

PENNSYLVANIA TURNPIKE COMMISSION

And

TEAMSTERS LOCAL UNION NOS. 77 AND 250

In the Matter of:
Don R. Fluke

OPINION AND AWARD

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PERTINENT CONTRACT PROVISIONS

Article 2 – Management Rights

Section 1. Except as expressly limited by relevant statutes and codes or provisions of this agreement and reserving unto the Commission any and all management rights which, by law, may not be bargainable, the Commission shall have and retain, solely and exclusively, all other managerial responsibilities, power and authority, which shall include, but not be limited to: the right to establish policies; to establish change or abolish job classifications or the job content of any classification; to hire, retire, demote, layoff and recall employees to work; to control and regulate the use of machinery, equipment and other property of the Commission; to introduce new or improved research, development and services; to determine the number and types of employees required and to assign work to such employees in accordance with the operational needs of the Commission; and to direct the work force, except as expressly modified or restricted by a specific provision of this agreement. Absent an emergency or other operational need, the Commission will provide the Union with any new or revised policy 15 days prior to implementing the same.

Section 2. The listing of specific rights of this agreement is not intended to be nor shall it be considered restrictive or a waiver of any of the rights of management not listed and not specifically surrendered herein whether or not such rights have been exercised by the Commission in the past.

Article 17 – General Provisions

Section 3. Subcontracting

The Commission may subcontract new construction; the reconstruction and rehabilitation of roadways, structures and facilities; the installation of new equipment; and all work incidental to the foregoing; and original equipment and facility warranties. The Commission agrees that it will not subcontract other work which, by past practice or tradition, it has not heretofore subcontracted. The Commission may subcontract work that either the employees are incapable of competently performing or which the Commission lacks the necessary manpower and/or equipment with which to perform such work.

Article 26 – Grievance Procedure

Third Step: Arbitration

1. The Arbitrator shall have no power or authority to add to, subtract from or modify the provisions of this agreement in arriving at a decision of the issue(s) presented and shall confine his decision solely to the application and interpretation of this agreement. The decision or award of the arbitrator shall be final and binding with the proviso that any decisions of the arbitrator or arbitrators requiring legislation will only be effective if such legislation is enacted.

ISSUE

Did the Commission violate the agreement when it subcontracted attenuator repair and maintenance work at interchanges?

If yes, what is the appropriate remedy?

BACKGROUND SUMMARY

A grievance (JT-2) dated July 29, 2009 was filed by Don R. Fluke alleging a violation of Article 17 Section 3 of the labor agreement (JT-1). The agreement is between the Pennsylvania Turnpike Commission (Commission) and Teamsters Local Union Nos. 77 and 250 (union). In essence the grievance was filed on behalf of a number of Everett maintenance employees who witnessed the repair of impact attenuators at the east end of lane #1 at the Breezewood interchange. The work was not being performed by bargaining unit employees. The grievance was signed by a number of employees in addition to Mr. Fluke. The remedy sought was for the Commission to immediately stop the subcontracting of bargaining unit work. By letter dated August 18, 2009 (JT-3), the Commission denied the grievance by responding "in an effort to more efficiently maintain and repair attenuators in a timely manner across the system, the Commission has elected to subcontract this work out at all their Interchanges across the system." The letter was signed by Richard Shaffer, District 2 Maintenance Superintendent.

A similar denial to the grievance (JT-4) at the next step was authored by Guy Jeffrey, Maintenance Superintendent District 1. His response included the following:

“moreover since no employees were laid off or lost any time as a result of this subcontract it is our position that the intent and spirit of Article 17 Section 3 has not been violated.” A final denial (JT-5) was sent to the union by Patrick J. Caro, Labor Relations Specialist dated October 6, 2009. In his response Mr. Caro states: “The Commission made the decision to subcontract the repair of attenuators after researching the history of the time frame it would take for repairs to take place on damaged attenuators. Attenuators are in place for safety of the employees and turnpike customers. It is imperative that they are in proper working condition at all times. When an attenuator is damaged, getting repairs made in the quickest time possible is in the best interest of the employees and traveling public. By subcontracting the work, the Commission is assured repairs will be made in the shortest period of time possible. I understand the Union’s concern on this grievance; however based on the importance of expediting repairs to damaged attenuators, the Commission has the right to subcontract the work.”

The union representing employees is divided within the state by local unions 77 and 250. For purposes of this arbitration, Local 250 is the relevant local and represents maintenance department employees and fare collectors at the various interchanges. The local’s jurisdiction is the western part of the state.

The interchange attenuator work was subcontracted to Transcore. This contractor was and is currently performing interchange equipment and lane work throughout the turnpike. The attenuator at the interchange as well as other sites on the turnpike protects individuals on the road and specifically toll takers. There are 1,100 attenuators system wide and 512 are within Local 250’s jurisdiction. Further, 389 continued to be maintained by the local and 123 subcontracted to Transcore.

The procedure followed when damage to an attenuator occurs is for a call to be made to the Harrisburg central office requesting maintenance repair. A call would be made to the District maintenance office to advise repair work was necessary. Prior to the subcontracting of work, bargaining unit employees would make said repairs. Further, attenuator repairs have never been performed by a subcontractor. Testimony revealed no special schooling was necessary for employees pertaining to maintenance and/or repair and that employees only use a manual for attenuators when determining what maintenance work and repair work is necessary. The manual was supplied by the Commission for employee use.

As a result of the parties' inability to resolve the grievance, the undersigned was selected as the Arbitrator to hear the case from a panel provided by the Pennsylvania Bureau of Mediation. A hearing was held on May 13, 2010 in Pittsburgh, PA. All parties were provided the opportunity to present and cross-examine witnesses, submit exhibits, and at the conclusion of the hearing both parties requested the opportunity to present post-hearing memorandums. After receipt of the memorandums, the hearing was closed on June 17, 2010.

COMMISSION POSITION

The Commission stresses that Article 17 Section 3 must be read in its entirety rather than extracting one sentence from the applicable subcontracting language. The Commission believes it had the right to subcontract this work that had been done in the past by bargaining unit members. The attenuator work has increased dramatically over the past ten years. Between 2000 and 2010, 108 attenuators have been installed to reach

the current total of 283 attenuators at interchanges throughout the toll road and specifically 123 within Local 250's jurisdiction.

The decision was made to carve out the interchange maintenance and repair work and have Transcore perform said work. The subcontract was justified due to the unavailability of the necessary manpower and/or equipment to perform such work. Bargaining unit employees are kept busy throughout the year. Attenuator maintenance and repair is only a small portion of a maintenance employee's work. To identify and outline the numerous duties, the Commission presented the testimony of Steven Dawson, Roadway Maintenance Program Manager. Dawson testified that a maintenance schedule is established each year which fully utilized all maintenance employees. Duties included painting lines, mowing grass, sealing joints, milling, paving, plowing and salting plus maintenance at 21 maintenance facilities. These duties did not include work involving the 1,100 attenuators system wide. Further, thousands of hours of scheduled maintenance were not accomplished due to the demands on current maintenance employee tasks.

Mike Haney, Director of Maintenance, identified the history of attenuators throughout the turnpike system. Federal guidelines required that any blunt end must have a new attenuator installed. During the past three years, discussions occurred among Commission officials that identified attenuator maintenance needed to be done by an outside contractor. The work most important would be at the interchanges since they were damaged most often. Further, some exchanges did not have any attenuators which needed to be corrected. Since Transcore was presently performing work at the interchanges, it would be prudent to have the additional maintenance and repair work performed by this company.

Commission witnesses identified numerous task performed by maintenance employees that would keep them busy during the entire year. Also, it was emphasized current employees would continue to repair and maintain all attenuators not at the interchanges.

The Commission argues no harm has occurred to the union. There is plenty of maintenance work to be done as well as emergency situations which required overtime. No bargaining unit employee has been reduced in hours nor has any employee been laid off. The Commission lacks the necessary manpower to perform the subcontracted work. Local 250 will continue to maintain 389 attenuators within its' jurisdiction and 123 attenuators will be serviced by the subcontractor. The grievance must be denied based upon the entire subcontracting language as well as Article 2 Management Rights.

UNION POSITION

The union contends it is undisputed that maintenance employees have always done all work on attenuators throughout the turnpike. Based on that fact, the subcontract language in Article 17 Section 3 prohibits the Commission from subcontracting work unless the Commission can prove the employees are incapable of competently performing said work or it lacks the necessary manpower and/or equipment with which to perform such work. The Commission's argument that a valid subcontract occurred based on the complete language in this section is not correct. The Commission did not present any testimony that bargaining unit employees were incapable of competently performing the work or which the Commission lacks the necessary manpower and/or equipment with which to perform said work. Bargaining unit employees had always performed this work

and regardless of a maintenance schedule emergency situations do occur and the responsibility to perform the work is that of maintenance employees. Similarly, the Commission's argument that the subcontract would allow maintenance and repair work at the interchanges to be done more efficiently must be rejected. The Commission presented no such evident to support this allegation. Since the subcontract occurred, bargaining unit employees represented by Local 250 continue to have jurisdiction over 389 attenuators, which equates to 75% of all attenuators. While it is not disputed that interchange attenuators are damaged more frequently, the Commission presented no testimony that current employees could not perform the work competently as they have been doing for years prior to the subcontract. Similarly, no evidence was presented to indicate the Commission lacked the necessary manpower to perform the work at the interchanges. Just listing duties performed by maintenance employees in the current year and indicating all the work is not completely done, does not satisfy the lack of manpower requirement. The Commission presented no evidence relative to work hours during any time frame for maintenance and repair work at interchanges.

The language in the Article 17 Section 3 is clear and concise. The Commission may subcontract bargaining unit work provided the applicable conditions are satisfied. At no time did the Commission present testimony to indicate employees were incapable of competently performing the work or manpower was lacking. Thus the subcontract must be considered a violation of Article 17 Section 3.

The appropriate remedy for such a violation is a cease and desist order as well as the awarding of back pay at the straight time rate for all affected employees. It is imperative the Commission be penalized a monetary amount so that it does not consider

this practice in the future. The union believes it is justified in seeking a back pay award. Arbitrator James Beilstein found a monetary award to be valid relying upon similar contract language. His award and specifically the monetary award were affirmed by the appellate court. Pennsylvania Turnpike Commission v Local Union 250, 639 A.2d 968 (PA.Comwlth.1994)

DISCUSSION

My role, as the Arbitrator, is concisely outlined in Article 26 of the agreement. My decision is confined solely to the application and interpretation of the agreement. In that respect, I believe the Commission may subcontract work that has not been previously subcontracted, provided it satisfies one of two necessary elements. Specifically, the Commission must prove employees are incapable of competently performing the work or the Commission lacks the necessary manpower and/or equipment to perform such work.

The Commission believes its' exhibits 2 and 3 plus the testimony of Haney and Dawson satisfied the requirement that it lacks the manpower to perform the subcontracted work. Those exhibits indicate bargaining unit employees in 2008 and 2009 were not able to perform all planned hours. Yet, neither the exhibits nor the testimony of Haney and Dawson indicated bargaining unit employees could not perform attenuator work at the interchanges. The Commission presented no testimony relative to hours worked by the subcontractor at the interchanges or actual work hours in prior years by bargaining unit employees. Attenuator work at the interchanges is dependent on damage being done. It cannot be prescheduled. Hours worked could only be estimated based upon work performed in prior years. The Commission offered no evidence to analyze whether it

lacked the manpower to perform repair and maintenance work at interchanges only. For some unexplained reason, the Commission elected to have bargaining unit employees continue attenuator work on all other attenuators on the turnpike. Testimony revealed most damage to attenuators occurs at interchanges, but if lack of manpower was the real reason for the subcontract then it should have eliminated all attenuator work from the bargaining unit.

Regarding the other element that bargaining unit employees are incapable of performing the work, the testimony of the union's only witness, Daryl Senkow, countered that argument. Senkow testified bargaining unit employees have always done the work in the past and continue to perform all attenuator work involving non-interchanges. I must conclude the employees had and continue to have the ability to competently perform the work at issue.

I should note none of the answers to the grievance remotely indicated the Commission lacked the necessary manpower to perform repair and maintenance of attenuators at the interchanges. The step 1 response by Richard Shaffer indicated the work was subcontracted "to more efficiently maintain and repair attenuators in a timely manner across the system." Efficiency was never addressed. Mr. Jeffrey's response indicated since no employees were laid off or lost any time, the intent and spirit of Article 17 Section 3 has not been violated. I do not believe a response is necessary to that position. Finally, Labor Relations Specialist Caro wrote in his response, "by subcontracting the work, the Commission is assured the repairs will be made in the shortest period of time possible." Again all responses do not satisfy the Commission's

burden to prove it lacked the necessary manpower or even that bargaining unit employees were incapable of competently performing the work.

It is well established that two of the most important agreement clauses are the management rights clause for the employer and the subcontracting clause for the union. A union attempts to protect job security by limiting an employer's ability to subcontract. For years, a prohibition against any subcontracting prevailed in most labor agreements. Unions viewed subcontracting as an attack on the job security of employees who are covered by the agreement. Job security was an inherent element of the labor agreement. New Britain Machine Co. 8 LA 720 (1947) and American Bakeries Co. 46 LA 769 (1966). Subcontracting of work has become more frequent provided the employer complies with all requirements contained in the agreement.

In this case, the Commission may subcontract work that has not been previously subcontracted. Testimony from the union's witness eliminated that right since the work at issue has never been subcontracted. Senkow's testimony leads to no other conclusion than the work at issue has always been performed by bargaining unit employees. The burden now rests with the Commission to prove that either the employees are incapable of competently performing the work or the current workforce precludes the work from being done. In both instances the Commission presented no testimony to satisfy either requirement. The Commission argued in its' answer that repairs will be made in the shortest time possible as a result of the subcontract. Efficiency or completing the work in the shortest time possible does not satisfy the Commission's burden.

The Commission submitted two prior arbitrator decisions that dealt with similar issues arising from Article 17. Both decisions involved the same parties in this dispute. A

thorough review of those decisions leads me to conclude that justification for denying the grievance is not present in this case. Arbitrator Buchheit found the work in dispute "went far beyond normal repair and maintenance done by bargaining unit employees on the turnpike. The work required many thousands of man hours to complete, attesting to the significant nature of extra work performed on the guard rails at each site." Likewise, Arbitrator Das found the work in dispute to have been done in the past by bargaining unit employees and by contractors. Most importantly, he found the Commission did not have mobile crane equipment to place the posts in place and to affix the signs to post or bridge structures. He concluded the Commission lacked the necessary equipment to perform sign erection work of this magnitude or scope.

As previously discussed, the work in dispute in this case has always been performed by bargaining unit employees and performed as normal maintenance and repair. No special skills or training has been required. The lack of necessary manpower can be distinguished. In Arbitrator Buchheit's decision he found the subcontracted work involved many thousands of hours of extra work. Likewise, Arbitrator Das while utilizing the lack of equipment as the controlling factor, he also mentioned that an additional 5,000 – 6,000 hours of work were necessary on the project.

The Commission has the burden to present evidence it lacked manpower to perform the work at issue. No legitimate evidence was offered. I cannot estimate hours to be worked by Transcore or even hours worked by bargaining unit employees in the past several years. The planned versus available hours document did not address the issue. No evidence relative to attenuator work at interchanges for any year or by estimates from the subcontractor was offered. Haney testified that discussions took place among

Commission officials that led to the conclusion that attenuator maintenance needed to be performed by an outside contractor. Again, no documentation or testimony was offered to support the reason for the subcontracting. I should note that even with the Commission's exhibit pertaining to planned versus available hours, no testimony was offered to address how this shortfall in prior years was handled, if at all.

The union seeks a monetary award as part of the remedy. The Commission argues that no employee lost any work as a result of the subcontract, thus no monetary award is warranted. I acknowledge the Commission's position, but I recognize the importance of subcontracting language to the union. Specific requirements were negotiated to insure subcontracting would only occur provided all elements were met. The Commission made no attempt to address the requirements.

I was troubled by Haney's testimony that for the last three years discussions took place that repair and maintenance of attenuators needed to be done by an outside contractor. If those discussions occurred, where was the evidence to support the justification for the subcontract? If lack of manpower was the issue, why did bargaining unit employees continue to perform maintenance and repair at 389 of the 512 attenuators in the Local's jurisdiction? Why wasn't evidence presented to indicate the actual or estimated hours worked at interchanges within the local's jurisdiction?


Finally, the lack of communication between the parties was obvious and most troubling. This issue could have been resolved had there been any discussion prior to the subcontract award. Based on the reasons provided above, my award must include a monetary provision in addition to a cease and desist order.

AWARD

The grievance is sustained. The Commission must cease and desist from utilizing a subcontractor to perform maintenance and repair on attenuators at interchanges within Local 250's jurisdiction. The Commission shall determine the number of hours worked by the subcontractor performing maintenance and repair of attenuators only and compensate bargaining unit employees who would have performed said work. The rate shall be at the straight time hourly rate.

7/12/10

Date



Stephen M. Schmerin, Esq.
Arbitrator