

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

CHAUFFEURS, TEAMSTERS AND
HELPERS LOCAL NO. 190,

Complainant,

- vs -

YELLOWSTONE COUNTY SCHOOL
DISTRICT #26, LOCKWOOD SCHOOL
SYSTEM, BILLINGS, MONTANA,

Defendant.

FINAL ORDER

ULP 9-83

* * * * *

No exceptions having been filed, pursuant to ARM
24,26,215, to the Findings of Fact, Conclusions of Law
and Recommended Order issued on May 28, 1984, by Hearing
Examiner Rick D'Hooge;

THEREFORE, this Board adopts that Recommended Order in
this matter as its FINAL ORDER.

DATED this 22nd day of October 1984.

BOARD OF PERSONNEL APPEALS

By Alan L. Joscelyn
Alan L. Joscelyn, Chairman
Board of Personnel Appeals

* * * * *

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy
of this document was mailed to the following on the 24th
day of October 1984:

Jennifer Jacobson

Emilie Loring
Hilley & Loring, P.C.
121 4th Street North Suite 2G
Great Falls, Montana 59401

Richard A. Larson
Larson & Associates
1733 Park Hill
Billings, Montana 59102

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE 9-1983:

CHAUFFEUR'S, TEAMSTERS AND)
HELPER'S LOCAL #190,)
Complainant,)
-vs-)
YELLOWSTONE COUNTY SCHOOL)
DISTRICT #26, LOCKWOOD SCHOOL)
SYSTEM, BILLINGS, MONTANA,)
Defendant.)

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

This recommended order addresses a question of subcontracting out collective bargaining unit work by a public employer.

On July 18, 1983, the complainant, Union, Teamsters, filed an unfair labor practice charge alleging a violation of Section 39-31-401(1), (2) and (5), MCA. The defendant, employer, School District, responded as follows to the charges:

CHARGE NO. 1 - Charging Party is the duly certified exclusive representative of the custodians employed by Defendant at its Lockwood School."

RESPONSE: The Lockwood School District agrees that Local No. 190 is the "certified bargaining representative for the purpose of collective bargaining for all employees employed by the District identified as Housekeepers, Custodians and Offset Printers as defined. . .

CHARGE NO. 2 - On or about June 21, 1983 Defendant, acting through its Board of Trustees, decided to contract all housekeeping duties for the 1983-84 School year.

RESPONSE: On June 21, 1983, the Board did, by unanimous action of its members, all members being present, award a bid for Housekeeping services to

Commercial Building Maintenance Company.

1
2 CHARGE NO. 3 - On or about June 22, 1983 the
3 custodians were notified that their
4 last day of work would be July 8,
5 1983.

6 RESPONSE: On June 22, 1983, Housekeepers
7 employed by Lockwood School Dis-
8 trict were "laid off" in accord-
9 ance with specific contract terms
10 of the current Agreement.

11 CHARGE NO. 4 - Defendant never bargained with the
12 Charging Party regarding contrac-
13 ting of the bargaining unit work
14 and termination of all Union
15 Members.

16 RESPONSE: Allegation Denied

17 CHARGE NO. 5 - Failure to negotiate over contrac-
18 ting of unit work is a failure to
19 bargain in good faith, in violation
20 of Section 39-31-401(1) and (2).

21 RESPONSE: Allegation Denied

22 CHARGE NO. 6 - Defending Party decided to contract
23 unit work and dismiss all members
24 of the bargaining unit in order to
25 eliminate the union and avoid the
26 necessity of future bargaining, in
27 violation of Section 39-31-401(1)
28 and (2).

29 RESPONSE: Allegation Denied

30 (Employer's Response to Complaint)

31
32 On September 27, 1983 a hearing was held to determine
if the defendant violated Section 39-31-401(1), (3) and (5),
MCA. The hearing was held under the authority of Section
39-31-406, MCA and the Administrative Procedure Act (Title
2, Chapter 4, MCA).

Because the Board of Personnel Appeals has little
precedent in some areas, I will cite federal statute and
case law for guidance in the application of Montana's
Collective Bargaining Act, Title 39, Chapter 31, MCA (Act).
The federal statute will generally be the National Labor
Relations Act, 29 U.S.C., Section 151-166 (NLRB) precedent
for guidance. (State Department of Highways v. Public Em-

1 ployees Craft Council, 165 Mont. 349, 529 P.2d 785 (1974);
2 AFSCME Local 2390 v. City of Billings, 555 P.2d 507, 93 LRRM
3 2753, (1976); State of Montana ex. rel., Board of Personnel
4 Appeals v. District Court of the Eleventh Judicial District,
5 598 P.2d 1117, 103 LRRM 2297, (1979); Teamsters Local 45 v.
6 Board of Personnel Appeals and Stewart Thomas McCarvel,
7 635 P.2d 1310, 38 State Reporter 1841, (1981)).

8 I. FINDINGS OF FACT

9 After a thorough review of the testimony, exhibits,
10 post hearing briefs and reply briefs, I make the following
11 findings:

12 1. In September of 1980 the Union won an election to
13 represent a collective bargaining unit of about ten employ-
14 ees consisting of housekeepers, custodians and off-set
15 printers employed by the School District.

16 2. Sometime after the Union election, the Teamsters
17 made an initial contract proposal to the School District.
18 The initial contract proposal included the following sec-
19 tions:

20 LARSEN: Are you able to read through all of
21 those notes and could you read the union
22 proposal as presented to you or dropped
23 off here at the school, I think it was
24 your testimony, in 1981, under the topic
25 Subcontracting?

26 SWANSER: Proposal was, entitle it Subcontractor,
27 it came under heading entitled General
28 Conditions. The employer agrees that no
29 contract or subcontract that would
30 directly impact the union or its members
31 will be entered into without an evalua-
32 tion of the total economics involved in
that operation as it relates to the
public good. The right to contract or
subcontract shall not be used for the
purpose or intention of undermining the
union or to discriminate against any of
its members. That was the full quote of
that initial proposal. The only thing
that was changed on that was after
public good, after total economics was
added by the Board, an evaluation, by
the Board and then another clause was
added and it was moved to management
records.

(Emphasis Added, Tape 3).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

3. After several bargaining meetings, the parties reached a tentative agreement. The bargaining meetings included exhaustive discussions about contracting and subcontracting work. (Swanser, Espeland, Tapes 1 and 2.) On March 13, 1981, the parties signed a collective bargaining agreement effective until June 30, 1982. The collective bargaining agreement contains the following relevant sections:

ARTICLE 2 - MANAGEMENT RIGHTS

.

The management of the District and the direction of its employees is vested exclusively in the Employer. All matters not specifically and expressly covered or treated by the language of this Agreement may be administered by the Employer in accordance with such policy or procedure as the employer may determine. Management rights will not be deemed to exclude other management rights not herein specifically enumerated, including the right to contract and subcontract. The employer shall be entitled to receive a day's work for a day's pay.

Contracting and Subcontracting

Employer agrees that no contract or subcontract that would directly impact the Union or its members will be entered into without an evaluation of the total economics involved in that operation by the Board as it relates to the public good. The right to contract or subcontract shall not be used for the purpose or intention of undermining the Union nor to discriminate against any of its members.

.

ARTICLE 10 - SAVINGS CLAUSE - SEVERABILITY

.

B. This Agreement constitutes the entire Agreement between the parties. Any supplement hereto shall not be binding upon either party unless executed by the parties hereto. The parties further acknowledge that during the course of collective bargaining each party has had the unlimited right to offer, discuss, accept or reject proposals. Therefore, for the term of this Agreement, no further collective bargaining shall be had upon any provisions of this Agreement, nor upon any subject of collective bargaining, unless by mutual consent of the parties hereto.

.

(Joint Exhibit I.)

1 4. During the spring of 1982, the School Board directed
2 Dennis Espeland, Lockwood School Superintendent, to do
3 an economic study on the subcontracting of the housekeeping
4 activities. The housekeeping economic study was a standard
5 part of the budgetary process because the School District
6 had had some financially lean years. (Swanser, Tape 1).

7 On May 13, 1982 the parties signed a new collective
8 bargaining agreement effective until June 30, 1984. The new
9 collective bargaining agreement contains the same above
10 relevant sections. (Joint Exhibit II.)

11 5. On June 10, 1982, the Teamsters filed Unfair Labor
12 Practice Charge 18-1982 against the Lockwood School Dis-
13 trict.

14 6. On February 8, 1983 the Board of Personnel Appeals
15 issued a Recommended Order in the Unfair Labor Practice
16 Charge ULP 18-1983 with the following conclusions of law:

17 CONCLUSIONS OF LAW

18 By threatening to cut the work hours of Linda
19 Zelmer and Marcie Strever because of the Union's
20 proposal to not have housekeepers lock doors and
21 sweep entrance ways, by showing Linda Zelmer and
22 Marcy Strever a cost comparison between a proposed
23 subcontracting bid from a cleaning company and the
24 cost of the School District doing the same work -
25 eliminating the employee's job, and by asking
26 Linda Zelmer and Marcie Strever to talk to Brenda
27 Klein and Georgia Williams about the Union's
28 actions, demands and expectations, the Yellowstone
29 County School District Number 26, Lockwood School
30 District by the actions of Doug True did violate
31 Section 39-31-401(1), MCA of the Collection Bar-
32 gaining Act for Public Employees.

33 The Recommended Order also contains findings and discussions
34 that the School District's actions had a very limited effect
35 on the Union. See Findings 13, 15, 16, and Page 15, Lines
36 8-26 of ULP 18-1983.

37 7. During early March, 1983, the School District
38 complied with the Recommended Order. Receiving no written
39 exceptions to the Recommended Order, the Board of Personnel
40 Appeals issued a Final Order in ULP 18-1982.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

8. On March 4, 1983, Brenda Klein, Housekeeper Lockwood School District, called Dennis Mueller, Business Representative Teamsters Local 190, and asked if he knew the School District was thinking about subcontracting the housekeeping work. Dennis Mueller did not know. Dennis Mueller called Dennis Espeland about subcontracting. Dennis Espeland invited Dennis Mueller to attend the School Board meeting scheduled for that night. Dennis Espeland followed up the telephone invitation with a written invitation. Dennis Mueller believes he attended all the following relevant School Board meetings. (Mueller, Tape 1.)

9. Dennis Mueller attended the May 5, 1983 work study meeting of the Lockwood School District. The School Board minutes state the following:

ECONOMIC EVALUATION OF HOUSEKEEPING AND CUSTODIAL COSTS FOR LOCKWOOD SCHOOL

Dennis Mueller of Local Union #190 - addressed the Board and received a copy of the SAMPLE Contract for Custodial Services. James Logan moved to take item under advisement. Judy Johnson seconded the motion. All voted in favor. No action taken on this agenda item.

(Employer Exhibit 1.)

10. On May 12, 1983, Dennis Mueller attended the regular Lockwood School Board meeting. The School Board minutes state the following:

ECONOMIC EVALUATION AND BID SPECIFICATIONS

A motion was introduced by James Logan, seconded by Judy Johnson, to hold a Special Meeting on May 16, 1983, 5:00 p.m. to review economic evaluation and bid specifications on Custodial Contracted Services.

Those voting in favor of the motion were: Ward Swanser, Joyce Deans, Judy Johnson, James Logan and Gary Forrester. Motion Carried.

Note - Mr. Dennis Mueller of Local Union 190 presented each Board member with a memo regarding contracted custodial services.

(Employer Exhibit 2.)

Dennis Mueller's memorandum to the School Board states the following:

Mr. Chairman, School Board Members, and Guests:

My name is Dennis Mueller, business representative of Teamster's Local #190. I am here tonight to speak on behalf of the Teamster membership who presently provide custodial service for School District #26. It is not my intent to dispute the figures as presented by Mr. Espeland, at this time, although I personally do not agree with the bottom line, and that is, will the school district actually realize the estimated savings? While my access to firm costs to the district for custodial services has been limited, other public employers have, in recent years, tried sub-contracting out custodial services and the experiment did not work! Which brings us to the question: If the School District does not realize the savings projected, what is the real reason for attempting to sub-contract custodial services at this time?

Would it be wrong for the Union to assume that the employer, who has a mutually agreed to contract, which will not expire until June 30, 1984, which contract was negotiated in good faith and which calls for an average increase of 35¢ for the present custodial staff of July 1, 1983, by sub-contracting such work accomplish two things?

One: It would eliminate the necessity of the School District to pay the negotiated increases.

Two: It would eliminate the necessity for the School District to deal with Teamsters Local #190, the certified representative.

In researching past dealings with the present custodial staff, it's desire to have Union Representation and the management at Lockwood Schools, I feel justified in saying this relationship has been a very strained relationship which has resulted in grievances, Unfair Labor Practice Charges (which were upheld by the findings of the Hearing examiner), and other problems which were solved without formal grievances.

While the above mentioned Unfair Labor Practice did not address the problem of whether or not the School District had the right to sub-contract, the hearing examiner did state that he questioned the timing of the study. Which was done during the time of negotiating the present Labor Agreement. Would that question still be valid, under the present circumstances?

It is Teamsters Local #190's position that it would. This Union will not stand idly by while it's members' contract is being breached by sub-contracting out of bargaining unit work, during the term of an existing contract.

(Employer Exhibit 2, Page 6.)

11. Because of ULP 18-1983, the School District put the spring of 1982 housekeeping subcontracting study on hold. After the order in ULP 18-1983 was issued, Dennis Espeland asked the School Board if he should update the housekeeping subcontracting study. (Swanser, Tape 1, 2; Espeland, Tape 2).

About May 12, 1983, Dennis Espeland presented to the School Board an economic evaluation for sub-contracting housekeeping services as follows (Estimated savings):

ECONOMIC EVALUATION FOR HOUSEKEEPING & CUSTODIAL COSTS 1983-84

Wages Only: \$99,071

Fringe Benefits and Other Costs:

Social Security	\$99,071 X 6.70%	=	\$6,638	
Retirement	\$99,071 X 6.32%	=	\$6,261	
Medical Insurance	\$615.38 X 12	=	\$7,385	
Workmen's Comp.	\$2,10 X \$100	=	\$2,086	
State Unemployment	.06 X \$9900	=	\$ 594	
Extra Student Help		=	\$4,586	
Extra Vacation Days (Sub)		=	\$1,176	
Reg. Substitute Pay		=	\$2,822	
			\$31,548	\$13,619

Reducing housekeeping and custodial work year from 260 days to 197 days = 63 days, less at average \$502.38 per day, to equalize contracting service days -\$31,650
\$98,969

Estimated bid for service \$60,000
 Estimated savings on bid \$38,969
 Estimated savings by not replacing summer work of housekeepers (1st year) \$31,650
 Estimated net savings to district \$70,619

(Employer Exhibit 2, Page 5.)

Dennis Espeland states the above economic evaluation did not take into account the additional electrical cost of doing the cleaning at night instead of during the day. Dennis Espeland suggests the additional electrical cost to be minimal because the lights are on in the schools until 10:00-10:30 p.m. for community education, adult education, athletic events and other extra curricular events. (Espeland, Tape 3.)

1 When asked if the School Board was saving money by
2 subcontracting, Dennis Mueller stated he did not know.
3 (Mueller, Tape 1.)

4 A portion of the hearing record contains questions and
5 answers about the social cost of subcontracting. Some of
6 the social questions are what number of School District's
7 housekeeping employees went to school at Lockwood? What
8 number of School District's housekeeping employees have
9 children and grandchildren in the Lockwood School District?
10 And what number of cleaning company employees live in the
11 Lockwood community? The record contains no fixed answers to
12 these social questions. (Espeland, Swanser; Tapes 2 and 3.)

13 12. On May 13, 1983, Dennis Espeland wrote the follow-
14 ing letter to Dennis Mueller:

15 At last night's School Board Meeting, you made
16 reference to deficiencies in our proposed cleaning
17 specifications for contract bid.

18 Please advise us in writing where you feel we are
19 not meeting the existing job requirements or
20 deviating from the work actually being performed
21 by our housekeepers and custodians.

22 We need this information to be fair to the present
23 employees, and guarantee a sound economic evalua-
24 tion for the public good.

25 (Employer Exhibit 10.)

26 13. On May 16, 1983, at a special School Board meet-
27 ing, the Lockwood School Board voted to advertise for bids
28 to subcontract the housekeeping services. (Employer Exhibit
29 3.)

30 14. On May 17, 1983, Dennis Mueller answered Dennis
31 Espeland's letter of May 13, 1983 with a lengthy detailed
32 list of the discrepancies between the actual work being
performed by the present custodial staff and the proposed
bid specifications. (Employer Exhibit 4.) Dennis Espeland
states that the Teamsters fully cooperated in preparing the
bid specifications. (Espeland, Tape 2.)

1 15. During late May, 1983 the Lockwood School District
2 distributed bid specifications for contracting the house-
3 keeping services. The bid specifications contained the
4 following sections of interest:

5
6 NOTE: If there is no projected long-term finan-
7 cial or other advantage to the District, all bids
8 will be rejected and the current custodial program
9 will remain in full force and effect. The award
10 of bid shall be made only after an evaluation of
11 the total economics involved in that operation by
12 the Board as it relates to the public good.

13
14 The successful bidder agrees to consider hiring
15 any present custodial employees recommended by the
16 District for employment. This clause shall apply
17 prior to the effective date of any contract resul-
18 ting from this bid, and shall be a one-time pro-
19 cess only. After effective date of employment,
20 said employees will be employees of the successful
21 bidder and subject to their usual personnel poli-
22 cies.

23 (Employer Exhibit 11.)

24 Dennis Espeland stated that he recommended any and all
25 current employees to the subcontracting cleaning company.
26 That he did not give the cleaning company a list of current
27 employees. (Espeland, Tape 3.)

28 16. The minutes of the June 2, 1983 work study meeting
29 of the Lockwood School Board states the following:

30 BID OPENING FOR CUSTODIAL SERVICES

31 BIDS WERE RECEIVED FROM, COMMERCIAL BUILDING
32 MAINTENANCE and MAXINE'S COMMERCIAL CLEANING
SERVICES.

Monthly custodial services as specified, including
all cleaning, washing and waxing chemicals con-
sumed by employees of the Contractor necessary for
compliance with specifications.

MAXINE'S COMMERCIAL CLEANING SERVICE - \$5,820.00
per month

COMMERCIAL BUILDING MAINTENANCE - \$73,800.00 per
9/1/2 months (197 days)

A motion was introduced by Gary Forrester, sec-
onded by Joyce Deans, to take bids under advise-

1 ment and report on bids at regular board meeting
2 on 6/9/83. Those voting in favor of the motion
3 were: Ward Swanser, Gary Forrester, Judy Johnson,
4 Joyce Deans. Motion was carried.

5
6 Dennis Mueller of Local Teamster Local Union spoke
7 in behalf of the Lockwood Housekeepers.

8 (Employer Exhibit 5.)

9
10 17. The minutes of the June 9, 1983 regular Lockwood
11 School Board meeting states the following:

12 CONTRACTING HOUSEKEEPING SERVICES

13 A motion was introduced by Joyce Deans to reject
14 Maxine's Commercial Cleaning Service bid in the
15 amount of \$5,820.00 per month because the BID BOND
16 enclosed with original Bid only covered the bid
17 for 9 months. Gary Forrester seconded the motion.
18 Those voting in favor were: Joyce Deans, Judy
19 Johnson, Gary Forrester, Ward Swanser. Motion was
20 carried.

21 A motion was introduced by Joyce Deans to hold a
22 special Board Meeting on Tuesday, June 21, 1983 at
23 7:30 p.m. to discuss Commercial Building Maintenance
24 Bid in the amount of \$73,800.00 for 197 days
25 or 10 months. Judy Johnson seconded the motion.
26 Those voting in favor were: Ward Swanser, Joyce
27 Deans, Judy Johnson, Gary Forrester. Motion was
28 carried.

29 (Employer Exhibit 6.)

30
31 18. The minutes of the June 21, 1983 special Lockwood
32 School Board states the following:

33 TO REVIEW BID FROM COMMERCIAL BUILDING MAINTENANCE -
34 CHUCK LAGGE, MANAGER

35 Chairman, Ward Swanser read letter of reference
36 from the following:

- 37 1. Burlington Northern Railroad
- 38 2. Herbergers
- 39 3. United Industry, Inc.
- 40 4. Exxon Oil Company

41 Dennis Mueller of Teamster Local Union #190 spoke
42 on behalf of the Lockwood Housekeepers regarding
43 the cutback on number of days offered to contrac-
44 tor - Commercial Building Maintenance and not
45 offered to Lockwood housekeepers.

46 Dick Larsen summarized his letter to the Lockwood
47 School Board dated June 17, 1983 regarding -
48 Contracting for Housekeeping services. Letter
49 attached. His summary stated = "The District has
50 a Union Contract that allows for CONTRACTING AND
51 SUBCONTRACTING under defined procedures. The
52 District would meet the terms of the contract in

1 its evaluation and award of a Contract for House-
2 keeping Services. The District has not discrimi-
3 nated against any member of the Union, nor are we
4 constrained from contracting by the ULP decision
5 of February 8, 1983."

6 Dennis Espeland recommended accepting the bid from
7 COMMERCIAL BUILDING MAINTENANCE in the amount of
8 \$73,800.00 for 197 days or 9 1/2 months.

9 The study and evaluation of the total economics
10 involved in the housekeeping operation by the
11 Board as it relates to the public good demon-
12 strated that the costs to the District under the
13 current labor agreement are projected to be
14 \$130,619.00 [Should read \$98,969 as corrected by
15 August 11, 1983 Minutes, Employer Exhibit 9]
16 (including benefits) for 1983-84. The bid price
17 reflects a figure of \$73,800.00, or an immediate
18 savings of \$25,169.00 or 25%.

19 A motion was introduced by Joyce Deans, seconded
20 by James Logan to accept Commercial Building
21 Maintenance bid in the amount of \$73,800.00 for
22 197 days and to negotiate a written contract with
23 them. Those voting in favor of the motion were:
24 Ward Swanser, Joyce Deans, Judy Johnson, Gary
25 Forrester and James Logan. Motion was carried.

26 The housekeepers will be given a written layoff
27 notice stating the following: Please be advised
28 that due to lack of work we are notifying you that
29 your last day of work will be Friday, July 8,
30 1983. Due to the School Board action of June 21,
31 the Lockwood School District #26 will be contrac-
32 ting housekeeping duties for the coming school
year, therefore we will need current addresses so
that we might contact you if there is need for
your recall.

(Employer Exhibit 7.)

19. On June 22, 1983, the Lockwood School District
informed all housekeeping employees that their last day of
work would be July 8, 1983. (Employer Exhibit 13.)

20. Dennis Mueller believes the housekeeping employees
did get their negotiated wage raise on July 1, 1983 of about
35¢ per hour average.

21. At the July 14, 1983 regular Lockwood School Board
meeting, the Lockwood School Board voted to sign a contract
with Commercial Building Maintenance for housekeeping ser-
vices. (Employer Exhibit 8.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

22. The laid off employees had some problem with-
drawing their Public Employees Retirement System (PERS)
monies because the form had a self-termination statement.
Dennis Mueller believes the School District was, to some
extent, more cooperative in helping the employees get their
PERS monies than the School District was on other problems.
All employees did get their PERS monies but the employees
thought they did get a run-around. (Mueller, Tape 1.)

23. Dennis Mueller testified that he is the business
agent for the complainant serving eleven collective bargain-
ing agreements; that the difference between the Lockwood
School District and other employers he works with is that if
the other employers agree to a solution to a problem, the
solution was executed; that the Lockwood School District
would agree to a solution to a problem but only execute
after several additional confrontations; that two examples
of problems with the Lockwood School Districts are Linda
Zellmer's hours of pay and Linda Ruzick's seniority date;
that the Lockwood School District said Linda Zellmer would
be paid for all hours worked but Linda Zellmer's paycheck
did not include pay for all hours worked; that later, Linda
Zellmer did get paid for all hours worked after additional
confrontation; and that the Teamsters filed a grievance over
Linda Ruzick's seniority date and later dropped the griev-
ance but the problem still existed. (Mueller, Tape 1.)

Dennis Mueller states that the Union was not asked if
they would work for less wages or fringe benefits; that he
never asked the School Board for consideration and/or asked
the School Board to re-open the contract for consideration
of the Union's standpoint on subcontracting and/or request
negotiations on subcontracting; that he was, up to the last
minute, hoping the School Board would choose not to subcon-

1 tract out the housekeeping work; that the School Board was
2 in a position to make up their mind to subcontract or not;
3 that he was hoping the School District would offer the same
4 terms to the Union as the School District was offering to
5 the subcontractor; that he never requested the School Board
6 to offer to the Union the same working conditions as the
7 subcontractor had; that during the School Board meeting he
8 felt the School Board knew very well the position of the
9 Union; and that the Union position was the School District
10 should not subcontract out the work. (Mueller, Tape 1.)

11 24. Georgia Williams testified that she was a house-
12 keeper for the Lockwood School District for the past five
13 years, was Union shop steward since September, 1980 and was
14 a member of both negotiating teams; that she was with Jim
15 Davis, a Teamster Union business representative, when they
16 met with Dennis Espeland about a problem and arrived at a
17 solution; that when the solution did not materialize, a
18 second Union business representative and her met with Dennis
19 Espeland; that the second meeting turned into a fight when
20 she stated her beliefs and Dennis Espeland accused her of
21 telling him what to do; that at a Friday morning meeting,
22 when she stated something about Linda Ruzick's seniority
23 date, Doug True, housekeeping supervisor, said, now you are
24 trying to tell me what to do; that she believes the above
25 incident had an effect on her next evaluation because she
26 was marked low in cooperation - getting along with people;
27 and that other than ULP Charge 18-1982, the Linda Ruzick
28 grievance was the only grievance between the parties.
29 (Williams, Tape 1.)

30 25. Brenda Klein testified that she was a Lockwood
31 School District housekeeper for the past three years, was a
32 Lockwood employee before and after the Teamsters represented

1 the Lockwood housekeeping employees and was not a member of
2 the first negotiating team; that the management attitude
3 changed after the Teamsters started representing the house-
4 keeping employees; that before the Teamsters' representation
5 she would take a twenty - twenty-five minute coffee break
6 with the cooks and Dennis Espeland, and nothing was said,
7 but after the Teamster representation she could only take a
8 fifteen minute break; that before the Teamster representa-
9 tion she could exchange work hours by working short hours
10 one day and long hours the next or working on Saturday, but
11 after the Teamster representation the exchange of work hours
12 was not allowed; and that she asked Doug True about the
13 above changes and Doug True would say the changes were
14 because of the Union. When asked if the labor contract
15 stated hours of work, five days of work and fifteen minute
16 breaks, Brenda Klein agreed. Brenda Klein stated she did
17 know about the wages and hours discussions in the first
18 negotiations. Brenda Klein testified that she was told by
19 Doug True that if she saw children misbehaving, she was to
20 correct them or take the children to the principal; and that
21 she had corrected children every day or sent them to the
22 principal. (Klein, Tapes 1 and 3.)

23 26. Ward Swanser testified that the School Board only
24 talked about saving dollars by subcontracting; that the
25 School Board based its judgment to subcontracting on \$25,169
26 or 25% savings; and that as custodian of public funds, a
27 position of trust, the School Board not only had a duty but
28 an obligation to subcontract the housekeeping with a \$25,169
29 savings. When asked about his public trust and obligation
30 to the community in dollar terms and questioned about the
31 School Board's trust and obligation to the Lockwood resi-
32 dents in terms of continued employment, Ward Swanser an-

1 swered that the dollars were the only consideration.
2 (Swanser, Tapes 1 and 2.)

3 27. Dennis Espeland testified that if the subcontracting
4 did not do the work, the School District would recall
5 the Lockwood housekeeping employees as stated in the collec-
6 tive bargaining agreements; that the quality of housekeeping
7 was not a question when considering subcontracting; and that
8 the substantial saving of \$25,000 or two mills and the
9 dollars for the public good was the only consideration.

10 Dennis Espeland stated that there was a low turnover in
11 the School District's housekeeping staff; that he does not
12 care about the turnover of the cleaning company's employees
13 as long as the quality of work is good; that when the clean-
14 ing first started, the quality of work needed some adjust-
15 ment; that the cleaning company failed to clean black
16 boards; that every problem pointed out to the cleaning
17 company was corrected; and that a week before the hearing,
18 the service from the cleaning company was good. (Espeland,
19 Tape 3.)

20 28. Mary Ann Wilcox testified that she was a Lockwood
21 School District housekeeper for six years in the primary
22 school; that she was a Lockwood resident but did not go to
23 school at Lockwood; that four of her children and two of her
24 grandchildren are going or have gone to the Lockwood School
25 District; that a week before this hearing, she visited that
26 School and found dead grass, snow, mud and water in the
27 hallways and found paper towels and water spewed about the
28 bathrooms; that the school buildings were not in the same
29 clean condition as before subcontracting; that she does not
30 believe a single day-time employee can keep the schools as
31 clean as the School District's employees did; and that with
32 student discipline she would unofficially point out to the

1 principals and/or teachers the problems or actions of the
2 students. (Wilcox, Tape 3.)

3 29. At the hearing the defendant moved to introduce
4 the deposition of Vincent E. (Bud) Henman, former Teamster
5 business representative and negotiator of both the March 13,
6 1981 and the May 13, 1982 collective bargaining agreements.
7 The deposition was taken the day before the hearing,
8 September 26, 1983 in Billings, Montana. The deposition was
9 received and marked as Employer Exhibit 16 but not admitted
10 to the record of this proceeding.

11 The complainant's October 20, 1983 brief sets forth the
12 following argument:

13 The Deposition of V.E. (Bud) Henman Should Not Be
14 Admitted.

15 The day before the hearing on this matter, namely
16 September 26, 1983, the School District took the
17 deposition of V.E. (Bud) Henman, a former Business
18 Agent of Local 190. The District's representa-
19 tive, Richard Larsen, said, at the time, the
20 deposition was being taken "to preserve testi-
21 mony"; the Teamster's attorney was present. At
22 the hearing the school district moved to admit the
23 deposition and Complainant's attorney objected.
24 The deposition should not be admitted for any
25 purpose.

26 Under the Montana Rules of Civil Procedure the use
27 of depositions is carefully prescribed in Rule
28 32(a). They may be used to impeach the testimony
29 of the deponent. Henman was not called as a
30 witness, so such use is impossible. They may be
31 used if the person deposed was "at the time of
32 taking the deposition" one of a specified list of
agents of a party. Henman was no longer a busi-
ness agent at the time the deposition was taken.
Finally the dsposition may be used if the witness
is dead, more than 100 miles from the place of
hearing, or unable to testify because of age,
illness, infirmity or imprisonment. None of those
factors was present. Henman had been deposed only
the day before the hearing, he was available in
Billings, not deceased, not unable to testify
because of age, illness, infermity or imprison-
ment. At the deposition he testified he was
unemployed. All the School District had to do, if
they wanted his testimony, was to subpoena him.
There is absolutely no excuse for admission of an
unsigned deposition from a person easily available
for testimony.

1 Montana's courts are strict about improper admis-
2 sion of depositions. If the party offering a
3 deposition does so on the ground the witness is
4 absent from the state, there must be proof of such
5 absence at the time of trial, not merely an asser-
6 tion by counsel that, to the best of his knowl-
7 edge, the deponent was then residing in Chicago,
8 at an unknown address. Healy v. First Bank of
9 Great Falls, 108 Mont. 180, 89 P.2d 555 (1939).
10 Here the School District gave no reason at all for
11 not having subpoenaed Henman to testify in person
12 so the Hearing Examiner could observe his demeanor
13 and ask questions himself if necessary to clarify
14 his testimony.

(Pages 2 & 3.)

9 The defendant did not address the question of the admission
10 of the deposition. The defendant did not challenge the
11 facts surrounding Mr. Henman's deposition as stated above by
12 the complainant.

13 Section 39-31-406 MCA, states that the Board of Person-
14 nel Appeals is not bound by the rules of evidence prevailing
15 in the courts. Rule 24.26.201 ARM, states that the Board of
16 Personnel Appeals adopts the model rules proposed by the
17 Attorney General. The Attorney General's Model Rule 13,
18 1.3.217 ARM, states that in all contested cases discovery
19 shall be available to the parties in accordance with rule
20 26, 28 through 37 of the Montana Rules of Civil Procedure.
21 Therefore, a conclusion that the Board of Personnel Appeals
22 is governed by Rule 32(a) of the Montana Rules of Civil
23 Procedure is in order. Above, the complainant sets forth
24 the principles of Rule 32(a). Because of the facts sur-
25 rounding Mr. Henman's deposition would conflict with the
26 principles of Rule 32(a), Mr. Henman's deposition is not
27 considered part of this proceeding.

28 II. DISCUSSION

29 The above complaint, response and findings produce the
30 following questions:

- 31 1. In Findings 2 and 3, did the Union grant
32 to the Lockwood School District the privilege of
subcontracting collective bargaining unit work
without further bargaining with the Union, i.e.,
was there a waiver by express agreement?

1 2. In Findings 6, 10, 23, 24, and 25, did
2 the Lockwood School District have anti-union
3 animus and did the anti-union animus govern the
4 decision to subcontract?

5 3. In Finding 23, did the Union grant to
6 the Lockwood School District the privilege of
7 subcontracting collective bargaining unit work by
8 not requesting bargaining on subcontracting i.e.,
9 was there a waiver by inaction?

10 1. The School District's Duty to Bargain About Sub-
11 contracting. The Board of Personnel Appeals in ULP 3-1975,
12 Carpenter's Local #112 v. Board of County Commissioners,
13 Silver Bow County, in ULP 18-1978, IBEW Local #185 v. Helena
14 School District #1, and in ULP 30-1980, Butte Teamsters
15 Union Local #2 v. Missoula County, Missoula County Airport,
16 adopted the principals of Fiberboard v. NLRB, 379 U.S. 203,
17 57 LRRM 2609, 1964. From the principals of Fiberboard,
18 supra, the NLRB states that bargaining on subcontracting is
19 not required where:

- 20 A. the subcontracting is motivated solely by
21 economic reasons;
- 22 B. it has been customary for the company to
23 subcontract various kinds of work;
- 24 C. no substantial variance is shown in kind or
25 degree from the established past practice of
26 the employer;
- 27 D. no significant detriment results to employees
28 in the unit;
- 29 E. the union has had an opportunity to bargain
30 about changes in existing subcontracting
31 practices at general negotiating meetings.

32 See: Westinghouse Electric Corporation vs.
International Union of Electrical, Radio and
Machine Workers, AFL-CIO, (1065); 150 NLRB
No. 136; 58 LRRM 1257. 153 NLRB No. 33; 59
LRRM 1355. Town and County Mfg. Corp. vs.
NLRB, 1962) 316 F2d 846; 53 LRRM 2054.

From the above NLRB cases and other NLRB cases a conclusion
that subcontracting of collective bargaining unit work is a
mandatory subject of bargaining under the NLRA is in order.
Because of the similarity between the Montana Collective

1 Bargaining Act for Public Employees and the NLRA and because
2 of the Board of Personnel Appeals' action in ULP 3-1975, ULP
3 18-1978 and ULP 30-1980, a conclusion that subcontracting of
4 collective bargaining unit work is a mandatory subject of
5 bargaining under the Montana Collective Bargaining Act for
6 Public Employees is in order.

7 In the case at hand, in Findings 18 and 19, the School
8 District did, in the long term, lay off the housekeeping
9 employees because of subcontracting. A comparison between
10 Findings 18 and 19 and the above Westinghouse standard (Item
11 D) produces a conclusion that the subcontracting had a
12 significant detrimental result to the employees in the bar-
13 gaining unit. The record contains no direct evidence of the
14 School District's past customary subcontracting (Item B of
15 the Westinghouse standard) and the kind or degree of estab-
16 lished subcontracting (Item C of the Westinghouse standard).
17 But, from the whole record, we can easily and honestly
18 arrive at the conclusion the School District has changed
19 both the customary subcontracting (Item B) and the kind or
20 degree of established subcontracting (Item C). The above
21 conclusion on the amount of past subcontracting is based on
22 the belief the Union would have had no bargaining unit if
23 the School District had customarily contracted out the
24 housekeeping work. Because an employer has to meet all the
25 items of the Westinghouse standard in order to be relieved
26 of the duties to bargain and because the Lockwood School
27 District has failed to meet Items B, C, and D of the
28 Westinghouse standard, I see no need in applying the remain-
29 ing items. Without addressing the School District's argu-
30 ment of waiver, from the above application of the Westin-
31 ghouse standards (Items B, C, & D), we can easily conclude
32 the Lockwood School District had an obligation to bargain

1 with the Teamsters Union about subcontracting of the house-
2 keeping activities.

3 2. Express Waiver of Duty to Bargain. Did the Union
4 waive its statutory right to negotiate over subcontracting?

5 In collective bargaining, a union may waive a bargain-
6 ing right that is protected by the NLRA. NLRB v. C & C
7 Plywood Corp., 385 US 421, 64 LRRM 2065, 1967; American
8 Distributing Co. v. NLRB, ___ F2d ___, 114 LRRM 2404, CA
9 9, 1983. The NLRB cases teach that any waiver of the sta-
10 tutory right to bargain over a mandatory subject of bar-
11 gaining must be in "clear and unmistakable language".
12 Plumber's Local #669 v. NLRB, 600 F2d 918, 101 LRRM 2014,
13 CADC, 1979; Office and Professional Employees Local #425 v.
14 NLRB, 419 F2d 314, 70 LRRM 3047, CADC, 1969; Leads Northrup
15 Co. v. NLRB, 391 F2d 874, 67 LRRM 2793, CA 3, 1968; NLRB v.
16 Perkins Mach. Co., 326 F2d 488, 55 LRRM 2204, CA 1, 1964;
17 Timkin Roller Bearing Co. v. NLRB, 325 F2d 746, 54 LRRM
18 2785, CA 6, 1963; NLRB v. R L Sweet Lumber Co., 515 F2d 785,
19 89 LRRM 2326, CA 10; Murphy Diesel Co. v. NLRB, 454 F2d 303,
20 78 LRRM 2993, CA 7, 1971.

21 A lengthy review of the NLRB cases on waiver of manda-
22 tory subjects of bargaining produces a conclusion that a
23 waiver of a mandatory subject of bargaining, whether wages,
24 hours of work, subcontracting, plant closure, or plant
25 relocation, are all subject to the same clear and unmis-
26 takable language test. The NLRB cases teach that the NLRB
27 has been reluctant to infer a waiver. New York Mirror, 151
28 NLRB 834, 58 LRRM 1464, 1965; Puerto Rico Phone Co., 149
29 NLRB No 84, 57 LRRM 1397, 1964. The U.S. Supreme Court
30 teaches that while the NLRB is not empowered to adjudicate
31 the rights of the parties covered under a collective bar-
32 gaining contract, the NLRB had the right to determine by
reference to the collective bargaining contract whether a

1 party has agreed to relinquish a mandatory subject of bar-
2 gaining. NLRB v. C & C Plywood Corp, supra; Weltronic Co.
3 v. NLRB, 419 F2d 1120, 73 LRRM 2014, CA 6, 1969.

4 Applying the "clear and unmistakable language" standard
5 to Article 2 of the collective bargaining agreement -
6 Management Rights (Finding #3), we find that "management
7 rights will not be deemed to exclude other management rights
8 not herein specifically enumerated, including the right to
9 contract and subcontract". This language appears to be
10 clear and unmistakable. Applying the same standard to
11 Article 2 - Contracting and Subcontracting (Finding 3), we
12 find that the "Employer agrees that no contract or subcon-
13 tract that directly impacts the union or its members will be
14 entered into without an evaluation of the total economics
15 involved in that operation by the board as it relates to the
16 public good. The right to contract or subcontract shall not
17 be used for the purpose of or intention of undermining the
18 union nor to discriminate against any of its members." The
19 language of the subcontracting sections appears to put
20 restraints on the language of the Management Rights section.
21 Reading both sections together, we find that Management
22 Rights include the right to contract or subcontract work
23 that directly impacts the Union or its members provided
24 first, that management does an evaluation of the total
25 economics involved in that operation as it relates to the
26 public good and provided second, that management's purpose
27 or intent (motivation) of subcontracting is not to undermine
28 the Union or to discriminate against its members. I cannot
29 easily and honestly arrive at a different reading of the two
30 sections. The complainant has not set forth any other
31 readings of the sections or any case providing another
32 reading of the sections. The language of the two sections

1 meet the "clear and unmistakable language" standard. With
2 some restrictions, the Union did waive its right to negoti-
3 ate over subcontracting.

4 The complainant argues the following:

5 The School District argues Article 2, Management
6 Rights, in the collective bargaining agreement
7 gives it the right to subcontract without bargain-
8 ing with the union. It must be remembered, how-
9 ever, that the Board of Personnel Appeals found
10 that the contract had been ratified as a result of
11 an unlawful threat to subcontract, ULP 18-82. The
12 union had asked, as the remedy in the earlier
13 unfair labor practice proceeding, that the con-
14 tract at issue here be set aside. The Board
15 refused to grant that remedy. Under such circum-
16 stances it would be clearly inequitable to hold
17 that the contract provides justification for
18 employer conduct that, otherwise, would clearly be
19 unlawful.

20 Complainant's Brief, Page 8.

21 I disagree because of timing. The Union's initial
22 contract proposal contains part of the above subcontracting
23 language. Finding 2. The first collective bargaining
24 agreement, some 27 months before the lay off, contained the
25 same above subcontracting language. Finding 3. The second
26 collective bargaining agreement was signed before the
27 Union's negotiating team and the Union's business represen-
28 tative had any knowledge of the School District's coercive
29 activities in ULP 18-1983. Findings 4 and 6. Therefore, I
30 will not disregard the Union's waiver of the right to nego-
31 tiate subcontracting because the Union agreed to the waiver
32 before any coercive activities occurred. Also, the School
District's coercive actions had a very limited effect on the
Union. Finding 6.

3. Was the School District's anti-union animus the moti-
vating factor for subcontracting?

The complainant's brief contains an argument that "The
labor relations between the parties have not been smooth."
Complainant's brief, page 1. In Findings 6, 10, 23, 24, and

1 25, we see signs and statements that the School District had
2 an anti-union animus.

3 In a temporary injunction case, the 7th Circuit Court
4 of Appeals in Wilson v. Liberty Homes, Inc., 664 F2d 620,
5 108 LRRM 2699, 1981, set forth the following teachings:

6 Section 8(a)(3) of the Act [NLRA] makes it an
7 unfair labor practice to discriminate with respect
8 to tenure of employment for the purpose of discour-
9 aging membership in a labor organization. 29
10 U.S.C. Sections 158(a)(3) (1976). Section 8(a)(1)
11 makes it an unfair labor practice for an employer
12 to interfere with, restrain or coerce employees in
13 the exercise of their rights to organize and
14 bargain collectively through representatives of
15 their own choosing. 29 U.S.C. Sections 158(a)(1)
16 (1976). It is well settled that an employer
17 violates both of these sections by "subcontracting
18 part of an integrated business and dismissing the
19 persons employed therein if the action is moti-
20 vated at least in part by anti-union considera-
21 tions". NLRB v. Townhouse T.V. & Appliances,
22 Inc., 531 F2d 826, 828-29, 91 LRRM 2636 (7th Cir.
23 1976): NLRB v. George Roberts & Son, Inc., 451
24 F2d 941, 945-46, 78 LRRM 2874 (2nd Cir. 1971):
25 NLRB v. National Food Stores, Inc., 332 F2d 249,
26 56 LRRM 2296 (7th Cir. 1964).

27 As the district court noted, the employer's
28 motivation for subcontracting its operations and
29 discharging the drivers thus becomes the critical
30 element in the controversy.

31 108 LRRM at 2704

32 The 5th Circuit Court of Appeals in NLRB v. Big Three Indus-
trial Gas and Equipment Co., 579 F2d 304, 99 LRRM 2223,
1978, states the following:

Accepting the Board's finding of anti-union
motivation, and yet assuming the existence of some
legitimate business purpose, we are found with a
decision activated by two goals: one legitimate,
and one that we must condemn. In this circuit,
the threshold for illegality is crossed if the
force of invidious purpose is "reasonably equal"
to the lawful motive prompting conduct. Cramco,
Inc. v. NLRB, 339 F2d 1, 6, 68 LRRM 2890 (5th Cir.
1968). While we cannot fix precise percentages
for the motivational ingredients of Big Three's
action, we do say that the employer has failed to
establish that business justification was domi-
nant. The Board dismissed Big Three's [Employer]
purported justification as a sham; we find this
justification subsidiary to the force of union
animus in triggering the mass discharge. Accord-

ingly, the motivational predicate for Sections 8(a)(3) violations is established.

99 LRRM at 2230-2231

In a plant removal case, the 2nd Circuit Court of Appeals in NLRB v. Rapid Bindery, Inc., 293 F2d 170, 48 LRRM 2658, 1961, cited several subcontracting cases and stated:

. . . .

The Board's position appears to be that a move by management when that move is required for sound business reasons is nevertheless an unfair labor practice if the move is accelerated or reinforced by contemporaneous employer differences with a union. This position is not supported by the language of the Act or by the decisional law interpreting that language. The subsection reads:

Sections 8(1) It shall be an unfair labor practice for an employer--

* * *

(3) by discrimination in regard to hire or tenure of employment or any term of condition of employment to encourage or discourage membership in any labor organization: * * *

This language has been interpreted to mean that a change or discontinuance of the employer's business operations in order to avoid obligations imposed upon it by the National Labor Relations Act is a violation of the subsection. NLRB v. Brown Dunkin Co., 287 F2d 17, 47 LRRM 2551 (10 Cir. 1961); NLRB v. E.C. Brown Co., 184 F2d 829, 27 LRRM 2022 (2 Cir. 1950). For example, in NLRB v. E.C. Brown Co., supra, we enforced an order directing an employer to rehire employees displaced by the formation of a second corporation. However, there the second corporation was an exact replica of the superseded entity.

In those situations where a change or discontinuance of business operations is dictated by sound financial or economic reasons the courts have refused to find that Sections 8(a)(3) has been violated even though the employer action may have been accelerated by union activity. NLRB v. Lassing, 284 F2d 781, 47 LRRM 227 (6 Cir. 1960). * * * NLRB v. R.C. Mahon Co. 269 F2d 44, 44 LRRM 2479 (6 Cir. 1959); NLRB v. Houston Chronicle Pub. Co., 211 F2d 848, 33 LRRM 2847 (5 Cir. 1954). In Lassing an employer had been toying with the idea of terminating its own transportation of the gas it produced in favor of utilizing a common carrier for this purpose, and had determined that any further increase in costs would dictate such a move. A union demand for recognition of three of its drivers foreshadowed just such an increase. The discontinuance of private carrier in favor of common was not found to be violative of Section 8(a)(3). NLRB v. R.C. Mahon, supra, was a similar

1 situation. There plant guards were discharged for
2 reasons of economy and the employer hired an
independent contractor to supply it with plant
protection.

3 The case of NLRB v. Houston Chronicle Publ. Co.,
4 supra, where the background situation was as
redolent with animosity as it was in the instant
5 case, is closest on its facts to our case. There
6 the Board found violations of Sections 8(a)(3),
7 8(a)(5) and 8(a)(1) when the employer changed its
8 system of newspaper delivery from one which it
9 controlled to one operated by independent contrac-
10 tors. As here, the corporation produced testimony
11 to show that the change was required by economic
necessity; but in the case before us that testi-
mony was not challenged. There it was. Neverthe-
less, on review the Court of Appeals held that the
Board's finding that the employer's act had been
illegally motivated was not supported by substan-
tial evidence, and that the real motivation was
the one of economic necessity.

12 48 LRRM at 2661-2662

13 In studying the NLRB cases, we find the Circuit Courts have
14 explored the use of the "but for" test from Wrightline, 251
15 NLRB No. 150, 105 LRRM 1669, 1980 and/or Mt. Healthy, 429
16 U.S. 274, 1977 in subcontracting where motivation is a
17 question. See NLRB v. Carbonex Co., 679 F2d 200, 110 LRRM
18 2566, 1982; Big Three Industrial, supra, Note 15.

19 The Montana Supreme Court in Board of Trustees of Bil-
20 lings School District No. 2 v. Board of Personnel Appeals
21 (Widenhofer), 604 P2d 770, 103 LRRM 3090, 1979, adopted the
22 Mt. Healthy "but for" test for dual motive cases under
23 Montana's Collective Bargaining Act. 103 LRRM at 3095.
24 Even though Widenhofer, supra, was a nonrenewal of a non-
25 tenured teacher case, I cannot see why the "but for" test
26 should not be used in this subcontracting case. In the case
27 at hand, we have dual motives, the School District's anti-
28 union animus (Findings 6, 10, 23, 24, and 25), versus the
29 School District's savings of \$25,169 or 25% savings of the
30 housekeeping budget (Finding 18). In addition, the Circuit
31 Courts in both Big Three, supra, and Rapid Bindery, supra,
32 appear to some extent to strike a balance between the inter-

1 est of the employer and the employees as is done in the "but
2 for" test.

3 The following facts support the argument that anti-
4 union animus was the motivating factor in the decision to
5 subcontract:

6 a. The conclusion of law that the Lockwood
7 School District did violate 39-31-401(1) by coercing
8 some of the bargaining unit members. (Finding
9 6).

10 b. Mr. Mueller's statement to the School
11 Board that subcontracting would eliminate the
12 necessity for the School Board to deal with the
13 Union. (Finding 10).

14 c. Mr. Mueller's statement and examples of
15 two comparatively lengthy grievance problems with
16 the School District. Later, Mr. Mueller stated
17 that one of the grievances was settled when the
18 School District did pay the employee and that the
19 second grievance was dropped by the Union.
20 (Finding 23).

21 d. Ms. Williams' statement about a hostile
22 meeting, a hostile statement, and poor evaluations
23 because of her Union activities. (Finding 24).

24 e. Ms. Klein's statement about the change
25 in management attitude about hours of work and
26 breaks after the Union started representing the
27 employees. Later, Ms. Klein agreed that the
28 collective bargaining agreement addressed hours of
29 work and breaks. (Finding 25).

30 The following facts support the argument that a \$25,169
31 savings or a 25% savings in of the housekeeping budget was
32 the motivating factor of subcontracting:

a. The housekeeping study was a standard
part of the budgetary process. (Finding 4).

b. The note in the bid specification indi-
cating that all bids would be rejected if there is
no projected long term financial or other advant-
age to the School District by subcontracting.
(Finding 15).

c. The School District saved \$25,169 or 25%
of the housekeeping budget by subcontracting.
(Finding 18). Mr. Mueller did not refute this
savings. (Finding 11).

d. Mr. Swanser's statement that the only
question addressed by the School Board concerning
subcontracting was the dollar savings. (Finding
26).

1 e. Mr. Espeland's statement that the sav-
2 ings of \$25,000 or 2 mills was the only consider-
3 ation when addressing the question of subcontract-
4 ing. (Finding 27).

5 Weighing the above evidence, I believe the above evi-
6 dence is closer to the evidence in R. C. Mahon Co., supra,
7 where the employer subcontracted guard activities for econ-
8 omic reasons than the evidence is in Liberty Homes, supra,
9 and Big Three, supra, where the employer was openly hostile
10 to the Union.

11 Weighing the above evidence by the "but for" test, the
12 record contains only a thread of evidence in Mr. Mueller's
13 statement, Ms. Williams' example and in ULP 18-1983, that
14 the School District would have not subcontracted the work if
15 the Union did not represent the employees. The School
16 District's evidence that it saved \$25,169 or 25% of the
17 housekeeping budget or 2 mills as a motivating factor far
18 outweighs the Union's evidence.

19 The Lockwood School District was motivated by the
20 financial savings. The Lockwood School District met the
21 "^{PURPOSE}~~COPIOUS~~ or intentions" restriction of the collective bar-
22 gaining agreement, Article 2 - Subcontracting.

23 4. Waiver of Right to Bargain by Inaction. In
24 Finding 23, did the Union grant the Lockwood School District
25 the privilege of subcontracting collective bargaining unit
26 work by not requesting bargaining on subcontracting, i.e.,
27 was there a waiver by inaction?

28 The U.S. Supreme Court in NLRB v. Columbian Enameling,
29 306 U.S. 292, 4 LRRM 524, 1939, teaches that a union cannot
30 charge an employer with failure to bargain when the union
31 has not requested negotiations. We also understand that the
32 union is relieved of its duties to request negotiation on
subcontracting if the decision to subcontract has already
been made.

1 In Finding 8, on March 4, 1983, Mr. Mueller had know-
2 ledge of management's intent to consider subcontracting and
3 written invitations to attend School Board meetings on
4 subcontracting. In Findings 9, 10, 11, 12, 13, 14, 15, 16,
5 17, and 18, the record demonstrates that the decision to
6 subcontract did not come about until June 21, 1983. Mr.
7 Mueller's statement in Finding 23 supports this conclusion.
8 Mr. Mueller stated he was hoping to the last minute that the
9 School Board would choose not to subcontract out the house-
10 keeping work. The Union was not relieved of its duty to
11 request bargaining on subcontracting because the decision to
12 subcontract was not already made.

13 In Finding 23, Mr. Mueller admits he never asked for
14 consideration or negotiation on subcontracting. Because of
15 the teachings of the U.S. Supreme Court in Columbian Enam-
16 eling, supra, we cannot find that the employer refused to
17 bargain about the question of possible subcontracting when
18 the Union did not request negotiations.

19 I reject any argument that the School District had an
20 obligation to request bargaining because the School District
21 was the moving party and was changing the status quo. The
22 School District must give timely and adequate notice of the
23 possibility of subcontracting which the School District did
24 in this case.

25 III. CONCLUSIONS OF LAW

26 Because the complainant, by written agreement, waived,
27 with restrictions, the right to negotiate over subcontract-
28 ing during the life of the collective bargaining agreement,
29 because the Lockwood School District's motivation to subcon-
30 tract the housekeeping activities was economics, and because
31 the complainant did not request bargaining over subcontract-
32 ing, a conclusion of law that Lockwood School District did

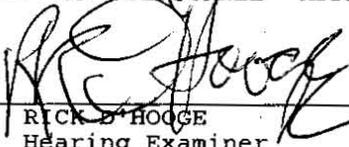
1 not violate Section 39-31-401(1)(2) and (5), MCA is in
2 order.

3 IV. RECOMMENDED ORDER

4 For reasons stated above, I recommend that ULP 9-1983
5 be dismissed.

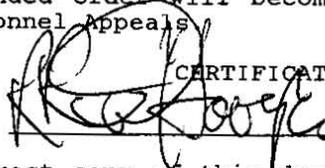
6 Dated this 28th day of May, 1984.

7 BOARD OF PERSONNEL APPEALS

8
9 By: 
10 RICK D. HODGE
11 Hearing Examiner

12 NOTE: As stated in the Board of Personnel Appeal's Rule
13 24.26.584, ARM, Exceptions, the parties shall have twenty
14 (20) calendar days to file written exceptions to the
15 Recommended Order. If no written exceptions are filed, this
16 recommended Order will become the Final Order of the Board
17 of Personnel Appeals.

18 CERTIFICATE OF MAILING

19 I, , do certify that a true
20 and correct copy of this document was mailed to the follow-
21 ing on the 28th day of May, 1984:

22 Emily Loring
23 Hilley, Loring P.C.
24 121 4th Street North
25 Suite 2G
26 Great Falls, MT 59401

27 Richard L. Larson
28 Larson & Associates
29 1733 Park Hill
30 Billings, MT 59102

31
32 BPA5:Drr