STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 280, Complainant, vs. CITY OF KENNEWICK, Respondent.	CASE NO. 1437-U-78-179 DECISION NO. 482-B PECB DECISION OF THE COMMISSION

E. W. "Bill" Clifford, Business Representative, appeared on behalf of the complainant.

William L. Cameron, City Attorney, appeared on behalf of the respondent.

This case concerns the right of the City of Kennewick to contract out custodial work in the city hall which theretofore had been performed by bargaining unit employees, without first advising the bargaining representative of its intention and giving that representative a chance to request bargaining about it before presenting the bargaining representative with the accomplished fact.

An arbitration panel found that contracting out the work did not violate any express provision of the collective bargaining agreement, but disclaimed any intention of passing on the question of whether or not it violated RCW 41.56.140. Accordingly, this Commission cannot defer to the arbitration award.

The Examiner found that contracting out the work in question violated RCW 41.56.140(1) and (4). The city has petitioned for review.

The facts are fully stated in the examiner's decision under the heading "Background," and will be restated here only to the extent necessary for clarity.

The petition for review objects to findings of fact 2, 3 and 4 on the ground that they convey an erroneous impression. The facts are adequately explained by the examiner's discussion.

Much point is made of the fact that the union had not been certified as the representative of the positions in question, although the positions had been

filled by unit employees for some time in the past. The existence of a formal certification is immaterial to the issues here. The union had been legally, if voluntarily, recognized by the employer as the bargaining representative for the employees who had filled the positions, and the bargaining obligations on both sides were the same as they would have been had a certification been outstanding.

Finding of fact 3 is objectionable only to the extent that it contains both findings of fact on the existence of the collective bargaining agreement and conclusions of law on the absence of a waiver. It is undisputed that as of January, 1978, the city and the complainant were parties to a collective bargaining agreement which made no specific mention of contracting out work.

The city contends that the broad management rights clause, Article IV of the collective bargaining agreement, gave the city an "absolute right to let the work out and the question of subcontracting not being expressly provided by the terms of the collective bargaining agreement, did in fact constitute a waiver of complainant's right to bargain the matter." 1/ Article IV provides:

> "ARTICLE IV - EMPLOYER RIGHTS
>
> Section 1. Any and all rights concerned with the management and operation of the Departments are exclusively that of the employer, unless otherwise expressly provided by the terms of this Agreement."

Article XXII of the same agreement provides:

> "ARTICLE XXII - ENTIRE AGREEMENT CLAUSE
>
> Section 1. The Agreement expressed in writing constitutes the entire agreement between the parties and no oral statements shall add to, or supercede any of its provisions.
> Section 2. The parties acknowledge that each has had unlimited right and opportunity to make demands and proposals with respect to any matter deemed a proper subject for collective bargaining and the results of the exercise of that right are set forth in this Agreement."

The city had not contracted out bargaining unit work in the past. Such contracting out was not discussed in the contract negotiations. It does not appear that either party even thought about it.

No collective bargaining agreement can cover every term and condition of employment. But waivers must be made knowingly. Neither the management rights clause nor the entire agreement clause of the collective bargaining agreement between these parties contains the specificity necessary for the

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1/ Petition for review, paragraph 1.2.

Commission to infer a waiver of statutory bargaining rights. This case is thus clearly distinguishable on its facts from the situation in Borg-Warner Corp., 245 NLRB No. 73 (September 27, 1979), where the management rights clause went beyond a general statement, as follows:

> "It is agreed that except as specifically limited by a particular provision herein this Agreement, the management and operation of the business is vested in and shall remain exclusively the right of the Company. Included within such management rights but not limited thereto are such rights as the right to hire, assign, direct, train and determine the size of the work force; the right to discipline or discharge employees for just cause; the right to determine the nature and methods of operation of the business, including the right to determine routes, the assignment of vehicles, the number of shifts, starting and quitting times, and the schedule of operations. The Company shall also have the right to sell, close, liquidate, or cease operations in whole or in part, or to add to, change, modify existing operations; to employ part-time employees; to make necessary rules and regulations in the operation of the business; and other such actions as may be found necessary, in the sole discretion of the Company, to operate the business in an efficient and satisfactory manner." (245 NLRB No. 73, slip opinion at pp 10-11 of ALJ opinion.)

The National Labor Relations Board therein concluded that the union effectively waived its right to require bargaining concerning a decision to transfer courier work from one location to another when it agreed to the "sell, close, liquidate, or cease operations in whole or in part, or to add to, change modify existing operations" language in the management rights clause. In the instant case, Article IV incorporates into the contract the doctrine that all rights and privileges not expressly given up are reserved to the employer; but it nowhere indicates that the union has surrendered its right to require bargaining on contracting out of unit work.

Our inquiry cannot end with the "waiver" arguments. The collective bargaining agreement deals expressly with seniority. Article XX, sections 3 and 4 provide:

> "Section 3. The best qualified City employee within the departments covered by this agreement shall be given first consideration over non-employees for transfers or promotions to higher classifications. Actual job performance shall be considered in any examination used to determine qualifications and fitness of candidates. If the qualifications of applicants are relatively equal, seniority shall govern. It is understood by the parties hereto that if examinations are utilized they will be given to all those applying for the promotion.
> Section 4. The City will post bid jobs prior to probable openings. Employees shall have an opportunity to apply therefor with final selection being based on Section 3, above."

The evidence is that the custodial work was contracted out primarily to remove those custodial jobs from the impact of those job bidding provisions. The constant bidding out of these entry level jobs by employees seeking to better their positions resulted in excessive turn-over in the custodial positions and insufficient continuity of tenure and experience. The cost savings were incidental. The solution the city seized upon was to get those jobs out of the unit instead of asking the union to negotiate a solution to the problem.

Contracting out of work which has been done or which may be done by bargaining unit employees is a subject of mandatory bargaining. Westinghouse Electric Corporation, 150 NLRB 1574 (1965); Fibreboard Paper Products Corporation, 138 NLRB 550 (1962), affirmed, 379 U.S. 203 (1964); Town and Country Manufacturing Company, 136 NLRB 1022 (1962). The city's action in contracting out this work was unprecedented and a sharp departure from past practice. It was motivated by a desire to remove certain entry level jobs from the ambit of the seniority clause of a collective bargaining agreement. As in Fibreboard, supra, this unilateral contracting out involved a departure from previously established operating practices and effected a change in conditions of employment. See: Westinghouse, supra, at p. 1576.

The city's action was taken when the custodial classification was vacant, so no individual employee was displaced. Hiring into other positions has actually increased the number of employees in the bargaining unit, but the unit was nevertheless adversely affected by the removal of the two positions. If the city's contention were to be sustained, all entry level jobs could be eliminated from the unit in the same way, even though the beginning wage rates have been negotiated and are contemplated in the contract.

The city correctly points out that it never refused to bargain about contracting out this work, and that the union never requrested bargaining. But those facts are irrelvant. The city transgressed its statutory bargaining obligation by failing to give the union notice of, and an opportunity to bargain about, this abrupt change from its past practices before embarking on it.

AMENDED FINDINGS OF FACT

1. The City of Kennewick is a "public employer" within the meaning of RCW 41.56.020 and RCW 41.56.030(1).

2. International Union of Operating Engineers, Local No. 280, is a "labor organization" within the meaning of RCW 41.56.010 and is the

"bargaining representative" of certain employees of the city employed in the appropriate bargaining unit described as:

> "beginning, limited and general craftsman; limited equipment operator; equipment operator; plant operator; chief plant operator; general craftsman leader; general foreman; mechanic foreman; and city electrician."

3. As of January, 1978, the city and the complainant were parties to a collective bargaining agreement which made no specific mention of contracting out work.

4. Prior to January, 1978, the city had not contracted out work of the type performed by bargaining unit employees.

5. During the negotiations for the collective bargaining agreement which was in effect in January, 1978, the union had no reason to anticipate the city would contract out work theretofore performed by bargaining unit employees.

6. Contracting out of unit work was not a subject of bargaining between the city and the union in the negotiations which culminated in the collective bargaining agreement which was in effect in January, 1978.

7. In January, 1978, the city elected to contract out custodial work in city hall which had theretofore been performed by bargaining unit employees.

8. The city did not notify the complainant of the proposed change, nor offer to consult or negotiate the matter with the complainant.

9. Contracting out of the custodial work removed two positions from the bargaining unit and effected a change in conditions of employment.

AMENDED CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this matter pursuant to RCW 41.56.160.

2. The collective bargaining agreement did not reserve to the employer a right to contract out bargaining unit work.

3. The union did not waive its right to bargain about contracting out of bargaining unit work.

4. By unilaterally implementing changes in the manner and under the circumstances set forth, the city failed and refused to bargain the contracting out of bargaining unit work with the complainant, and has committed an unfair labor practice within the meaning of RCW 41.56.140(4) and (1).

AMENDED ORDER

The City of Kennewick, its officers and agents, shall immediately:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Union of Operating Engineers, Local No. 280 as the exclusive representative of the city's employees in the appropriate bargaining unit described in paragraph 2 of the foregoing findings of fact.

(b) Making unilateral changes of working conditions without giving notice to International Union of Operating Engineers, Local No. 280.

(c) Contracting out the work of bargaining unit positions without first giving notice to and bargaining with International Union of Operating Engineers, Local 280.

2. Take the following affirmative action which the Commission finds will effectuate the policies of RCW 41.56:

(a) Terminate any contract for the performance of custodial work formerly performed by bargaining unit employees, and restore all bargaining unit positions whose work has been improperly contracted out.

(b) Give International Union of Operating Engineers, Local 280, notice of any proposed changes in working conditions, and specifically with respect to any proposals to transfer work from bargaining unit employees to other employees or contractors, before the decision is made so that International Union of Operating Engineers, Local 280, has a reasonable opportunity to request to bargain about the matter and to suggest alternatives or voice objections.

(c) Upon request, bargain in good faith with International Union of Operating Engineers, Local No. 280, as the exclusive representative of the city's employees in the appropriate bargaining unit with respect to changes of working conditions and specifically with respect to any decision to transfer work from bargaining unit employees to other employees or contractors.

(d) Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix A". Such notices shall, after being duly signed by an authorized representative of the City of Kennewick, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the City of Kennewick to ensure that said notices are not removed, altered, defaced or covered by other material.

(e) Notify the Executive Director of the Commission, in writing, within ten (10) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice posted in accordance with this Order.

DATED this 16th day of January, 1980.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Mary Ellen Krug
MARY ELLEN KRUG, Chairman

R. J. Williams
R. J. WILLIAMS, Commissioner

Don E. Olson
DON E. OLSON, JR., Commissioner

"Appendix A"

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF RCW 41.56, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to bargain collectively with International Union of Operating Engineers, Local No. 280, as the exclusive bargaining representative of the employees in the bargaining unit described as:

> "Beginning, limited and general craftsmen; limited equipment operator; equipment operator; plant operator; chief plant operator; general craftsman leader; general foreman; mechanic foreman and city electrician."

with respect to grievance procedures and personnel matters including wages, hours and working conditions.

WE WILL NOT unilaterally change working conditions of employees in the bargaining unit, and specifically will not contract out work of bargaining unit employees, without first giving notice to and, upon request, bargaining with respect thereto with International Union of Operating Engineers, Local No. 280.

WE WILL terminate any contract for the performance of city hall custodial work formerly performed by bargaining unit employees, and will restore all bargaining unit positions whose work has been improperly contracted out.

DATED_____

CITY OF KENNEWICK

By:_____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone: (206) 753-3444.