A MATTER IN ARBITRATION

In a Matter Between:	Grievance:	Subcontracting Clerical Work
PACIFIC GAS AND ELECTRIC COMPANY		
(Employer)	Hearing:	2/25 & 3/3/94
and	Award:	September 14, 1994
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 1245 (Union)	McKay Case No. 93-242	
	Parties' Arbitration Case No. 198	

DECISION AND AWARD

GERALD R. McKAY, ARBITRATOR
DOROTHY FORTIER, UNION MEMBER
ENID BIDOU, UNION MEMBER
STEPHEN A. RAYBURN, COMPANY MEMBER
RICK R. DOERING, COMPANY MEMBER

Appearances By:

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STATEMENT OF PROCEDURE

This matter arises out of the application and interpretation of a collective bargaining Agreement which exists between the above-identified Union and Employer.[1] Unable to resolve the dispute between themselves, the parties selected this arbitrator in accordance with the terms of the Contract to hear and resolve the matter. Hearings were held on February 25 and March 3, 1994 in San Francisco, California. During the course of the proceedings, the parties had an opportunity to present evidence and to cross-examine the witnesses. At the conclusion of the hearing, the parties agreed to file written briefs in argument of their respective positions. The arbitrator received copies of those briefs on or before August 9, 1994. Having had an opportunity to review the record, the arbitrator is prepared to issue his decision.

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1 Joint Exhibit #1

ISSUE

Does the Company's use of Buypass/Buypay violate the clerical agreement? If so, what is the appropriate remedy?[2]

RELEVANT CONTRACT LANGUAGE

TITLE 19. DEMOTION AND LAYOFF PROCEDURE

. . . . . .

19.17 TECHNOLOGICAL CHANGES

Company shall continue to provide Union with as much notice as practicable of technological changes in its business which may have a significant effect on its workforce. In such circumstances, Company and Union shall then meet to study and endeavor to adopt appropriate solutions, such as retraining or special placement, as may be practicable before Company implements the provisions of Titles 206, 306 and 19 of the Physical and Clerical Agreements. (Added 1-1-88)

. . . . . .

TITLE 24. MANAGEMENT OF COMPANY AND MISCELLANEOUS

24. MANAGEMENT OF COMPANY

The management of the Company and its business and the direction of its working forces are vested exclusively in Company, and this includes, but is not limited to, the following: to direct and supervise the work of its employees; to hire, promote, demote, transfer, suspend, and discipline or discharge employees for just cause; to plan, direct, and control operations; to lay off employees because of lack of work or for other legitimate reasons; to introduce new or improved methods or facilities, provided, however, that all of the foregoing shall be subject to the provisions of this Agreement, arbitration or Review Committee decisions, or letters of agreement, or memorandums of understanding clarifying or interpreting this Agreement. (Relocated from 1.3 on 1-1-80)

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2 Tr. Pages 3 and 4

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24.5 CONTRACTING

It is recognized that the Company has the right to have work done by outside agencies. In the exercise of such right Company will not make a contract with any company or individual for the purpose of dispensing with the services of employees who are covered by the Clerical Bargaining Agreement. The following guidelines will be observed:

(a) Where temporary services are required for a limited period of time, such as an emergency situation or for a specific special function.

(b) Where the regular employees at the headquarters are either not available or normal workloads prevent them from doing the work during the time of the emergency or special function situation.

(c) The Union Business Representative in the area should, if possible, be informed of Company's intentions before the agency employees commence work. (Added 1-1-80)

BACKGROUND

For a period in excess of forty years, the Employer has used local businesses, such as drug stores, grocery stores and banks, as pay stations to permit its customers to pay their utility bills without having to actually go to an Employer office. For the service rendered to the Employer, the pay station businesses were compensated by the Employer by receiving a fee per transaction of approximately twenty-five cents on average. There are approximately four hundred pay stations currently operating which is about the same number that have been existence for the past twenty years.[3] In general terms, the customer would come to the pay station with his or her PG&E bill, submit payment to the clerk in the store and receive a receipt for the payment. The clerk would then bundle the PG&E bills with the money received and deliver it to a PG&E office for processing. The agreement to perform the work for PG&E was reflected in a contract arrangement between the pay station and the Employer.

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3 Opinion and Award of Walter Kintz, Case No. 183, Page 5

Several years ago, the Employer decided to try a new system advertised and sold by Bypass Corporation, a business located in Atlanta, Georgia.[4] This company is in the electronic funds transfer business, or ". . . in a data transportation business."[5] One of the products marketed by the company for utility customers is a computer program referred to as Bypay. Mr. John Fitch, the director of utility payment services for Bypass Corporation, testified that Bypay,

> . . . is an automated electronic system that expedites the movement of information from remote facilities back to the host computer of Buypass in Atlanta where it's stored for later retrieval by Buypass customers.
> . . . . . .
> Buypay is exclusively for utility companies, utility companies being phone companies, gas companies, cable companies, municipal governments, and so forth.[6]

The software to operate the Buypay system, Mr. Fitch testified, is proprietary and not for sale which the Employer was told when they inquired about purchasing Buypay.

What Buypay provides to the Employer is a means for the pay stations to collect money from the Employer's customers directly and report the collections electronically on a computer terminal which is owned and maintained and installed by Buypass Corporation at the pay station. The pay station proprietor takes the money from the customer and deposits the cash into a Buypass Corporation account. The data collected at the pay station terminals is fed back directly to the Buypass Corporation computer in Atlanta. Personnel from the Employer's processing office then retrieve the information from the Buypass Corporation computer in Atlanta for processing. Buypass then transfers the funds collected to PG&E less the fee charged for the services provided.

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4 Tr. Page 159
5 Tr. Page 159
6 Tr. Page 160

The clerk in the pay station is required under the Buypay system to perform more activities than was required under the Employer's old method of collecting funds from its customers. Instead of simply taking the money and stamping a receipt and then turning the money over to a PG&E field office, the clerk is now required to input the customer information into the computer terminal and deposit the funds in a Buypass Corporation account. As a result of these changes, the work performed by an Employer clerical processing the bundled information which came from the pay station no longer exists.

When the Employer adopted the Buypay system, the arrangement it made with the Buypass Corporation was to have the Buypass Corporation enter into agreements directly with the various pay stations to operate the Buypay terminals and make deposits into the Buypass account. The Employer no longer had any direct supervisorial control over the pay stations and had no connections with the pay stations, except as the beneficiary of the collections made by the pay stations. The decision to eliminate a pay station, in theory, rested with the Bypass Corporation as the contracting agent. The decision with respect to how much to pay the pay station per transaction collected is not set by PG&E but is set by the Bypass Corporation. According to Mr. Fitch, if one of its agents is crooked and steals money at a pay station, the liability for that loss rests with the Buypass Corporation and not with PG&E. Mr. Fitch stated, "We have assumed the liability for the transactions that take place."[7] However, Buypass does not answer any questions related to a customer's bill. Those inquiries, according to Fitch, are referred to PG&E for an answer. Buypass, according to Mr. Fitch, is simply a conduit for data and not a source of business information for customers.

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7 Tr. Page 199

The Employer's witnesses described various other technological methods the Employer uses to collect money from its customers. For example, customers can have the utility bill directly deducted from their checking accounts by their bank. In addition, a customer may pay the utility bill by using their personal computer at home to direct their bank to make the payment to PG&E. At the end of 1993, there were in the neighborhood of 180,000 customers using alternative methods of paying their bills other than mailing their checks directly to the Employer or paying their utility bill directly at an Employer office. Besides these methods, the Employer has also developed its own pay station computer program which is similar to Buypay but not as efficient. The Employer's program is referred to as LOPP and has many of the same characteristics as Buypay in the sense that the bundling of paid bills and cash delivered by clerks from the pay stations to the local Employer offices is not necessary when the LOPP terminal entries are made at the pay station. The Union filed a grievance protesting the Employer's use of LOPP as well as the Employer's use of Buypay. The LOPP grievance was consolidated with Case 198 by agreement of the Review Committee dated April 14, 1994.

In a prior dispute between the parties dealing with the issue of the Employer's use of pay stations, arbitrator Kintz ruled that the Employer's long practice of using pay stations did not violate the Contract although the Employer did violate the Contract with respect to giving notice to the Union as required by Section 24.5(c). Arbitrator Kintz noted, in part,

> The evidence in this record establishes that the Union has, over an extended period of time and a series of collective bargaining Agreements, acquiesced in the Employer's practice of using pay stations concurrently with the closure--consolidation of CSO's. That acquiescence together with the absence of a demonstrated casual relationship between the use of pay stations and the "displacement" of employees precludes (the remedy the Union was seeking). Also in connection with (2) above, this record does not disclose that bargaining unit work has been lost to pay stations which is an obvious assumption of this remedial request.

It is the Union's position that in the present dispute, it has demonstrated a loss of work which formed one of the bases in arbitrator Kintz' decision for not granting the Union the relief it sought as a result of the Employer's subcontracting. Susie Stickel, the Employer's supervisor of payment research deposit control, testified that the Employer's various automated systems for allowing customers to pay their bills all result in the loss of certain clerical procedures which would have been done had the automated system not been used. This would apply to the Employer's APS, LOPP and Buypay systems. Joan Lozano testified that her current position is project manager of MDT (Mobile Data Terminal). She described the MDT system in the following manner,

> The MDT system utilizes data over radio technology to send gas and electric service orders into what we consider to be dumb terminals as opposed to smart computer terminals in gas and electric service vehicles.[8]

The use of this system has reduced the manual posting of orders by as much as sixty percent which has eliminated bargaining unit work. The Union initially objected to the MDT system but conceded that the Employer was permitted to use this technology under 19.17, even though it impacted negatively on the work available to the bargaining unit.

The Union in its brief asserted that the Employer is changing its method of operation by consolidating all of its field offices into four regional offices. Ms. Stickel described a number of payment methods which tend to centralize the data processing as a result of their use, including LOPP, Buypay and the bank transfer systems. Because of the changes in the Employer's operation, Ms. Stickel was not able to testify specifically that the use of Buypay or LOPP resulted in any "Title 19 activity" referring to the layoff or reduction in force. There is no evidence in the record that any specific employee was laid off as a result of the introduction of the Employer's new

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bill-collection methods although the evidence establishes that some of the work which had been performed prior to the introduction of these systems was eliminated by the use of these systems which would suggest that employees who had been doing the work either no longer had work to do or had been transferred to perform other work. The time required to process the Buypay data, Ms. Stickel testified, was about an hour to an hour and a half for one clerical person. Mr. Rick Doering, the director of labor relations services, testified that at the time the Employer adopted the Buypay system, it informed the Union that it was the Employer's intention that the new technology not cause displacements.[9] According to Mr. Doering, the Union was informed that the implementation of the LOPP program which was a Company-owned system, would have exactly the same impact in the pay stations and on the bargaining unit as the use of the Buypay system.

POSITION OF THE PARTIES

UNION

The Union stated that the issue of the Employer contracting out bargaining unit work so long as bargaining unit employees are not laid off was dealt with directly in the arbitration before arbitrator Chvany. The Company's notion was rejected by arbitrator Chvany when she stated,

> Reduction of the scope of the bargaining unit can occur in situations that do not involve the current employees. Even where no current employee in the unit has been displaced by agency employees, erosion of the bargaining unit occurs when available jobs that would otherwise go to bargaining unit members under the recognition clause of the contract are filled by persons outside the unit. The bargaining unit is not a static concept nor is it defined in terms of the employees currently working. The unit is defined in terms of jurisdiction over certain jobs and types of work. When those jobs or that type of work is given to outside agencies

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> rather than to bargaining unit persons, the services of bargaining unit employees are dispensed with, and the scope of the unit is reduced.

In the case before arbitrator Chvany, she then issued a broad, remedial order prohibiting the Employer from contracting out the work in the disputes in question.

Several years later in Review Committee Case No. 1656, the Employer acknowledged that contracting out the folding and mailing of letters to consumers with past due accounts was bargaining unit work. Initially the Employer asserted that the contracting of this work would have no adverse affect on the bargaining unit. However, ultimately, it agreed that even though the amount of bargaining unit work being performed by the outside agency was minimal and would have no deleterious effect on the bargaining unit, it was precluded from using the outside agency because the use of the agent was not for a limited period of time and because the Union was not notified in advance of the Employer's intention to contract the work outside.

The Union then cited the decision by arbitrator Kintz in Case No. 183 where he concluded that the Employer had a right to use outside pay stations as it had been using them for the past forty years. His conclusion, the Union argued, was based on his finding that there was ". . . no demonstrated loss of current or prospective employment opportunity flowing from the conduct." The Union then went on to assert that the Company's use of Buypay created a loss of current and prospective employment opportunity which, therefore, violates the Contract. The Buypay system reduces the scope of the unit work which arbitrator Chvany noted was prohibited. Unlike pay stations which the Union asserted actually produce additional work for the bargaining unit employees, Buypay diverts work from the bargaining unit. The Union asserted that Buypay

eliminates twenty FTE positions from the bargaining unit which is a demonstrated loss of current or perspective employment opportunity as required by arbitrator Kintz.

The Buypay system is of unlimited duration. Arbitrator Chvany suggested that limited duration was six months or less. The Buypay stations clearly have been in operation longer than that and have no foreseeable termination date. There are available regular employees who could handle the work coming from the manual pay stations. The Employer's use of LOPP terminals and pay stations also produces a loss of current and prospective employment opportunities, and it, too, violates the Contract just as Buypay. Its use in the pay stations is also not for a limited period of time but is for an indefinite period of time.

The Employer's reliance on past practice is inappropriate, the Union stated, because for a past practice to exist, the Contract must be silent, the practice must be open and notorious and it must have existed for a relatively long period of time. The Contract in the present case is not silent with respect to the issue of contracting out. The evidence of past practice does not address the specific factual situation the Union is challenging in the present dispute. None of the past practices cited by the Employer involve a wholesale supplanting of bargaining unit employees.

As a remedy, the Union asked that the arbitrator direct the Employer to cease and desist from contracting with Buypass and return the bargaining unit work performed by the Buypay stations to the bargaining unit. Other remedies may also be appropriate in light of the Employer's present intention to consolidate offices. The Union asked that the issue of remedy be remanded to

the parties for their further deliberation. If a resolution cannot be found, the Union suggested that a remedy could then be returned to the panel for a final and binding determination.

EMPLOYER

The Employer argued that Buypay is permissible new technology and is not subcontracting. Subcontracting involves dispensing with the services of bargaining unit workers and hiring agency workers to do the unit work. While Buypay makes the "bundle" work at CSO redundant, the impact is purely technological because no Buypay workers are involved in "bundle work." Buypay is software which automatically stores, sorts and transfers payment information. The Union is attempting to have the panel apply Title 24.5 of the Agreement rather than Titles 19.17 and 24.1. The technology clause recognizes that the use of improved technology may have a significant effect on the bargaining unit and result in layoffs. The use of new technology eliminates the work obviating the Union's claim to it since it no longer exists any more. If as the Employer asserts Buypay is new technology, it has the right to implement it without any limitation with respect to the impact it may have relative to layoffs.

The Union must establish that Buypay uses agency workers to do work once done by the bargaining unit. The Union's only chance is to focus on the pay station workers who use Buypay terminals to record payments and issue receipts. According to the Employer, pay station workers with or without Buypay have done "counter work" by receiving payment, recording it and providing a receipt and banking or depositing the money. This "counter work" has been subcontracted to pay stations for years as arbitrator Kintz found in his decision. The work the

Union is seeking to protect in the instant dispute is "bundle work." It is the bundle work that the Buypay technology eliminates. The Employer asserted that Buypay does not do any work. It is simply an electronic, transmittal and storing function which is similar to the Employer's LOPP system. The benefit to the Company of the new electronic posting is the avoidance of shutting off customer services when the customer has actually paid its bill. Whether or not the Employer actually owns the technology is irrelevant, the Employer stated. Title 24.1 does not restrict the Employer's right to introduce new technology only to those which it owns or develops. For all these reasons, the use of Buypay is not subcontracting.

The Employer asserted that the Union made all of the same arguments relative to improper subcontracting in Case No. 183 before arbitrator Kintz. The Employer speculated that the Union would attempt to trivialize his findings as dicta, but his finding with respect to past practice demonstrates the primacy of that factor in his analysis. There can be no doubt that the pay stations were subcontractors since arbitrator Kintz even found that the Company violated the Agreement by failing to give notice of subcontracting pursuant to Title 24.5. Nevertheless, the decision found that the Company's use of pay stations for the past forty years had established a contractual right to continue to do so. But even if the Buypay system could somehow be defined as subcontracting, the Employer has established a past practice of subcontracting "bundle work" out to organizations such as Bank of America and to BankTech which involve far more customers than use the Buypay system to pay their bills.

The Union failed to show that Buypay had any adverse impact on the bargaining unit. The Employer asserted that the evidence is uncontroverted that Buypay was not intended to dispense with bargaining unit employment and, in fact, Buypay did not dispense with any employee's

service. No unit employee, according to Mr. Oase, ever spent the whole day doing pay station bundle work. The Union could not make its case using the argument of harmful effects either, the Employer argued. With no layoffs or displacements to parade, the Union must try to twist the projected labor savings into a lost employment opportunity. The theory that labor savings equals harm was rejected in arbitration Case No. 183. Even if the Employer closed all pay stations, it would not have hired more clerks. An analysis of the work performed at the pay stations shows that the use of those centers involves about thirty FTEs worth of counter work per year in contrast to the projected savings of twenty FTEs of bundle work due to Buypay. Arbitrator Kintz found that the thirty FTEs saved by using pay stations was not harmful, therefore, certainly the twenty FTEs saved in the instant dispute cannot satisfy the Union's need to show harm either. Harm in a subcontracting case, the Employer asserted, cannot be demonstrated without a showing of layoffs or lost opportunities which means of the use of non-unit employees to perform functions traditionally done by the bargaining unit. For all these reasons, the Employer asked that the grievance be denied.

DISCUSSION

In a traditional contract interpretation issue, the function of the arbitrator is simply to look at the terms of the contract and apply it to the facts presented. If for some reason the contract is ambiguous, then the arbitrator looks at the traditions and practices of the parties or the negotiating history to determine what the parties intended by the contract language. It is, of course, the intent of the parties which creates the contract between them, not simply the words that are used to reflect that intent. In the present case, however, it is necessary to step back and look at the issue which is in dispute more broadly to fully understand the Contract language and the intent of the parties. One

cannot simply look at "bundle work" or "twenty FTEs" and make any intelligent resolution of the present problem.

The Employer is in the business of selling customers utility service. In exchange for that service, customers are expected to pay the Employer on a regular, monthly basis for the benefits received. This dispute in its broadest context involves the question of how customers pay the Employer for the services the customers receive. If one were to step back in history far enough, it is possible that if utility companies existed in those times, customers may have paid for the services they received in large stones or colorful sea shells. Payment of this type would have required the customer to physically convey the item of value to the company to whatever location the company designated as its location for receipt. Obviously, the payment for services in commodities such as sea shells or even ingots of gold are, by and large, relegated to antiquity. Customers in today's market pay for services from companies that sell utilities in some paper form or in some electronic substitution for paper. In its simplest context, the customer takes the bill with the paper currency to the Employer's office and hands over the legal tender in exchange for a receipt showing the payment of the monthly bill. This method of payment, of course, is the slowest and most costly to the Employer. If every customer had to trundle down to the local utility office with cash to pay the bill, the Employer would be required to increase it offices and its workforce significantly above its present level. Furthermore, it would have to develop methods of storing the large amounts of paper currency it received from customers who paid in that form.

The most common form of payment, based on the record evidence, is the customer who writes a check to the Employer and deposits that check in a "goldenrod" envelope and returns it to the Employer via the mail in payment of the services provided. This is a relatively efficient way for

the Employer to collect payment for services from customers in the sense that it does not need to physically accept payment from people, and the form of the payment received is relatively secure from theft in contrast to the paper currency that a customer might bring himself to the Employer's offices. When a customer sends a check to the Employer, the work involved in recording the payment of that check is bargaining unit work which the clerks presently perform. However, as the Employer witnesses described during the hearing, the processing of payments in this form are being improved by the use of scanning technology which will eliminate the need for clerks sitting at a station and recording the receipt of checks from customers individually. When this technology is improved and installed, all those clerks who punched in the receipt of a customer's check will no longer have work of that nature to perform. Of course, the use of this improved technology is permitted to the Employer under Section 19.17 and is not being challenged by the Union.

In addition to the customer paying by check, other customers have opted to use a different form of payment, either by directing their bank where the customer has a checking account to automatically deduct the amount due to the Employer each month, or by using their personal computer to direct the bank to transfer those funds to the Employer. This type of payment is a convenience to both the customer and the Employer because it involves an immediate transfer of funds to the Employer and a recording electronically of the payment of that money due without either the Employer or the customer having to process any paper at all. The work required of the customer is reduced, and the work required of the Employer is reduced. Of course, the bank employees have some functions to perform that might otherwise have been performed by bargaining unit employees, at least in the area of the automatic deductions, but the Union does not appear to be complaining about the loss of work in this area which, in reality, involves microseconds of clerk time per customer transaction. Once the bank has programmed its computer

to make the automatic deduction which involves a human transaction, the subsequent transactions can be done electronically without any further human involvement.

As it must be apparent, the trend in the customer payment for services is not toward the renewed use of sea shells. It is, instead, toward the development of systems of payment that do not require the exchange of any physical item between the Company and the customer. Ideally, the arbitrator would speculate, the Employer would be most satisfied with a system where all of its customers automatically had money credited to the Employer's account for monthly utility bills without the need for the Employer sending the customer a bill directly, or the customer sending the bill back to the Employer in the mail. One could suppose a system where the utility meters located at each customer's residence would be connected through computer modems to the Employer's central terminal which would record the utility use for the month. This information would then be fed into the Employer's billing computer system which would electronically assign a cost of service to each customer based on the use and electronically post them at the customer's place of credit which could be a bank or some other form of electronic credit center. The customer's credit center would then electronically credit the Employer for the services received. In a system of this nature, there would be no need for meter readers; there would be no need for people to open the mail; there would be no need for data entry, and there would be no need for recording payments. The only people that would be required would be those who repaired the computers and those who dealt with the problems with customers whose credit centers ran short of credit.

While the arbitrator recognizes the Employer's system has not achieved this level of automation, it is, nevertheless, the direction in which the Employer is heading. Without any doubt, the intention of the Employer is to reduce the amount of paper processed to an absolute

minimum. It is doing this by the use of increased and improved technology. The use by the Employer of Buypay and of LOPP is intended to do exactly what the arbitrator has just suggested. Both of these devices and systems are simply means of making electronic entries into the Employer's credit system to show payment for services rendered. Both Buypay and LOPP are sophisticated computer programs which are used for posting credit and transferring funds. Those two systems, themselves, are not people replacing bargaining unit members to perform the work that bargaining unit members used to perform. The point of contact where bargaining unit work is done through these systems is at the pay stations. Taking the cash or the check from a customer who walks into a pay station and punching that information into either the Buypay terminal or the LOPP terminal is bargaining unit work. Once the information has been punched into these terminals and is processed into the computers to which they are attached, that work is no longer what could be described as bargaining unit work. It is now digital bits of data existing only as electronic impulses. The Buypass Corporation is not displacing bargaining unit employees except to the extent that it is providing a program or system which allows the inputting of credit data directly to the Employer's computers, nor is the LOPP system displacing bargaining unit members either. Both Bypay and LOPP are improved forms of technology permitted by Section 19.17. Both eliminate some work which had been done with additional paper shuffling but which now is done with direct computer input.

The real issue in the present case is very similar to the issue the Union raised in Case 183 before arbitrator Walter Kintz. In that dispute, the Union argued that the use of pay stations violated the subcontracting provisions of the Contract. Arbitrator Kintz acknowledged, in essence, that, yes, the use of pay stations violates the subcontracting provisions of the Contract. However, he went on to conclude that since the Employer has done this for more than forty years without the Union complaining that the Union has no basis to raise a complaint at the present time. Rather than

deciding the question on the basis of past practice as the Employer has argued, a careful review of arbitrator Kintz' award would suggest that he has, in essence, decided that on the basis of laches, the Union has lost its right to make a complaint. For forty years the Employer has developed and used pay stations during which time the Union sat on its hands. Now that it appears the Union may be impacted negatively, it chooses to raise a complaint that the Employer's practice violates the Contract. While arbitrator Kintz concluded that the Union was correct, he also concluded that the Union had no remedy. The only way one has no remedy if the Contract was violated is through the theory of laches where the Union failed to act appropriately and in a timely manner.

There is no doubt whatsoever that the Employer's use of pay stations is a violation of the subcontracting provisions in Section 24.5. In its brief, the Employer described the work done by the clerks in the pay stations as "counter work." Certainly, counter work is work which bargaining unit members do and is within the jurisdiction of the bargaining unit as recognized by the Employer. For the Employer to argue that the use of pay stations to collect payments from customers is not subcontracting in violation of 24.5 is not persuasive, nor is it persuasive for the Employer to argue that it may subcontract as a result of past practice. Past practice can only exist if the Contract is silent with respect to the issue involved. In the present case, the Contract is not silent with respect to the question of subcontracting. The Employer under the circumstances is prohibited from doing so which leads back to the question which was placed before arbitrator Kintz in Case 183.

This arbitrator does not disagree with the result reached by arbitrator Kintz. He viewed a factual situation in which the parties allowed a practice to exist for over forty years. Drug stores, grocery stores, banks and other locations have been used by the Employer to permit customers to

make payments for their utility bills at those various locations. At no point, apparently, until the issue was raised with arbitrator Kintz, has the Union ever questioned the Employer's right to use pay stations. For the Employer to continue to use pay stations as it has creates a convenience for the Employer and for the Employer's customers that would be significantly harmed by the Union's assertion of its rights at the present time. This is what arbitrator Kintz appears to say but which he did not say directly. It is for this reason this arbitrator agrees with arbitrator Kintz. One cannot sit on one's rights for forty years and then expect to enforce them. If the Union wants at the present time to change the system of using pay stations, then given the decision of arbitrator Kintz and the inclination of this arbitrator, it must do so at the collective bargaining table.

In summary, the Employer's use of Buypay and LOPP are merely new forms of technology that are permitted under Section 19.17. Even if those new forms of technology negatively impact on the work available to the bargaining unit, the Contract, nevertheless, permits the introduction of new technology. The fact that these technologies are being used at pay stations does not change the nature of the technology involved. Whether the pay stations were manned by bargaining unit personnel or by non-bargaining unit personnel, the use of Buypay or LOPP would be permitted under Section 19.17. The real issue is whether the Employer can use pay stations at all which is the question that arbitrator Kintz resolved in Case 183. If the Employer can use pay stations and non-bargaining unit personnel to do counter work, then the Employer can use the new technological systems of Buypay and LOPP to perform the work. It is this arbitrator's opinion that the Employer has the right to continue to use pay stations as arbitrator Kintz stated, not on the basis that the Employer has established a past practice since it cannot do so in the face of existing Contract language prohibiting subcontracting, but on the basis that the Union is estopped by laches from asserting its rights under the Contract having sat on its hands for over forty years. If the Union wants to change the use of pay stations and require that they be manned by bargaining unit

personnel, then it must achieve that result at the collective bargaining table. For these reasons, the grievance must be denied.

AWARD

The Company's use of Buypass/Buypay and the Company's use of LOPP does not violate the clerical Agreement. The grievance is denied.

It is so ordered.

September 14, 1994

Gerald R. McKay, Arbitrator

Dorothy Fortier dissent

Dorothy Fortier, Union Member

Enid Bidou dissent

Enid Bidou, Union Member

concur

Stephen A. Rayburn, Company Member

Concur

Rick R. Doering, Company Member