highway structures" or "roadway structures," that is, "structures you would associate with highways." He said that he worked with persons from the ODOT construction department to draw the classification specifications. Mr. Audet was handed Classification Refresher Training: Training Manual (Department of Administrative Services Classification and Compensation Section) (Union Exhibit 6). He was asked to read the definition of "e.g.": "An (e.g.) statement set forth examples of work that are (sic) performed. Because it is an e.g. any combination of what is inside the (e.g.) statement or OTHER COMPARABLE tasks or elements or examples can be substituted to satisfy the list job duty appearing outside the parenthesis." (Emphasis added by the Arbitrator.) Mr. Audet admitted the relevance of the document and said that the key word was "comparable."

On rebuttal, the Grievant testified to project inspectors inspecting outposts, garages, and salt containment buildings, all of which he described as falling within the concept of "structures." In particular, he described the Dillonvale outpost as having sump pumps used to raise the waste water above creek level and maintained that such work was working with waste water and similar in some respects to sanitary lift stations.

Discussion

Based on the evidence, the Arbitrator concludes that the inspection of the sanitary lift station at issue was work normally performed by ODOT Project Inspectors and, hence, work normally performed by bargaining unit employees. Mr. Lindebaum rather than contradicting the Grievant, in essence, agreed that ODOT project inspectors had inspected sanitary lift stations. Moreover, he essentially agreed that the lift station at issue was theoretically the same as the smaller stations, only bigger. The Classification Specification states that the primary purpose of ODOT Project Inspectors is to monitor state highway construction PROJECTS. The sanitary life station was without objection part of a "state highway construction project." The description of the work of a Project Inspector 2 states that the person under this description is to ensure contractor compliance with State specifications. The list of types of projects with the "e.g." parenthesis is, not exclusive, but illustrative. Moreover, many of the items listed in that parenthesis are comparable to the work involved in sanitary life stations. (In particular, drainage, water works, and subgrades.)

B. WERE THE INSPECTION DUTIES ASSOCIATED WITH THE CONSTRUCTION OF THE LARGE TIE BACK WALL THOSE DUTIES THAT ODOT PROJECT INSPECTORS NORMALLY PERFORM?

Facts

In Stipulation No. 6, agreed to by the parties prior to the substantive arbitration hearing, the parties agreed that the "work performed by MS Consultants on Project number 8008(90) that involved the inspection of precision blasting pertaining to a tie back wall and construction of any component related to this tie-back installation and the inspection of the drainage tunnel is work not normally performed by ODOT project inspectors." The Union in its brief asks the Arbitrator to ignore the stipulation because Mr. Graham, an ODOT employee, allegedly testified that ODOT Project Inspectors were used to inspect parts of the tie-back wall/drainage tunnel project.

Discussion

The Arbitrator rejects this request. Joint stipulations of fact should be encouraged and respected within the Arbitration process. Only in the gravest circumstances where injustice would result should the Arbitrator reconsider such stipulations. Joint stipulations serve a "notice" and permit both parties to structure their arguments and presentation within those parameters. Reformulating stipulations after the hearing is exactly the type of behavior to be avoided.

II. UNDER ARTICLE 39, DID THE EMPLOYER CONTRACT OUT WORK ON PROJECT NOS. 398(90) [STATE JOB NO. 110470], 543(90) [STATE JOB NO. 116641], 602(90) [STATE JOB NO. 115524] AND 8008(90) [STATE JOB NO. 115522] BECAUSE OF GREATER EFFICIENCY, ECONOMY, PROGRAMMATIC BENEFITS OR OTHER RELATED FACTORS?

Facts

The Employer bore the burden of proving that the decision to contract out met the criteria of Article 39. To this end, the Employer offered the testimony of William Lindenbaum, Construction Engineer for District 11. Mr. Lindenbaum had been an ODOT employee for about 10 years and Construction Engineer for District 11 for about 5 years at the time of his testimony. Mr. Lindenbaum holds a Bachelor of Science in Civil Engineering and is a licensed professional engineer.

Mr. Lindenbaum stated that from 1983 to 1990 the main task of District 11 was reconstruction work on four lane highways, in particular upgrading, bridge replacing, resurfacing, joint repairing, paving, putting in new guardrails, safety upgrading, etc. The average cost per projection was approximately 5 million dollars. In addition, he testified that District 11 of ODOT was usually engaged in lots of two lane resurfacing, guardrail reconstruction, administering mowing contracts, and carrying out pavement markings. The usual District 11

program was in the 40 million dollar range and carried out in some 50-70 construction contracts. Most, if not all, of these projects were one year in duration. However, beginning in 1990, according to Mr. Lindenbaum, District 11 experienced growth in projects at least 4 times the average annual projects in prior years. In particular, District 11 began five (four of which are at issue in the Arbitration) highway projects that were significantly larger and more complex than projects done in the past. In particular, according to Mr. Lindenbaum, these items were new construction. In 1990, two phases of the Wintersville-Steubenville bypass were sold (ODOT sells projects i.e. contracts out the CONSTRUCTION of the various projects. This contracting out is NOT at issue in this Arbitration.) One phase (602) was 28.5 million and the second (Project 8008) was 58.2 million. Also sold in 1990 were Route 30/East Liverpool alignment at 11 million, Route 7/Bellaire (Belmont County) Project (543) at 16.9 million, State Route 39/Tucarawas County Project at 9 million, and the Wellsville Bypass (Columbiana County) at 11 million. These new projects accounted for 123 million of the 152.8 million to be spent in District 11 in 1990. According to Mr. Lindenbaum, the 29 million in regular projects was approximately the same as District 11's regular yearly expenditures.

Mr. Lindenbaum testified that from original conception to actually moving dirt on the project might take upwards of 8 years. These new projects were mostly 2 year projects, although some were finished before two years and some exceeded two years.

According to Mr. Lindenbaum, he did not have enough currently employed Project Inspectors (1 & 2) to properly inspect all these upcoming 1990 projects. All these projects would be going on simultaneously. Moreover, inspectors had to abide by the hours of the construction contractor, and if the construction contractor ran either double shifts or overlapping shifts, project inspectors had to be there. He understood that one of the options was to use (sub contract) Consultant Inspectors. Mr. Lindenbaum said that in prior years he had been asked by the Bureau of Consulting Services whether he needed to hire Consultants and, in past years, he had answered in the negative. He said that he brought the decision to Mr. McKenna, his immediate supervisor and Deputy District Director. Lindenbaum said that they considered the personnel need for these projects a "short term need" . . . two years but recognized that two could turn into three. Moreover he characterized their need as "quick." They would need 40 additional project inspectors by July ‘90. Mr. Lindenbaum also testified that as he understood "it was not possible to get a big increase in staff in the 11th District.” He indicated that the Deputy District Director McKenna (since retired) was the person who told him that no increase in current ODOT personnel levels was possible. Mr. Lindenbaum said that hiring new personnel was also not efficient because of, what he described as, the long start up time involved in hiring and that these project inspectors were needed quickly. He also indicated that when new employees were hired, their training as project inspectors was primarily "on-the-job" training. With new ODOT project inspectors, he said, they were purposely moved around so that they could gain a wide ranging experience. He said the hiring of consulting inspectors made him apprehensive at first. He was worried how these new people would get along with current ODOT employees, he was worried about their learning curve (how fast they would catch on), and the time they would need to learn the ODOT paper reporting system. Therefore, on each project, a core group of ODOT employees was assigned, led by a Project Engineer or Supervisor. The Project Engineer or Supervisor was given two other ODOT personnel under him: a lead worker to coordinate the field and another ODOT person to coordinate the office work. Then, the "ranks" were filled with Consultant Inspectors. He said that the "responsible" person on each project was always an ODOT employee. The Consultants also brought with them Nuclear Density gauges which were needed and, in the case of Project 8008(90), a special knowledge of tie-back walls. The biggest benefit of the Consultant Inspectors, according to Mr. Lindenbaum, was the flexibility in their use. When work dropped off, the company involved was told not to send any more inspectors, and when it picked up again they sent them out again. Since ODOT is locked into reacting to the construction contractor's time schedule, the flexibility of use with the Consultant Inspectors was beneficial to the program. Moreover, such flexibility was particularly valuable when construction folks could not work normally during the winter months.

With respect to these particular projects, Mr. Lindenbaum indicated that. Consultant Inspectors were used from some of the same companies that designed the particular projects. The actual work that was being performed was by a construction company that had no relation to the designer nor the Consultant Inspectors. Mr. Lindenbaum indicated that the final decision to use Consultant Inspectors was Mr.

McKenna's. He indicated that his job was to present alternative solutions to Mr. McKenna. He said the use of 1000 hour transfers probably had been possible but that not much discussion centered about that alternative. He indicated that new hiring would have been a possible solution but that Mr. McKenna made clear that "with current staffing constraints we were not going to be able to fill these slots." Mr. Lindenbaum said that he did not consider the economics of the decision but rather his "need for bodies." Ms. Hoke showed Mr. Lindenbaum (p. 177) a list of District 11 vacancies. (Union Exhibits 47 and 48) Mr. Lindenbaum indicated that he had no control over the decision to fill the vacancies shown in those rosters.

Mr. Lindenbaum indicated that he knew that ODOT not only trained its own inspectors but also trained the Consultant Inspectors. He also said that with new hires for ODOT project inspectors 1, no prior on the job training is needed but that the new ODOT project inspectors receive training "on the job" for one year. Mr. Lindenbaum also acknowledged that given the 8 year lead time between conception of a project and actual "dirt moving" that he had foreknowledge of the upcoming increase in work. He/said that the decision to subcontract was made in late '89 for Projects where the dirt didn't start moving until July or August '90.

The Employer also called Mr. John S. Audet, Human Resources Administrator 1 for ODOT. Mr. Audet defined a personnel ceiling as a "cap on the number of employees, a number above which no more employees can be hired." According to his testimony, a whole department could be "capped," and then, the Department would set District "caps" for internal parts of the Department to meet the Department wide "cap." In addition, ceilings are set for certain kind of positions. The cap has its foundation, according to Mr. Audet, in the amount of funding provided to the Department by the Legislature. Thus, the funding level of the Department drives the personnel policy. of those funds, a certain percentage is set for personnel services, and the Office of Budget and Management sets a personnel ceiling for each Department within the funding limits. Some of the funding from the Legislature is allocated to certain kinds of spending so that the Legislature can control to some extent the type of personnel hired. (The most notable level according to Mr. Audet is the limit on administrative positions.) The end result as described by Mr. Audet is a "lock-out" on the computer system so that personnel ceiling literally cannot be exceeded. Mr. Audet produced a chart "Full-time employees compared to District Personnel Ceiling by Quarter." (Employer Exhibit 4) That Chart revealed that personnel numbers had exceeded the personnel ceiling from January '89 until January '91 but that the personnel level was below the personnel ceiling from January '91 until October '92.

Mr. Audet was also asked how long the Department took to create and fill new positions. First, the District involved would have to provide substantial justification for any new positions. If the position already exists, he said no new position description as such need be created. In the case of project inspectors, he agreed that no new description would be needed. OMB and DAS would have to approve. He indicated that the process in its major aspects would take 33 days in his area. Then the job would have to be posted and interviews conducted. Getting to and through the posting process, he estimated would take 5-6 weeks. Then interviewing for 30-40 positions is time consuming. He estimated that the whole process would take 3-4 months.

He agreed that 40 positions could be filled within 6 or 7 months (assuming they were approved). The decision to hire rather than contract out would be, according to Mr. Audet, a decision to be made, to the best of his knowledge, by the Deputy Director of Finance Mr. Bill Davis.

On the issue of the decision to subcontract, the Union called a variety of witnesses. Mr. James T. Brunot, an engineer who administers the consultant selection services, was called. He gave a detailed account of how consultants are selected. The process involved pre-qualification, screening in the District, initial proposals, scope of work meetings, and final proposals. The financial arrangement is that the consultant gets a set fee over the cost of the project. These fees range between 6% and 12% of the cost. He indicated that if modifications were needed and requested by the Consultant, the contracts could be modified if approved by ODOT. He said the contract contained no penalties for failure of the contractor to meet either time or quality standards. Mr. Brunot indicated that his department provided consultants to ODOT statewide and spent about 1.1 million dollars state wide. He said that his Department, as a matter of policy, was trying to have a sustained program throughout the State of 800 million a year. He indicated that the hiring of Consultants by ODOT began somewhere in the mid-80's. He agreed that the number of Consultant Inspectors in construction had grown about 4 times in the past five years.

The Union also called Michelle Hopper a Word Processing Specialist 1 in the ODOT Bureau of Consultant Services. Ms. Hopper indicated that she was responsible for the consultant selection process, that is, she processes the requests from districts for consultants through request to price proposal. She described the process and indicated that because of technological developments the process was much quicker today than even a few years ago.

The Union also called Mr. David LaRoche. Mr. LaRoche identified himself as a person who had been hired by Quicksall (one of the Consultant Inspector companies on the projects at issue) as a Consultant Inspector for an ODOT project. (Not one of the projects at issue.) Mr. LaRoche described himself as a high school graduate with significant experience in a variety of construction work. He said that he heard of the openings with Quicksall and understood the inspection work would be on ODOT projects. He sent in an application and was hired by return phone call and told to report to work on an ODOT project. He said his only contact with QUICKSALL per se was that his pay arrived by mail from them. He said that on the project he was supervised by an ODOT Project Supervisor. All his employment equipment was supplied by ODOT. He said he essentially learned the work "on the job. He stated that while on the job he often helped other Quicksall project inspectors to learn the job because they were young persons just out of high school who had none of his construction experience. He said he was paid $16 hour but that no health insurance was provided by Quicksall. He did use his own truck and was reimbursed for his expenses. He agreed that he had no knowledge of the particular projects at issue herein.

The Union also called Mr. Robert Mass, a District 11 ODOT Project Inspector 2. Mr. Maas testified that he had worked at some times of Project 543(90). He indicated that he worked there in conjunction with Consultant Inspectors. He said that on a variety of occasions he was pulled off Project 543(90) to do inspection work at an asphalt plant. He stated that on his way home from the Asphalt plant he could see that Consultant Inspectors were still working and presumably drawing overtime. He agreed that he had been trained in Asphalt Inspection by ODOT.

The Union also called Mr. Michael Mlynek, another ODOT Project Inspector 2. He too worked on Project 543(90). He claimed that he had to help the Consultant Inspectors learn to use the documentation forms and procedures used by ODOT. Like Mr. Mass he said he was pulled off 543(90) on occasion to work asphalt and that Consultant Inspectors worked on 543(90) and drew overtime when he was not. He agreed that he had been trained in Asphalt by ODOT and that in that period he had drawn 350 hours of overtime, including on rare occasions overtime at the asphalt plant.

The Union also called Jay Cole, an ODOT Project Inspector 2. Mr. Cole testified that he was assigned to a project, and that when he reported to the project, no one was there. The construction company did not show up for 12 weeks, and he continued to be assigned to a non existent project. He claimed that he had sat in his truck at the work site for 12 weeks with the full knowledge of his supervisor. On cross-examination, he admitted that during that 12 week period that he had participated in construction time for two-three days, he had 16 hours of other training, that he had taken 20 hours of vacation time and 10 hours of personal time. Moreover, he agreed that he had close to 353 hours of overtime in the construction season of 1990.

The Union also called James R. Graham, an ODOT Transportation Engineer 3, who had been a Construction Project Engineer 3 during the relevant period. Mr. Graham is a graduate engineer from the Colorado School of Mines with significant construction experience prior to his job with ODOT. He began with ODOT in 1984. Mr. Graham was the Project Engineer for Project 8008(90). This project involved the very expensive and complex tie-back walls. He had overall responsibility for the project. Mr. Graham testified that his policy was always to have at least one ODOT employee on site if he was not there himself. In particular, he said that his policy was to have a full time ODOT Project Inspector on site whenever Consultant Inspectors were working. All field work he said was coordinated by his lead ODOT Project Inspector, Rick Secrest, and all office work was coordinated by his office engineer, Todd Moore. Mr. Graham indicated that his supervisor was Mr. Lindenbaum.

The Union called the Grievant. The Grievant is an ODOT Projector Inspector 2 and has been an ODOT employee since 1980. In July of 1990, the Grievant was working on Project 520(90). He was temporarily reassigned to 398(90), and, while he was at that project, he came into contact with Consultant Inspectors. After talking with the Consultant Inspectors and observing them, he decided to file a grievance which he did

on July 25th. The basis of his grievance he stated was that 1) the Consultant Inspectors were not economic, in that when he talked to them he concluded that they made considerably more money then ODOT project inspectors. 2) Based on his observations, he concluded that their presence was also not efficient. 3) The Consultant Inspectors were taking work from the bargaining unit because he believed that vacancies existed in the position of project inspectors that were not filled. 4) His observations convinced him that the Consultant Inspectors were earning overtime that just as easily could have been awarded to ODOT project inspectors. The Grievant claimed that he, as union steward, asked for a labor-management meeting to discuss the issue but that the meeting kept being rescheduled or postponed. The Grievance was denied at Step One. The Grievance was denied at Step TWO on the ground that since no displacement had occurred, Article 39 was not violated and because under Article 39 the Employer had a right to contract out for greater efficiency, economy or other related factors. Subsequently, the two parties, agreed to a time extension on the Grievance and the Grievant amended the Grievance to add three other projects and other Articles of the Contract. According to the Grievant at Step THREE the Grievance was denied because the workload of the Consultant Inspectors was temporary, the use of such workers was permitted under Article 39, and lastly, no state workers were displaced.

The Grievant testified that on all the projects that he worked or was present in 90-91, Consultant Inspectors were at work. He testified that their presence had a severe detrimental effect on the morale of ODOT employees because the employees believed that these jobs were unavailable to bargaining unit personnel and were, in essence, lost to the bargaining unit. These beliefs coupled with the belief that the use of consultants was more expensive and less efficient was very upsetting to the Grievant and his bargaining unit co-workers. Moreover, the Grievant believed that the Consultant Inspectors were not doing the job -- i.e., properly monitoring the work. He cited one example from his own knowledge of a Consultant Inspector who failed to finish his documentation properly.

The main witness presented by the Union was Mr. John Vagnier. Mr. Vagnier is a CPA with many years experience in government, non profits, construction etc. accounting. He was hired by the Union to calculate the cost of the Consultant Inspectors to the Employer in the four projects at issue as compared with the cost to the Employer if the Employer had used ODOT employees to carry out the inspection duties. Mr. Vagnier consulted with Professor Elliot Sclar. Mr. Sclar is an academic expert on contracting out in the public sector. Mr. Vagnier faced a formidable task and formidable problems in carrying out that task. First and foremost, all the information needed to calculate the economics of the Consultant Inspector project was within the control of the Employer. Secondly, much of this information had not been accumulated in a central office but still resided in the original documentation within District 11 files. In order to determine what the actual costs were, the Union first proceeded to use ordinary discovery methods. This method had serious shortcomings for two reasons: First, the natural reluctance of the Employer to turn over documents led to a strict interpretation of every request so that if the Union did not know exactly what and how, to ask the information they received was technically correct but often unhelpful. Secondly, discovery requests were handled by the Labor Relations Office and OCB who apparently understood as little as the Union about the cost issue. When the futility of some of this methodology became apparent to the Arbitrator early on in the Arbitration, Mr. Vagnier was sent to the District 11 office with District 11 employees to ferret out the essential information. Based on this information he presented his first report at the Arbitration Hearing. His testimony was followed and rebutted by an Employer witness, Mr. Spahn. From Mr. Spahn's testimony, the Arbitrator and all participants quickly learned that while Mr. Vagnier now had the correct figures for the actual outlays made to the various companies that provided the Consultant Inspectors, he did not have access to the standard cost figures used by ODOT to calculate overhead, indirect costs, etc. This lack of information made his comparison to Mr. Spahn's figures an apples-oranges scenario. The Employer quite willingly supplied its cost figures and percentages and with this total information, Mr. Vagnier presented the Union's estimate of the cost of using Consultant Inspectors versus the use of bargaining unit personnel. His figure indicated that the Employer could have saved money by using ODOT employees. Mr. Spahn testified in rebuttal and indicated either a slight loss or a slight gain from using Consultant Inspectors. The main difference between the two views lay in the allocation of certain indirect costs. Both experts advanced rational arguments to support their approach. The approach used by Mr. Spahn is an approach used in

much governmental accounting. Mr. Vagnier's approach had a pragmatic and realistic basis that was intuitively appealing.

Discussion (Issue II)

The economic information presented by the Union was on one hand irrelevant and, on the other, very revealing with regard to other factors. First and foremost, the Employer stated categorically from the outset that their decision to contract out was not based on "economy." As stated earlier, Article 39 does not require the Employer to make its decision on economic grounds. So despite Mr. Vagnier's best efforts, the Union cannot rebut the Employer's decision on the grounds of economy. However, the discussion of the economy of the matter did reveal that the Employer, prior to the Arbitration, had never undertaken a comparison of the cost of contracting out versus the use of bargaining unit employees as project inspectors. This fact calls into question the legitimacy of the stated reasons of the Employer. Given the current financial picture of State government (of which the Arbitrator takes arbitral notice), a decision made without resort to financial investigation calls the rationality of the decision, and to some extent, the good faith of the decision, into question.

The main issue presented to the Arbitrator is whether the Employer has carried its burden to show that the Employer contracted out consistent with Article 39. The first sentence of Article 39 states that the Employer intends to use bargaining unit employees for work normally performed by bargaining unit employees. The Arbitrator has already held that the significant portion of the work done by the consulting inspectors represented work normally performed by bargaining unit members. The first sentence of Article 39 is NOT a promise by the Employer NOT to contract out. Rather, the sentence states an intention. At one time in contract law, a statement of intention was held to be a nudum pactum, i.e., an illusory promise, a statement having no promissory content. The modern way to look at such statements of intention is to conclude that where the parties have BARGAINED for such statements, the statements must have content, and the modern view is that statement of intention such as the first sentence of Article 39 indicates that the party is bound to give meaning to his intention IN GOOD FAITH, that is, in this case, the Employer would only violate his intention if the Employer's decision to use contracting out is NOT made in good faith. Good faith is a difficult phrase to define. Many commentators define good faith as the absence of bad faith. The Uniform Commercial Code defines good faith as "honesty in fact" a subjective standard. However, in the UCC good faith is implied in every contract. In this case, a labor contract, the Union bargained and, apparently, from the testimony, bargained hard to obtain some limitation on the Employer's right to subcontract. (Conversely, the Employer sought to maintain an absolute voice.) Like most hard bargaining, some gained and some lost.

In addition to the good faith bound intention of the first sentence, the Union gained a statement that the Employer would not contract out unless (conditional) greater efficiency, economy, programmatic benefits etc. would result. In essence, the Union obtained the necessity of a rational basis for the contracting out decision. The Employer could not contract out for "bad motives" or irrational ones. How was the Employer to make the decision? The second sentence indicated the method. To contract out, the EMPLOYER must rationally seek GREATER economy, or GREATER efficiency, or GREATER programmatic benefits. The key word is GREATER. (In contract interpretation every word must be given meaning.) The Employer must show something more than economy, efficiency, in and of themselves. The word GREATER requires a comparison! So the question becomes greater than what? In contract interpretation, all words must be read in context. The section is on contracting out. The EMPLOYER has stated an intention to use bargaining unit employees unless it makes a rational decision in good faith and makes that decision on a comparative basis. Therefore, the Employer must show in this case that the decision to contract out was based on a good faith conclusion that the use of Consultant Inspectors would result in GREATER economy or GREATER efficiency, or GREATER programmatic benefits THAN USING BARGAINING UNIT EMPLOYEES. This conclusion requiring a comparison is further strengthen if one looks at the second paragraph. In this paragraph, the EMPLOYER (under certain circumstances) must provide notice to the Union. Then, the Union has a right to a meeting to present alternatives, that is, to present information to the Employer in order for the Employer to make a rational and good faith comparison.

In this case, the evidence of the Employer must show that the Employer choose to contract out because the use of Consultant Inspectors would cause greater efficiency or greater programmatic benefits than the use of comparable bargaining unit employees. Has the Employer met its burden? The evidence indicates that Mr. Lindenbaum make HIS decision in good faith. He needed project inspectors; he needed them to meet certain time constraints, and he needed them in certain numbers. However, his testimony does not reveal that he made any meaningful choice between bargaining unit personnel and Consultant Inspectors. First and foremost, his testimony was that his superior told him that no new bargaining unit personnel were available nor could they been hired. Secondly, Mr. Lindenbaum testified that no meaningful discussion of 1000 hour transfers took place. So Mr. Lindenbaum could not have made a comparison of benefits because two options were ruled out by his superior. Mr. Audet testified about and described personnel caps. However, he did not make the decision to impose them nor was he clear as to how the actual decision was made. The decision that no new personnel was available was made at a higher level than either Mr. Lindenbaum and Mr. Audet, and no testimony was adduced about that decision. Certainly, ODOT had personnel caps. However, Mr. Audet said that those caps were set internally by ODOT management to meet the funding provided by the Legislature. if ODOT had the money to pay Consultant Inspectors, the department can hardly protest that ODOT could not have paid bargaining unit employees to do that work unless evidence existed that such a decision was either impossible or not rational on the basis of greater economy, greater efficiency or for other programmatic reasons.

Under the Contract, the Employer (in this case, ODOT), had to compare the use of contracting out to the use of bargaining unit employees. The Employer presented no evidence that such a comparison was carried out BY THE PERSONS WHO MADE THE ULTIMATE DECISION. The decision could have been entirely within the parameters of Article 39, but this Arbitrator has no such evidence. Moreover, the evidence presented by the Union called the decision into question. In particular, Mr. Lindenbaum stated that one benefit of hiring Consultant Inspectors was that they were already trained and experienced. This claim did not stand up under the evidence. Evidence showed that Consultant Inspectors were trained in the same training sessions as ODOT personnel and upon reflection Mr. Lindenbaum remembered this factor. Moreover, the testimony of Mr. LaRoche, a Consultant Inspector for Quicksall, indicated that in at least one situation the Consultant Inspectors were high school graduates without experience. So, in essence, they were trained in the same manner as ODOT project inspectors, "on the job." Mr. Lindenbaum also offered as a justification the long time period necessary to hire ODOT personnel. However, his own testimony indicated that the Department knew years in advance of projects and in his own case, management in District 11 knew at least 6 months in advance of "dirt moving." The testimony of ODOT personnel indicated that hiring project inspectors within 6 months was possible. Lastly, Mr. Lindenbaum focused significantly on the question of the need for flexibility during winter months. However, he also said no significant discussion was had as to use of 1000 transfers that were designed specifically for ODOT to meet seasonal work variations. Last but hardly least, the Union introduced evidence of unfilled and unoccupied project inspector positions. (Union Exhibits 47 and 48) The Employer never successfully explained away this evidence. While this evidence was not conclusive, its presence, coupled with the failure of the Employer to meet is burden of proof, created the conclusion that the contracting out was contractually inappropriate.

DID THE VIOLATION OF ARTICLE 39 ALSO VIOLATE ARTICLE 1.03?

The last paragraph of Article 1.03 states "The Employer recognizes the integrity of the bargaining units and will not take action for the purpose of eroding the bargaining units." The Employer in its brief rightly directed the Arbitrator's attention to the precise wording of that statement, in particular, directing the Arbitrator's attention to the key word "purpose." The use of the word "purpose" requires the Union to prove the Employer's intention. When the Employer breached Article 39, did the Employer do so with the purpose of eroding the bargaining unit? As current litigants before the U.S. Supreme Court have learned, proving "intention" i.e., purposive action toward a specific end, is extremely difficult.

The practice of contracting out per se does not erode the bargaining unit. The Union signed a contract permitting contracting out. To hold that contracting out, in and of itself, eroded the bargaining unit would cause Article 39 and Article 1.03 to be contradictory and incompatible. The basic assumption is that a contract is to be read as an integrated whole designed to be complementary not contradictory.

However, arguably, the violation of one Article could also violate a second Article. Contracting out is an entirely new conduct in District 11. (Both Union and Employer have directed the Arbitrator to limit her view to District 11.) The first misuse of a contractually permitted practice does not generally constitute a pattern indicating bad motive. The Union failed to adduce testimony that showed the Arbitrator that the violation of Article 39 was purposely used to violate Article 1.03 by seeking to erode the bargaining unit. The Arbitrator finds no violation of Article 1.03.

III. WAS IT NECESSARY FOR ODOT TO PROVIDE NOTICE TO THE UNION OF THE CONTRACTING OUT OF PROJECT INSPECTION SERVICES PURSUANT TO ARTICLE 39?

Under Article 39, the Employer must notify the Union of contracting out when such contracting out "would displace" bargaining unit employees. This question hinges on the meaning of the word displace. The Employer argues that the word displace is defined by the OAC. In particular by section 123:1-47-01(32):

“Means for the purpose of layoffs the process by which an employee with more retention points exercises his right to take the position if another employee with fewer retention points pursuant to the provisions of Chapter 123:1-41 of the Administrative Code.”

While many places may exist within the contract where the meaning of word may taken from ORC and OAC, such definitions only apply when the definition is specifically required or when the definition provides a logical explanation within its current context. In the case of Article 39, no specific reference is made to the OAC definition. Moreover, a close reading of Article 39, reveals that to limit the word "displacement" to the meaning of the OAC makes no sense in this context. If the Employer contracted out a function, does it make sense that notice would apply ONLY if an employee as a consequence of the contracting out were to "bump" another employee? What if the employee were laid off permanently and had no bumping rights? Certainly, the section was designed to operate in that situation. Displacement in Article 39 must have a broader definition than the OAC definition. One manner to determine meaning is to look at the word in context of the rest of the Article. The Union wanted notice so that the Union could present evidence to the Employer that the contracting out was unnecessary, that the bargaining unit employees could do the job with GREATER efficiency, greater economy, with GREATER programmatic benefits THAN non bargaining unit employees. However, under the contract their right to make such an argument was restricted to those situations where bargaining unit employees would normally be used. This Arbitrator finds that the words "would normally be used" clarifies the definition of "displaced" in this article. If the contracting out would cause bargaining unit employees to NOT be used where they NORMALLY would be, the bargaining unit employees would be "displaced." This reading of the word displaced in Article 39 is consistent with the meaning attributed to the same word by Arbitrator Graham in Grievance No. 31-08-(88-08-12)-0073-06-01 (1993). Arbitrator Graham relied on AFSCME v. Private Industry Council of Trumbull County, 748 F. Supp. 1232 (N.D. Ohio, 1990). In that case, no layoffs of bargaining unit employees had occurred. Yet the court considered conduct designed to replace bargaining unit employees with non bargaining unit personnel as "passive conduct" that equaled active conduct. When the Employer contracts out and hires non bargaining unit employees to do work normally performed by bargaining unit employees, a displacement occurs even though "passive" in nature.

In this case, the function of project inspector within ODOT plays an important function in the public role of highway construction. The public pays money to have highways constructed. ODOT uses those public funds to hire private contractors to build those highways to the specifications of ODOT acting in the public interest and with public funds. The function of ODOT project inspectors is to ensure that private contractors carry out the public mandate literally and figuratively. Thus, the function of project inspection is without a doubt a function that bargaining unit employees NORMALLY perform. Arguably, this function is one that is uniquely a public employee function. At a minimum, under the Contract, the Union is entitled to notice so that the Union can present an alternative.

IV. DID THE EMPLOYER’S DECISION TO SUB-CONTRACT VIOLATE SECTION 13.07-OVERTIME?

The Union presented the testimony of various ODOT project inspectors and the testimony of the Grievant. All these persons testified that on various occasions when they had been sent home that Consultant Inspectors were working on ODOT projects. The inference they wished to draw was that ODOT project inspectors were denied legitimate overtime opportunities. However, the Arbitrator finds that the Union failed to meet its burden of proof on this issue. The evidence presented was merely anecdotal and lacked the precision and clarity needed to make sure a finding.

AWARD

The Union has asked for an extensive remedy.

I. CEASE AND DESIST ALL SUBCONTRACTING WHICH DOES NOT COMPLY WITH THE CONTRACTUAL MANDATES OF ARTICLE 39, I.E. WHERE (a) MANAGEMENT FAILS TO PROVIDE A LEGITIMATE RATIONALE FOR ITS DECISION, (b) THE UNION SHOWS BY CLEAR EVIDENCE THAT THE SUBCONTRACTING WAS AGAINST PUBLIC POLICY, (c) BARGAINING UNIT MEMBERS ARE DISPLACED, and/or (d) THE UNION IS NOT NOTIFIED IN ADVANCE AND GIVEN A MEANINGFUL OPPORTUNITY TO PRESENT ALTERNATIVES TO SUBCONTRACTING;

II. HIRE TO FILL THE VACANCIES WHICH EXISTED IN THE ODOT CONSTRUCTION DEPARTMENT, UNIT 351, AT THE TIME THE DECISION TO SUBCONTRACT WAS MADE;

III. CANCEL THE REMAINING PORTION OF THE IMPROPER SUBCONTRACTS AND UTILIZE AVAILABLE BARGAINING UNIT PROJECT INSPECTORS TO FINISH PROJECTS 543(90) AND 8008(90);

IV. AWARD PAY TO DISPLACED BARGAINING UNIT PROJECT INSPECTORS EQUAL TO THE ACTUAL AMOUNT THEY WOULD HAVE RECEIVED HAD BARGAINING UNIT MEMBERS BEEN ASSIGNED TO PERFORM THE PROJECT INSPECTOR WORK;

ALTERNATIVELY, AWARD BACK PAY TO THE DISPLACED BARGAINING UNIT PROJECT INSPECTORS EQUAL TO ONE HALF OF THE ACTUAL NUMBER OF HOURS THE CONSULTANT INSPECTORS WORKED ON THE FOUR DISPUTED PROJECTS;

V. COMPENSATE BARGAINING UNIT PROJECT INSPECTORS FOR LOST OVERTIME OPPORTUNITIES EQUAL TO THE ENTIRE NUMBER OF OVERTIME HOURS WORKED BY CONSULTANT INSPECTORS ON PROJECTS 398(90) AND 602(90);

ALTERNATIVELY, COMPENSATE BARGAINING UNIT PROJECT INSPECTORS FOR LOST OVERTIME OPPORTUNITIES ACCORDING TO THE AMOUNT OF OVERTIME HOURS THAT BARGAINING UNIT INSPECTORS WERE AVAILABLE TO WORK ON PROJECTS 398(90) AND 602(90).

VI. PARTIES SHALL ADVISE ARBITRATOR RIVERA BY FEBRUARY 24, 1994 (30 DAYS AFTER THE DECISION IS EXPECTED) WHETHER THEY HAVE DETERMINED AND IDENTIFIED:

(a) THE SPECIFIC BARGAINING UNIT EMPLOYEES WHO ARE ENTITLED TO BE MADE WHOLE UNDER THE TERMS OF THIS DECISION AND AWARD and

(b) THE EXACT SUMS WHICH THE STATE SHALL PAY TO EACH AFFECTED BARGAINING UNIT EMPLOYEE.

SHOULD THE PARTIES FAIL TO MAKE THESE DETERMINATIONS PRIOR TO FEBRUARY 24, 1994, THE ARBITRATOR WILL FORMULATE HER OWN REMEDY BASED UPON THE PRESENT EVIDENTIARY RECORD IN THIS PROCEEDING AND WHATEVER ADDITIONAL EVIDENCE SHE DEEMS NECESSARY TO DETERMINE SPECIFIC SUMS AND IDENTIFIABLE RECIPIENTS.

Discussion

The Arbitrator has the duty of fashioning a remedy suitable and just to the violation. In typical commercial contract disputes, a breach of contract subjects the breaching party to paying compensatory damages. The breaching party is usually required to pay money to compensate the non breaching party for the. loss of his or her "expectancy." The usual rubric is that the money damages are given to put the non-breaching party in the position he or she would have been had the contract been performed (fulfilled). Everyone clearly recognizes that money cannot really fulfill one's expectancy. However, because the parties are in a commercial relationship and because the exact value of one's expectations are difficult to value, society had decided that money, in most cases, is the most appropriate measure. Now in some cases, the party demands an equitable remedy. The most common remedy is specific performance, that is, the non-breaching party asks the court to order the breaching party to do what he should have done if he kept his promise i.e., orders the breaching party to "fulfill" the contract. This remedy is seldom given. One usual place is where land is involved. Since the purchase of land involves the purchase of a unique item courts generally give specific performance because damages at law are "inadequate." They make the breaching party sell the land to the non-breaching buyer. This remedy is easy for the court to enforce because (1) everyone knows exactly which piece of land is involved and (2) the title to land is controlled by the courts so that changing the title requires only minimal court action. Therefore, certain standards have developed for the award of equitable remedies. First and foremost, money damages must be inadequate. Two, the subject matter must be both definite and certain so that the court can order the contract fulfilled without going beyond the expectations of the parties. Third, the order must be one that the court can monitor to see if the order is properly fulfilled. Last, the order must be just and equitable.

Now arbitration is an equitable proceeding. Generally speaking, the remedies given are orders to carry out the non fulfilled promises, and damages per se are rare. But the standards for awarding specific performance are still the same.

In this case, the Union has asked the Arbitrator, in essence, to give remedy that imposes retroactive specific performance. In particular, the Union asks the Arbitrator to order the Department of Transportation to hire new personnel today to fill the vacancies that existed at the moment the decision to subcontract was made (sometime in early 1990). This remedy request suffers from a number of faults. First and foremost, its parameters are neither certain nor definite. The Employer contracted out without meeting the criteria of the contract and failed to give the Union notice so that the contracting out could be challenged. Had the Employer followed the contract properly, one cannot say with certainty and definiteness what the result would have been. Moreover, the situation has changed, and the Arbitrator cannot roll back the clock. To tell ODOT now to hire a certain number of project inspectors irrespective of their need and use is patently unjust to the taxpayers of the State of Ohio. In addition, the breach by the Employer damaged the Union clearly, but the Arbitrator cannot identify any single individual harmed so that the Arbitrator can make that person whole. The persons hired today would, in all likelihood, have no relation to the persons potentially harmed in 1990. The evidence simply is too indefinite and too potentially fraught with injustice for the Arbitrator to grant the Union's request to hire project inspectors now for the violation in the past.

However, the Arbitrator can do what arbitrator's do best, namely, issue orders to prevent current contract violations and prevent future violations. In this case, the Arbitrator orders the Employer in District 11 to CEASE and DESIST in the current employment of and the prospective hiring of Consultant Inspectors without following the mandates of the Contract, in particular Article 39. In all current projects and all future projects, the Employer is to give notice to the Union of its intention to contract out when that contracting out will employ non bargaining unit employees to do work normally done by bargaining unit employees, in particular, project inspectors. NO non-bargaining unit employees may be used on any current or future

ODOT District 11 project UNTIL 90 days has passed from that notice and UNTIL during that 90 day period the Union has been given a good faith opportunity to present information to the Employer that bargaining unit employees can do the job. Good faith requires the Employer to provide the Union and the Employees with sufficient information for the Union to make a fair presentation. The Employer is not to contract out the work unless it has concluded, based on a good faith and rational examination, that non bargaining unit employees can perform the function with GREATER efficiency, GREATER economy, or GREATER programmatic benefits or other related factors.[3] In particular, the Employer is to consider in good faith filling vacant positions, using 1000 hour transfers, providing current ODOT employees with overtime to carry out the tasks under consideration.

While the Arbitrator is unable to determine with specificity and definiteness the individual parties harmed by the failure of the Employer to act appropriately under Article 39, the Arbitrator does find clear evidence that the Union itself was harmed. Without proper notice, the Union could not protect the jobs of its members. Moreover, the Union has had to engage in a timely and costly grievance to obtain those rights. therefore, while the Arbitrator cannot make the Union whole because she cannot estimate the value of the right to protect the membership, she can set a value on the cost of handling the Grievance. Therefore, the Employer shall make the Union financially whole. 1) The Employer shall pay the total cost of this Arbitration by reimbursing the Union for its share of the Arbitrator's fees and its share of the transcript fees. 2) The Employer shall reimburse the Union for the cost of its expert witnesses Vagnier and Sclar. 3) The Employer shall reimburse the Union for the salaries of the attorneys, clerks, and clerical and secretarial staff for the hours worked on this Grievance.

The Arbitrator shall retain jurisdiction for 30 days to clarify and/or settle any questions over this award raised by either party.

RHONDA R. RIVERA
Date: February 10, 1994

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[1] See p. 22.

[2] The phrase "not in the public interest" was used by this Arbitrator in her procedural opinion in this case. The Arbitrator states that the use of the phrase was improper and beyond her powers. As argued by the Employer, the Arbitrator cannot determine or decide "the public interest." The Arbitrator amends that sentence to read "nor contrary to public policy." Public policy is the articulated policy of the State as expressed in legislation, court decisions, etc.

[3] See FN 2.