OLYMPIA, WA

JUN 2 8 2001

PUBLIC EMPLOYMENT
RELATIONS COMMISSION

IN THE MATTER OF AN INTEREST ARBITRATION BETWEEN WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, COUNCIL 2, AFSCME, AFL-CIO, LOCAL 1122 and CITY OF YAKIMA

OPINION AND AWARD

OF

GEORGE LEHLEITNER

INTEREST ARBITRATOR

HEARING:	May 3, 2001
BRIEFS RECEIVED:	May 29, 2001
INTEREST ARBITRATOR:	George Lehleitner 4702 S.W. Scholls Ferry Rd., #334 Portland, Oregon 97225
REPRESENTING CITY OF YAKIMA:	Otto Klein, III, Attorney at Law
REPRESENTING THE UNION:	Audrey B. Eide, General Counsel

I. INTRODUCTION

The undersigned was selected as Interest Arbitrator by WSCCE, Local 1122 (Union) and the City of Yakima (City). The selection was made in accordance with RCW 41.56.492 and the Impasse Resolution Rules embodied in Chapter 391.55 of the Washington Administrative Code (WAC).

A hearing was held on May 3, 2001 in Yakima, Washington before an arbitration panel consisting of Neutral Arbitrator George Lehleitner and partisan arbitrators Anthony R. Menke for the City and Jon Stables for the Union. The City was represented by Otto Klein, III, Attorney at Law. The Union was represented by Audrey B. Eide, its General Counsel. Both sides were afforded a full opportunity to make oral and written presentations and submit post hearing briefs. Simultaneous briefs were received on May 29, 2001, and the hearing was closed on that date.

II. ISSUE

The only issue in dispute is the Union's proposal to amend Article XI of the collective bargaining agreement.

III. BACKGROUND

The City of Yakima maintains its own transit service. The Union represents a bargaining unit of employees working at Yakima Transit and has negotiated a series of collective bargaining agreements describing their terms and conditions of employment. (Exhibit U-4).

Since mid 2000, the Union and the City have been engaged in the process of bargaining a new collective bargaining agreement covering transit employees. The parties were able to resolve all issues except for the Union's proposal with respect to contracting out. After mediation of the contracting out issue proved unsuccessful, the Washington Public Employment Relations Commission (PERC) declared an impasse and certified the matter for arbitration. (Exhibit U-2). As previously indicated, the matter was heard before the arbitration panel on May 3, 2001.

A brief summary of the factual background of this dispute may be helpful. Yakima Transit operates nine (9) bus routes in the City of Yakima. The Transit agency also provides para-transit services (primarily for the disabled) through a subcontract. The bargaining unit of approximately forty (40) employees includes

drivers, dispatchers, service workers, route supervisors and customer relations coordinators (Exhibit C-1).

In 1997 a citizen's task force was created to explore ideas for making transit operate more efficiently. After receiving input from the public, from the transit staff and bargaining unit drivers over an extended period of time, the task force developed a number of recommendations. These recommendations included purchasing smaller buses, redefining the para-transit eligibility pool, increasing fares, doing away with Dial-A-Ride service on Sundays, eliminating a route and subcontracting Route 3 on an experimental basis.[1] Some of the task force recommendations were adopted; others were rejected or modified.[2]

With respect to the Route 3 recommendation, the City opted to contract this route out to a private company on an experimental basis. There were some initial problems with the service provided by the private contractor, but from the City's perspective many of these problems have since been ironed out. Consequently, the contract has been extended several times and the City is currently in the process of undergoing an analysis to determine what to do with Route 3, i.e., eliminate it entirely, sub-contract it to a private company or resume Route 3 as a service staffed by Yakima Transit drivers (Exhibit C-11, pages 16 and 17).[3]

As a result of contracting out Route 3 on an experimental basis, two (2) full time and a .25 temporary Operator positions were eliminated in the budget. (Exhibit U-22, page 2). However, no one was laid off because all of these positions were vacated either by retirement or attrition.[4] Not surprisingly, the Union objected to the decision of the Council to contract out Route 3 to a private company on an experimental basis. The end result of that objection is the Union's proposed amendment to "Article XI — Contracting Work." The Union's proposal is intended to protect bargaining unit work.

IV. POSITION OF THE PARTIES

A. Current Contract Language

Article XI of the current Contract states:

"**Article XI - Contracting Work**

The City agrees that no permanent employee shall be laid off as a direct result of the City contracting work currently done by City Employees. The City however, retains the right to contract work as deemed desirable or necessary by the City and reassign employees who might otherwise be laid off as a result thereof. The City further retains the right to lay off employees at the discretion of the City, due to lack of funds."

B. The Union

The Union proposes to amend Article XI to read as follows:

Article XI. Contracting Work.

Effective January 1, 2000, the City agrees that no employee shall be laid off *nor any existing budgeted position eliminated* as a direct result of the City's contracting out work currently performed by bargaining unit employees. The City, however, retains the right to continue currently contracted out work and to contract out any positions or services created in the future for which contracting out is deemed desirable or necessary. The City further retains the right to lay off employees, at its discretion, due to the lack of funds.

The Union's arguments are summarized as follows:

(1) The criteria set forth in the Public Employee Collective Bargaining Act (PECBA) are controlling. They are: (a) the constitutional and statutory authority of the employer; (b) stipulations of the parties; (c) compensation package comparisons, economic indices, fiscal constraints, and similar factors determined by the arbitration panel to be pertinent to the case; and (d) such other factors not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment.

(2) The legislature substituted interest arbitration for the right to strike as the sole means of resolving impasses between employers and unions involved with public transit. It follows that the arbitration process must serve as an adequate and effective alternative to the right to strike.

(3) Arbitration in the context of public transit must be viewed as an extension of the bargaining process. As Arbitrator Snow stated in City of Seattle (Snow 1988); "a goal of interest arbitration is to induce a final decision that will, as nearly as possible, approximate what the parties themselves would have reached had they continued to bargain with determination and good faith." The Union's proposal reflects this approach.

(4) The comparable jurisdictions offered by the Union are reasonable and should be adopted by the arbitration panel. In this regard the criteria used by Union Staff Services Director John Cole to develop a list of comparables was appropriate. More specifically, Cole relied on population and to a lesser extent revenues and geographic proximity. These same criteria have been routinely used by Interest Arbitrators in the State of

Washington to develop appropriate comparables. Conversely, the City failed to offer any comparables to support its position. Under these circumstances, the arbitration panel is bound to rely on the Union's comparators.

(5) The City's contention that the Union's comparators should not be considered because they were not presented to it prior to arbitration should be rejected. First, comparable jurisdictions are routinely considered by Interest Arbitrators in arriving at an award. Second, the testimony of Tom Barrington established that a list of comparables was presented to the City when the parties first went to mediation.

(6) The Union's proposal is designed to protect bargaining unit work. Throughout the bargaining process the City has taken a hard line arguing that the Union's proposal is not negotiable because it preempts the City's legislative authority. (Exhibit U-23). The City also contends that it is facing fiscal constraints and thus needs more flexibility. However, no nexus between hard times and the proposals was shown. The reality is that there is no such nexus because the Union's proposal does

not prohibit contracting out unless people or positions are being eliminated.

(7) The City also offered an alternate proposal in the event the arbitration panel decided to change the status quo. The problem with the City's alternate proposal is that it is contrary to Washington law. Under Washington law, if the parties are unable to negotiate a resolution, they have the right to mediation and interest arbitration.

(8) The Union's proposed language is justified because the City has already contracted out one of its routes, i.e., Route 3, resulting in a net loss of driver positions. The new language is needed to protect the bargaining unit from further loss of positions in the event the City decides to contract more bargaining unit work.

C. The City

The City proposes to retain current contract language.[5]

The City's arguments are summarized as follows:

(1) RCW 41.56.492 sets forth the criteria the arbitration panel must consider. These include the constitutional and statutory authority of the employer; stipulations of the parties; compensation package comparisons, economic indices, fiscal constraints and similar factors determined to be pertinent and such other factors traditionally considered in interest arbitration proceedings.

(2) Interest arbitrators have stated that in arriving at an award, they must consider the statutory factors and strive to arrive at an award that is framed by the negotiations process. Stated differently, interest arbitration should be viewed as an extension of bargaining and the arbitrator should, as nearly as possible, approximate what the parties themselves should have achieved through good faith bargaining.

(3) It is widely recognized that a party seeking to change existing contract language has the burden of establishing why new language is needed.

(4) It is improper and inappropriate for a party to bring up new theories at the arbitration hearing that were not

previously raised in bargaining. However, that is precisely what happened in this case. More specifically, the credible evidence established that during negotiations, including mediation, the Union failed to disclose it was relying on any set of comparables. The Union's stance in this regard was in stark contrast to that of the City's negotiating team, which made it clear from the beginning, that its financial health was a key component of its position. Under these circumstances, the arbitration panel should not consider the comparability data presented by the Union.

(5) It is undisputed that the current language with respect to contracting out has been in the collective bargaining agreement for many years. In fact, that same language is still in the collective bargaining agreement covering the general unit represented by AFSCME. The reason this language has remained in the applicable collective bargaining agreements for many years is that it strikes a reasonable balance between the interests of the employees and those of the employer. More specifically, the interests of the bargaining unit employees are protected because the City is prohibited from contracting out if it would result in the layoff of

a bargaining unit employee. On the other hand, the current language gives the City the flexibility it needs to subcontract work so long as no bargaining unit employees are laid off.

(6) John Cole, the Union's Director of Staff Services, sought to contrast the current language with some other contracts containing no contracting out language. A fundamental flaw in Mr. Cole's agreement is that in those jurisdictions the employer is free to pursue the subcontracting of bargaining unit work even if it results in layoffs because there is no contractual prohibition the union can rely on to prevent such layoffs from occurring.

(7) Under Washington law the arbitration panel must consider "fiscal constraints" in making its determination. Suffice it to say, the City of Yakima is faced with very difficult economic conditions. These include a very high unemployment rate of 14%, a heavy dependence on sales tax revenues to fund transit, an extremely high poverty rate and a general economic malaise in the local community. The City is working very hard to maintain transit service at current levels, but

clearly it is in no position to agree to language that would effectively freeze bargaining unit positions. Simply stated, the current contract language whereby the City has the right to subcontract but only if no bargaining unit employees are laid off provides the minimum flexibility required by management and a reasonable protection for employees. It should be retained.

(8) The Union's proposal is fraught with uncertainty. Without question, contract language should be clear and unambiguous. The Union's proposed language does not pass this fundamental test. For instance, it is unclear whether there would be a violation under the Union's proposed language if and when positions are left vacant at or about the same time a subcontract is undertaken. The end result in such a situation would likely be protracted litigation that would not serve the legitimate interests of either side.

(9) As previously indicated, the comparability data offered by the Union should not be considered by the arbitration panel because no such data was previously discussed with the City. Moreover, the methodology used

to select the Union's list of comparables is suspect. In this regard, the Union's comparables are drawn from a wide range of population (i.e., from 55,000 to 155,000) that covers numerous jurisdictions other than those selected, but no explanation was offered as to why or how they were excluded. It is also significant that the Union failed to take financial conditions into account in coming up with a list of comparables. Finally, the five (5) comparable jurisdictions offered by the Union in arbitration were not even the same ones allegedly presented by Mr. Barrington in mediation.

(10) Even if the Union's proposed comparables were taken into account by the arbitration panel, they would not support its proposal. Significantly, not one of the comparator contracts seeks to restrict subcontracting in the way the Union has proposed. If anything, the Union's comparability data show that there are a number of legitimate contractual approaches to subcontracting. The current contract language, which has stood the test of time, is just such an approach.

(11) The City readily acknowledges that it is committed to protecting its ability to determine the number of

employees that will perform transit service. Clearly, staffing levels are at the heart of management's governance and prerogative. The Union's proposed language is not acceptable because it intrudes into the staffing area by limiting the City's ability to eliminate unfilled positions. As shown at hearing through the credible testimony of City Manager Zais, all open positions are carefully reviewed to determine whether or not they should be filled given the difficult financial condition of the City. Any proposal that even arguably limits the City's ability to do so creates a serious problem for management.

D. Opinion

The current contract language balances the legitimate interests of both sides by providing that no employees shall be laid off as a direct result of bargaining unit work being contracted out. What follows is an application of the statutory criteria to the relevant facts.

1. An Overview

As the City's counsel correctly observes, when a party seeks to change existing contract language, it is

incumbent upon them to come forward with compelling reasons to justify the proposed change. This is particularly true where, as here, the language has been in the contract for many years and there has been no showing of problems with its application.

With respect to the relevant factors to be considered, it is apparent that the city relied primarily upon fiscal constraints and a resulting need for flexibility to justify its position while the Union relied primarily on comparability data. Consequently, the focus of this analysis will be on these same factors.

2. Fiscal Constraints

The City contends the current contract language strikes a reasonable balance because while it reserves unto the City the right to subcontract work and reassign employees, if necessary, it also protects bargaining unit employees by providing that no permanent employee shall be laid off as a direct result of subcontracting. According to the City, it must have, at a minimum, the flexibility contained in the current contract language due to fiscal constraints. From the City's perspective,

the Union's proposed language is entirely unacceptable because it would effectively do away with its inherent management prerogative to eliminate positions in bad economic times. The City argues further that the Union's language is unclear and would likely result in protracted litigation in the event management decided not to fill vacant positions.

The Union's simple response is that the City failed to establish a nexus between its (the Union's) proposal and an unacceptable lack of flexibility in hard times.

The City's arguments are more persuasive. First, there has been no showing that the current contract language, which has been in the contract for many years, is inequitable or inadequate. To the contrary, even though several positions were eliminated when Route 3 was contracted out on an experimental basis, no one was laid off. Stated differently, a reasonable balance was struck whereby the City had the flexibility to contract out a route for economic reasons but no bargaining unit employees were laid off nor were any drivers reassigned. Second, the City's evidence established that in fact it is facing severe fiscal constraints and needs the

flexibility contained in the current contract language. As the City's counsel correctly observes, the Union's proposed language would, if adopted, effectively prevent it from exercising its prerogative to deploy the work force any time work is contracted out.

3. Comparability Data

As previously indicated, the Union relies primarily on comparability data to justify its proposal.

The Union's reliance on contract language from its proposed list of comparator jurisdictions is unwarranted for a number of reasons. First, as a practical matter, comparability data is generally more helpful in analyzing economic proposals. What the comparability language offered by the Union basically shows is that even among the five (5) jurisdictions on the list there are a wide variety of ways to deal with subcontracting in a collective bargaining agreement. Second, the credible evidence established that there was little, if any, emphasis on comparability data prior to arbitration. In this regard, even if Mr. Barrington's testimony is accepted at face value, the comparability information he

allegedly presented to the City in mediation is different than that the Union seeks to rely on in arbitration. At the very least, the foregoing goes to the weight that should be accorded the comparability data introduced by the Union. Third and most important, a careful review of the language contained in the collective bargaining agreements of the comparator jurisdictions reveals that it is not particularly helpful to the Union's case. In this regard, none of the contract language from the comparator jurisdictions include a prohibition against eliminating budgeted positions as a result of contracting out. Moreover, several of the contracts contain no language whatsoever with respect to contracting out (Grays Harbor and Valley), at least one (Clallam City) allows the employer to contract out after discussing the issue with the Union and another (Link) seems to be tailored to specific circumstances in that jurisdiction. Finally, if comparability is going to be taken into account, internal parity must also be considered. In this case, the evidence established that the general unit in this City, which is represented by AFSCME, contains the same language as the current contract.

4. Award

Retain current contract language.

Respectfully submitted this 28th day of June, 2001

George Lehleitner, Neutral Arbitrator

FOOTNOTES

1. Testimony of Wayne Parsley and Mary Place.

   The testimony of Mr. Parsley, a bus driver with the City, suggested the recommendation to subcontract Route 3 on an experimental basis was flawed because the task force relied on faulty data supplied by a high school math class. However, the credible evidence established that the ridership on Route 3 was among the lowest of any route operated by the transit service. (Testimony of Chris Waarwick).

2. Testimony of Mary Place.

3. Testimony of Chris Waarwick.

4. Testimony of Wayne Parsley.

5. By letter dated April 25, 2001, the City offered alternate language in the event the arbitration panel decided to modify the status quo. However, both the City and the Union have expressed a preference for existing contract language over that contained in the City's alternate proposal.

   Inasmuch as both parties expressed a preference for current contract language over the City's alternate proposal, the latter will not be considered by the arbitration panel.