

CHAPTER 10

PUBLIC SERVICE WITHOUT PUBLIC SERVANTS

- Moderator:** **Howell L. Lankford**, National Academy of Arbitrators, Milwaukie, OR
- Panelists:** **Tracey Thompson**, Teamsters Local 117, Seattle, WA
Todd Lyon, Barran Liebman LLP, Portland, OR

Howell Lankford: I'm sure it is not news to anybody here that public sector union density has increased over recent decades as private sector union density has declined. And it's also not news that bits and pieces—sometimes very substantial bits and pieces—of what was once public sector work has been shifted to private sector employers. Thus, our topic this afternoon, “Public Service Without Public Servants.”

Both of our speakers have extensive first-hand experience with this issue. Tracey Thompson is the Secretary-Treasurer of Teamsters Local 117, one of the largest International Brotherhood of Teamsters locals in the country, which represents both public and private sector employees—from cab drivers to police officers and Washington's massive Department of Corrections. Tracey is closely involved in all three parts of the administration of Local 117: organizing, bargaining, and grievance arbitration. Todd Lyon and his highly respected firm, Barran Liebman, represent both private and public sector employers in Oregon and Washington. Todd is commonly involved both in deciding whether or not to subcontract public sector work and in seeing his clients through the consequences of those decisions.

We're going to start out with a general discussion of the topic, and then turn to some concrete examples of the sorts of disputes that these outsourcing decisions generate, which find their way into grievance arbitration. Finally, as a sort of second wave, we are going to look at the sorts of interest disputes that these grievances sometimes produce in an attempt to tighten up the collective bargaining agreement language that generated them.

Tracey Thompson: We thought what we'd do is talk about what's happening with respect to public employment and outsourcing. This includes what the theories are, why it's done, why it's bad from my perspective, and why it's good from management's perspective.

I represent workers in the State of Washington, including 6,000 State of Washington correctional employees. The number of Washington State employees has dropped for five consecutive years from 66,883 to 58,635, even as the state population they serve has grown by 1 million citizens. Since 1999, the federal government has been relatively stable, but the number of federal contractors has increased significantly from 4.4 million to 7.6 million. In 2005, for example, the federal government's annual spending on private contracting was \$377.5 billion.

We all know that the unionized workers are becoming fewer and fewer. The percent of the unionized public sector, which is the largest percentage of the unionized work force, declined in 2012 to 35.9 percent from 37 percent the previous year, and unionized private sector workers declined from 6.9 percent to 6.6 percent. Obviously, one of the concerns that we have as a union is that as you move from the public sector to the private sector, you're often moving from a unionized work force to a nonunionized work force.

Todd Lyon: We also took a look at the studies on the density of public sector unionization and the public sector work force. What we found was that public sector employment has actually decreased by over a half million jobs since the end of the recession. That has resulted in more than 200,000 fewer teachers, 50,000 fewer policemen, and 6,000 fewer air traffic controllers. What we also saw was an unprecedented contraction of public sector employment. Importantly, in past recovery periods of any recessionary period, there were always greater numbers of folks being employed in the recovery. But, in this recessionary period, we found that it was the opposite—that the recovery has not resulted in an increase in jobs, despite the history of the recovery.

Why is this? Fundamentally, from the employer's perspective, there is a major shortfall in public sector budgets. According to a recent study for just 2013,¹ 31 states saw budgetary shortfalls totaling \$55 billion. From personal experience in having to bargain

¹Center on Budget and Policy Priorities, June 27, 2012.

public sector contracts, this is the bane of my existence in bargaining when I have to explain that we have a \$6 million shortfall. Not only can we not afford to pay increases, we also have to lay off in order to meet our budget. This budgetary shortfall is, indeed, the driving force from the employer side.

Tracey Thompson: So what does public service without public servants really mean? What it means is privatization—the privatization of either the provision of public services or public goods. And privatization generally means the use of the private sector to provide a good or service including financing operations and quality control that had been provided by the public sector.

What we are seeing is a lot of different ways in which governments are privatizing. Divestiture, load shedding (they're actually getting rid of assets), contracting for goods, contracting for services, which is outsourcing (and in our world, that's where we see the most impact on our members), vouchers, school vouchers, things like that where public dollars are going to a private entity to provide what would normally be a public service. Other types of privatization include quasi-governmental entities, government-owned contractor-operated enterprises, third-party financing, and grants to private parties, such as a grant of land to be able to build a school for the deaf that's run privately. Another type is prize competitions. For example, the Department of Defense (DoD) had this prize for whoever could creatively build the fastest non-manned vehicle. The DoD gave a cash prize, which meant that they weren't using their own internal resources to develop the technology; they were using outside sources. Finally, governments are more frequently using volunteers. I'm sure many of you have seen grievances related to employers who have shifted from employees doing work to volunteers doing the work.

It's happening everywhere. There have been dozens of privatization initiatives implemented: waste water treatment, transportation infrastructure, education prisons, and prison services, health care and other human services, government building, municipal maintenance, emergency services. Really, across the spectrum of what we would normally view as public service, you now see privatization occurring.

Howell Lankford: Just to be the devil's advocate for a moment, is there really a bright line between a "public" service and a "private" service? I will give you a couple of examples. My first ever case, with the municipality of Anchorage over a quarter of a

century ago, arose in the Anchorage Municipal Telephone Company because Anchorage used to provide telephone service for its citizens. They have since spun that off. Was that a public service that was spun into the private sector, or was it a private service that was once upon a time performed by a public entity? Similarly, the City of Tacoma is still in the business of power generation and operates its own power plant with public employees. The State of Washington provides internal telephone service for the entire state office area. In doing that, it has some switching equipment and software that would make a small town telephone company absolutely green with envy.

At least when the choice is between public service and regulated industry, hasn't there always been room for argument about that choice?

Tracey Thompson: Todd and I are talking in absolutes when we are giving our perspective about privatization. You know the union's perspective is that absolute privatization is bad. This is my political bent: privatization is a union-busting strategy. I believe it firmly. One of the best examples of this is the American Legislative Exchange Council (ALEC), which is an intermediary, a nonprofit matchmaker for corporations and politicians, whose purpose is to encourage and facilitate privatization of public services or public goods. They've put forth a model Employee Freedom Act for public employees, wanting to eliminate dues deduction and union security. The goal is to limit federal authority on a lot of issues and put the model in the states, because there's a lot more ability to engage in privatization with states than with the federal government.

Ultimately, what happens is collective bargaining rights are eliminated, and we've seen that happen in many states over the last couple of years. Wages are driven down, and profits are driven up for the corporations. From the union's perspective, we see that is a very bad thing.

Todd Lyon: From the employer's perspective, this is primarily cost driven when there is a need to reduce services or privatize work. We don't see it as a union-busting technique. Indeed, many of the corporations that end up performing this work, whether they are First Student² for bus transportation, custodial services, or garbage and recycling collection, those corporations are fully

²A nationwide school bus company.

unionized. The notion that that would be a tactic to eliminate collective bargaining rights is foreign to me.

Tracey Thompson: The Chicago Skyway toll takers were Teamsters. They had good union jobs. When the Skyway was privatized, part-time employees were hired, non-union with no benefits and low wages. We're talking in absolutes, which is not really fair. But it's intended to give you the margins and the extremes, because there's so much going on. We want to provoke your thinking on this.

Another reason why the union thinks privatization is bad is lack of accountability. The Progressive States Network did a 50-state comparison of privatization.³ While the study is a little outdated because it's 2007, it's really interesting to be able to see which states are actually engaged in privatization and how much privatization there is in a particular area—whether it's transportation or prisons or human services. Once a government or public entity hands over to a private corporation or a nonprofit management of what would normally be a public service, there's very little accountability between the entity and the government agency. That has resulted in some really extreme stories and some significant problems. If there is going to be privatization, one of the things the union would say is you have to build in accountability with respect to those entities that are performing the work.

Privatization undermines the function of government. When you sell, lease, or somehow hand over the provision of a service to a third party—to a corporation—the corporation is not motivated by the mission of the agency, the government agency. They're motivated by profit. Corporations take on the provision of goods and services because they're going to make money. There's a profit-driven motive and therefore an associated lack of control by the government agency.

Howell Lankford: And sometimes government gets an increase in control in the sense that it can achieve through the contracting process some control goals it never could get at the bargaining table. That sometimes happens by putting those conditions into the Request for Proposal (RFP), so that they become part of the eventual subcontract. For example, school bus drivers who used to have seniority rights to various sorts of runs—when the school bus operation was done by the district itself—find that the RFP and

³<http://www.progressivestates.org/pubs/reports/privatizing-in-the-dark-the-pitfalls-privatization-why-budget-disclosure-needed>.

the resulting subcontract for the school bus service eliminated those seniority rights.

Tracey Thompson: Let me give you some examples of where privatization has, in the union's view, promoted waste, fraud, and abuse. There was a series called "Unlocked" in *The New York Times* about the New Jersey halfway houses. In the past decade, about a half a billion dollars has gone to two nonprofits to provide halfway house services to the State of New Jersey. These are offenders who have served their time in prison and who need transitional housing. This is where they're getting their feet on the ground and learning how to get back into society. There have been 500 to 600 escapes from the halfway houses in a given year. Offenders walk away from the halfway houses with no one reporting their escape, commit egregious crimes, and then they return to the halfway house. These nonprofits that the State of New Jersey is paying to perform these services are giving themselves handsome salaries. The head of Klintock Group earned \$781,000 a year. Then, this other group, which has the majority of the halfway house work in the State of New Jersey, is a funnel for dollars to the community education centers, which is politically connected to the governor of the State of New Jersey. We see that kind of arrangement as something that is inherently bad. Where you've got this nonprofit status, but these people are actually making a great amount of money and they're not providing the service that they should be providing to the citizens of New Jersey. That is bad public policy.

Then, there's the Indiana public benefits eligibility issue. In December 2006, Mitch Daniels, the governor of Indiana, entered into a \$1.16 billion, 10-year deal with an IBM-led consortium to provide eligibility review and claim processing for public benefits. The name of the consortium is Hoosier Coalition for Self Sufficiency. Rather than providing service that was at least as efficient as the state had provided, there were long waits on claims, people were kicked out of the system, people were severed eligibility for food stamps and Medicaid for no reason, and there was slow approval of claims that were eventually allowed.

In the summer of 2009, the new head of the Family Services Administration acknowledged problems with the privatized system and asked for the consortium to develop a corrective action plan. The consortium said they needed another \$180 million in order to do what they had been hired to do. Indiana paid them, and then three months later, severed their contract with this consortium. Governor Daniels called the fully privatized system a

failed concept. In the meantime, all those people who depended on the safety network of food stamps and Medicaid were incredibly disadvantaged.

Howell Lankford: So, Todd, do you find when you are called in to deal with a privatization decision, how often do you encounter at least a record that the public employer has paid some attention to anything other than the net cost of operation?

Todd Lyon: Often. The instances where I have bargained the subcontracting or privatization of functions of government, the employer put it out for RFP. The managers involved specifically went out and researched other operations in that area of the contractors that had submitted bids to find out—firsthand—what that company's experience was with the projects, by actually visiting other sites that they had built. It's, in my experience, not exclusively a cost item, and there may indeed be recent examples of fraud and waste. The good news about all of this from the employer's perspective is, if it's not working, then the employer or the agency can take the work back and end the contract, which it sounds like Indiana eventually did. It's not like the work or the function is forever gone once it's subbed out. If it doesn't work, they can take it back and regain control of it.

Tracy Thompson: One of the things that is a really important part about this is maintaining a level of control by the government agency. Take the Chicago parking meters. Chicago entered into a 75-year lease on its parking meters. As a result, Chicago has the highest per-hour cost for parking in the country, because there is no cap on how much the lessee can charge for parking. The lessee makes its money by raising the rates to park. Further, the lessee charges for lost revenue when the city takes control of its streets. When Rahm Emanuel came in as mayor of Chicago, he received bills from the lessee for millions of dollars of lost revenue when the city closed a street due to a street fair or for too many handicapped citizens parking for free. It's those unknown costs that are really problematic.

There are a lot of examples and studies that show that privatization actually does not lead to cost savings in the long run. In the short run, when you have a state or an agency that has a serious budget shortfall—they have to have a balanced budget like the state of Washington does—\$1.16 billion inflow for privatizing your benefits eligibility and claims process, like Indiana did, certainly looks good. The question is whether it makes sense in the long run.

Todd Lyon: I have an agency right now that just put to the voters a levy for increase in taxes. The council said that if you don't pass the levy, we will need to close swimming pools and libraries, and reduce detectives from the police department. The levy did not pass. So, now the city council is faced with all these kids coming in to city council meetings with their goggles and their swimsuits on, asking the council to not close our pools. The question for those agencies where they are facing those incredible budgetary short falls is what do they do even in the short term to bridge a \$6 million gap? Oftentimes, my clients are looking to this privatization tool to say let's find a way to get us through this problem.

Tracey Thompson: The problem is with state legislatures that are afraid to take strong steps and pass revenue measures. They have the authority to do it; they don't need to ask the voters to approve it through a levy. But, rather than take politically unpopular action, elected officials abdicate government function to a private party, even knowing that that private party is going to increase the cost of utilization—the cost increase is going to be borne by their citizens. Although it may appear to make sense to privatize, the problems of budget shortfalls could be solved more appropriately by politicians acting boldly.

Todd Lyon: The first advantage to outsourcing from the agency or the employer's perspective is cost savings. It's easier and more efficient for someone like Laidlaw or First Student to come in and handle the bus service than it is for some tiny school district to try and purchase, maintain, and run five buses, when First Student can come in on a contract basis and provide that service because they've got the economy of scale already locked down. Of course, there's a reduction in overall compensation for employees. Taking that money out of the budget is a very huge advantage for the agency.

Why are there cost savings? Private companies are appropriately motivated by cost and profit, because if you're a contractor and you want to get the contract from the agency, you're going to be providing a good quality service. If you are a terrible contractor and you've got that reputation, that agency is not likely going to award that contract to you. It's not exclusively motivated by economics; it's also motivated by the quality of service and the profit motive drives that quality of service as well.

How much in savings? There are a number of research studies that have gone on to examine how much privatization actually saves a public sector agency. The highest value of that is the

30 to 50 percent.⁴ A more conservative analysis was by Graham Graeme Hodge, who is a noted skeptic of subcontracting. According to that study, it was an 8 to 14 percent cost savings.⁵ It's a wide range, but at least it does confirm that there can be a cost saving in privatization.

Tracey Thompson: What I have not seen is data proving that there is a cost saving, not only to the agency, but also to those to whom the services are being provided—the public. We're focusing on a cost savings to the government entity.

Todd Lyon: Let's consider some real-world examples. In Florida, Governor Jeb Bush saved more than \$500 million and avoided the \$1 billion future cost by privatizing various aspects of public service, prisons, toll-ways, janitorial, and state personnel's human resources (HR) functions. He even subbed out that HR function.

In Chicago, Mayor Daley privatized over 40 city services, and the curious thing that Daley did, which got them into trouble with the parking meter thing, is that they demanded upfront cost. The contractor actually paid the city up front. Then there was the quid pro quo that the contractor could collect the money and keep it.

Fairly recently, Indianapolis saved \$400 million by outsourcing 80-plus city services. So these are, indeed, real examples of cities trying to tackle their budgetary short falls.

Tracey Thompson: I will note that Indianapolis also outsourced their water system.

Todd Lyon: Some other benefits of privatization from the employer's perspective or the agency's perspective are an improved quality of service and access to specialized services. This is especially true for small school districts offering bus service. They may not have been very efficient or very good at it. But, if you add it to the work of a contractor who does this work regularly, they know how to dispatch, they know how to route, they know how to handle school functions that are after school, and they know how to appropriately source those out and staff those, so as to not have overtime cost.

The next benefit would be operational flexibility, which may be dirty words for the union. But, from an employer's perspective, this is significant. Having that operational flexibility to provide the service through a contractor is very valuable. It's not a union-

⁴Datamonitor Research.

⁵Graeme Hodge, 1999.

busting technique, because having that flexibility could mean relying on contractors that are unionized anyway.

Tracey Thompson: The best thing would be to require your contractor to be unionized.

Todd Lyon: We want to note that each state may have some particular limitations or speed bumps to be aware of in privatization. In Oregon, for example, there was a recent statute passed about two years ago, mostly championed by Service Employees International Union (SEIU), where there is a requirement that if an agency decides to subcontract for a service that will cost over \$250,000, they must first do a cost analysis of that subcontract. Oregon also has a preference for subcontractors.

Tracey Thompson: Washington also enacted legislation in 2011 that requires the Office of Financial Management to assess every service that is performed and to determine if the private sector could do it in a more efficient and cost-effective manner. Most states seem to be leaning toward privatization; they may be able to privatize in order to become more cost-effective and more efficient.

Howell Lankford: Questions and comments from the audience?

Audience Member: Why isn't there greater political pressure not to privatize?

Tracey Thompson: There doesn't seem to be enough political pressure from citizens on politicians because everybody is focusing on budget shortfalls. How do we fill the gaps? The message is certainly being controlled. Citizens are hearing that we need to come up with ways to save more money, so that we can close this budget gap and move forward into the next biennium—and privatization is the way to go. As with the New Jersey halfway houses, with more light being shed on the problems that are resulting from privatization, you'll likely see more pressure from the electorate. But right now, everybody's still in that crazy recession budget deficit mode. It's scary because it opens the door for incredible opportunism from private companies that swoop in to "save the day," and then, all of the sudden, they own much of our public infrastructure.

Todd Lyon: The greatest drain on an agency's general funds is the personnel costs—the wages and benefits. It's hard for the public to get behind an effort to say that we don't want our firefighters to get a 3 percent raise in this economy in order to save more money in general funds. How are they going to get behind that to ensure that there are enough general funds to keep the libraries open and the parks and the swimming pools? It's a dif-

difficult thing for the public to get behind. In regard to the levy, the public became very much aware for the first time of their budgetary problems. Even though it did not pass, now the public is really engaged in how the city is spending its money.

Audience Member: How often does the union follow the work, so as to represent the employees in the private sector?

Todd Lyon: We talked at length about that and we did try to find studies about that. I can tell you from personal experience, that the public sector subcontracting that I have been involved in—especially in the bargaining side of things—we’ve actually included in the RFP’s provisions that the contractor must hire all, or at least offer all, of the existing city employees, that were being subjected to the layoff due to subcontracting. We bake that right into the RFP that the contractor would have to take those on. I don’t know how many agencies are willing to do that or have the wherewithal to have done it while in bargaining with the union, because the RFP had not yet been completed.

Audience Member: If a union follows the work into the private sector, doesn’t that actually increase private sector unionization?

Howell Lankford: It would be interesting, wouldn’t it, if subcontracting of public services actually led to a slight increase in overall private sector union density as unions followed their previous members from the public sector into the private sector?

Tracey Thompson: Folks get hired by the private company or the charter school at a lower wage with lesser benefits. That does create a possible organizing opportunity from the union’s perspective.

Audience Member: Can the parties simply prohibit subcontracting?

Tracey Thompson: I haven’t seen that actually written into a collective bargaining agreement. The whole point of collective bargaining is for the union to have the opportunity to have a say in how the work can be done in a cost-efficient manner. The Union says, “We can come up with different ways. Don’t outsource. Let us have the opportunity to do this work. This is how we’ll do it.” I’d actually really like to see that language.

Howell Lankford: Part of the limitation on that approach is that the union is stuck with the public retirement program costs for its public sector members. If it has to compete against bids of an employer who is free of retirement program cost, it’s starting something like 16 percent in the hole, unless the private employers are providing competitive retirement benefits. I’ve had several

interest arbitration cases that involved comparison of public sector benefit packages and private sector benefit packages, and I have yet to see anything like competitive retirement benefits in the private sector, at least in the Northwest.

Audience Member: Do agencies ever subcontract work to the private sector to avoid interest arbitration?

Todd Lyon: I have not seen that. I might see it in the context of Oregon, for example, where we have transit as being entitled to interest arbitration. There are a number of agencies that continue to try to sub out the transit for especially paratransit,⁶ because they just don't have the technology, the machinery, or the equipment to handle that. But, I don't ever recall seeing or hearing that there's an interest in contracting it out in order to avoid interest arbitration.

Hoyt Wheeler: Can't agencies reduce wages instead of subcontracting?

Tracey Thompson: I totally agree.

Todd Lyon: It's a challenge to effectuate a wage reduction, particularly in groups that have interest arbitrational rights. Because interest arbitration essentially is awarding the same pay as everyone else gets. For example, in interest arbitration, even if there are geographical differences in wages, the arbitrator is likely to award a raise in wages if all other jurisdictions have agreed to an increase. So it's frustrating for employers, as they look at comparators⁷ and try and figure out who's going to cause the interest arbitrator to continue a pay increase.

Tracey Thompson: As privatization increases, as it has and will continue to do, the income inequality in our country will just continue to expand. It's really sad, and it's also really scary. That is the objective of groups like ALEC because profit is the ultimate objective. Oftentimes, the way you make money is by driving down the wages.

Howell Lankford: Hoyt, your comment about general economic theory and the choice between decreasing wages or decreasing compensation, or simply subcontracting to decrease compensation, presents another really interesting suggestion about this entire topic. Are we really looking at just a tiny part of a bigger picture—the bigger picture being subcontracting in general—

⁶Transit for the disabled.

⁷Other public agencies performing the same or similar work as the subject agency.

never mind whether we're talking about the change of the work from the public sector to the private sector?

I've had a series of cases over recent years involving subcontracted portions of large industrial organizations. The subcontracting in those cases has led to single customer companies that subcontract with what was originally the overall company. The result of that sort of captive subcontractor situation is that it's possible for what once was a very large company to force certain sorts of employee burdens on the employees of its new subcontractor. That's a purely private sector feature, where you find that the XYZ Manufacturing Company used to do its own transportation, and now it's spun off the transportation function. Drivers who used to get paid for wait time, for example, when they were part of the XYZ Company, find that the deal between the new subcontractor and the XYZ Company allows XYZ to refuse to reimburse its captive subcontractor for wait time. That's exactly the sort of use of the RFP/subcontracting approach that you find when you're talking about subcontracting from the public sector to the private sector. Maybe we're taking a particular view of what is really a rather larger problem.

Audience Member: Can the public agency be liable if it subcontracts to avoid the union?

Tracey Thompson: Yes, I'd make a joint employer argument on that one.

I agree with you that it smacks of union avoidance. I do think there's an element of liability. If the contracting entity is retaining that much control to determine who this contractor is going to actually employ, I, as a union, would make the argument that an employer could try to get at the governmental entity that way. There is some liability.

Audience Member: When are the unions going to take a stand against privatization?

Tracey Thompson: It's really, really challenging. What you're going to see more and more of is a "taking it to the streets" action. SEIU is doing the low-wage, fast-food worker, Walmart campaigns across the country. They're not even looking to be unionized. For example, we've entered into agreements with independent contractors, which is another whole problem, where we're a service provider for an association of independent contractors. They can't belong to our union because they're not employees, but we're providing representational, lobbying, and political efforts. So, we're looking at new models. It's about activating workers

and getting them to understand that it's just going to be a further decline to the bottom if they don't start getting engaged.

At some point, there's going to be a tipping point. For the longest time, I've been hearing that people who don't have benefits and who have part-time jobs are looking at unionized workers and saying, "You shouldn't have that, I don't have it," rather than saying, "I want what you have." This change in attitude is really challenging for unions. We're trying to be more creative.

I was telling Rich Ahearn, who used to work for the Labor Board, that now that the Labor Board has no authority, we should do secondary boycotts. We should do all sorts of things because nobody can slap our hands since there's no authority on the Labor Board. Maybe we'll just start going crazy.

Todd Lyon: Except under Section 303 for federal lawsuits for secondary boycotts. But that's a different story.

Audience Member: Aren't public agencies and union interest inherently at odds during the recessionary periods?

Tracey Thompson: I had a meeting with former Washington Governor Christine Gregoire when she was in office. We were fighting about money for corrections, which I was always trying to get. She said, "Where do you want me to get it from? I have to balance the budget this biennium. You know that is what I have to do." I said, "But you're going to have problems three bienniums out." "That's not my concern. I can't worry about it," she replied. "My constitutional obligation is to balance the budget this biennium." That's what we hear, but it is such a short-term look. Municipalities, local government, states, find that their hands are really tied because they've got to come up with a budget based on the dollars that they have in hand. They can't worry about the future, and that's a scary thing.

Todd Lyon: In terms of some of the municipalities that I represent, they're looking to tap into the reserve funds, which will solve the problem for only six to nine months. What we get then in interest arbitration or negotiations is that you've got this big fat rainy-day fund, mister employer. Why don't you tap that and pay us the 3 percent wage increase that we're asking for? It's a very difficult struggle to do that in long-term analysis. Many of the agencies that I work with do have a five-year, sometimes a 10-year plan, but they're operating on such skeletal full-time equivalencies, so that it's hard for them to imagine where they're going to be in five years down the road.

Tracey Thompson: There are some incredible opportunities for unions and governments to work together on solutions. We bargained with King County health care, in Seattle, King County, over health care savings and achieved \$47 million in savings over the course of a three-year period. Now we have a \$25 million set-aside to protect premium increases. It was wellness programs and agreeing to things such as incentives. There are opportunities—if municipalities would engage—for unions to really come forward and work together to help fill those budget shortfalls, especially in the long term. The immediacy of “I’ve got to get my budget passed in three months” is really a challenge for everybody.

Howell Lankford: Now we’re going to take a look at some grievance situations that illustrate contract interpretation issues that arise as a consequence of contracting out. Here’s the first one:

Suppose that you showed up this morning, ready for what could have been an all-day hearing, and it actually only took about 90 minutes. There were two witnesses, hardly anything in controversy. What we have discovered is the grievant, Carl, works for the streets and grounds department of the public utilities division. Carl is a maintenance technician. He’s really good. Carl can fix absolutely anything mechanical, but he is really bad with human beings. Carl is just not that great a coworker, but he’s really good with machinery. So, the city decided to outsource its equipment maintenance services. Carl’s job went away, and Carl was laid off. The union grieved, arguing that Carl should have been permitted to bump into a water-utility clerk position in the water department of the public utilities division. But customer service deals with human beings all day, every day, solving problems, addressing complaints, and dealing with new accounts.

Here’s what the contract says, “If the city should reduce its work force, layoffs shall be made within each job classification of the department or division based on seniority.” No dispute that they’ve done that, right? “An employee laid off in a classification or division may exercise seniority rights by bumping laterally or lower into another classification provided,”—and here’s where the mischief comes—“skills and training standards for the new classification can be met.” We have no bargaining history on this language. As with many layoff cases, the language has been there forever. The memory of man extendeth not to the contrary as they said in the common law. We have no prior experience with layoff, so there’s no illuminating data about how this language has been administered in the past. That’s your complete record.

Now for closing arguments.

Tracey Thompson: From the union's perspective, the language here is really clear. It protects senior employees' right to continued employment. That is what this language is intended to do. The question is simply whether Carl, a dedicated, excellent, 20-year career employee, has the ability to meet the skills and training standards. The position requires only a high-school equivalency. No special skills are identified. While Carl has not worked in this position before, he certainly has demonstrated technical skills and ability. This is a 20-year public servant. Our contract gives him the right to bump a less-senior employee and continue his long service with the city. The union strongly urges the arbitrator to sustain this grievance.

Todd Lyon: The reason for the subcontracting was indeed because the city is facing a budgetary shortfall and had to subcontract that work. As a consequence, Carl was laid off.

One other area of mischief, as Howell said, with regard to the language, is found in bumping laterally or lower. When we're faced with a layoff, we don't intend that employees can just bump whoever they want, wherever they want, whenever they want. (The contract cites the need for qualifications to do another job.) As a public employer, we need to make sure the service is provided, provided timely, and performed well. We don't have the time these days to afford an employee a long period of on-the-job training as we may have in earlier times. Here, we find that he doesn't have the skill set for the new job.

Here the language talks about whether he's got the ability to have the skills and trainings to be met. He's a misfit. He's not going to be able to perform this work. He was a groundskeeper before and maintained the equipment, and now we're talking about putting him in front of customer service, where he's got to be responsible for complicated computer programs; monitoring the pays, the bills, and the receipts; and dealing with customers. We just don't think that Carl should be allowed to bump.

Howell Lankford: For the audience, a green card means that you would sustain the grievance. A red card denies the grievance. What is your vote? Green. Carl gets his job in the customer service function.

Tracey Thompson: Mostly green.

Howell Lankford: Here's the next case:

The small county's wall-to-wall unit, where the union represents all the employees in the county, except for police and fire and cor-

rections. The union represents the county painters as part of the unit, and the painters are on layoff. The county laid off the entire painter function. The county has a community health building that has a bunch of holes in the walls, and kicked floors, and scuffed surfaces. It has contracted with a private firm to fix up this building. That firm is going to fix the holes in the walls, paint the resulting plaster patches, and fix the baseboards. The collective bargaining agreement is absolutely silent on this topic of subcontracting. The union grieves, claiming that the county was obliged to recall the painters rather than use a third party.

Here's the recall language: "No new employee shall be hired until all laid off employees have been given an opportunity to return to work. Employees laid off for a period for more than 36 months lose seniority credits in recall. Employees recalled within 36 months shall be recalled according to seniority and may be required to attend refresher training. Refusal of recall..." The magic sentence is "no new employee shall be hired until all laid off employees have been given an opportunity to return to work."

Tracey Thompson: From the union's perspective, there's an implied right against subcontracting here, even though there isn't a specific prohibition on subcontracting. Otherwise, the rights set forth in the contract are meaningless. Job security is an inherent element of our labor agreement. We address that by ensuring that folks who were laid off due to lack of work had the opportunity to come back when work became available. Here, work became available. In terms of patching walls, this is the work that the painters always did. They didn't just have a paintbrush. They patched what they needed to patch before they painted. They were readily available to perform the work, skilled to perform the work. There's no justifiable reason for the employer not to recall these employees. The whole point of having this language and this long protection is to ensure that, when there are cycles of lack of work, that these municipal employees have the right and the opportunity to return to perform their work and to earn their wages.

Now, the employer may make the argument that they didn't hire any new employees; they simply hired a subcontractor. From my perspective, they were directing the work to be done. It was work done in their facilities. Even though they weren't ultimately paying the salary of those employees, they were paying the subcontractor to perform the work. The intent of the language is clear: if there's work to be done that these painters could do, the painters needed to be recalled.

Todd Lyon: From the employer's perspective, the union had ample opportunity to bargain a prohibition on subcontracting, but they didn't do that, nor did they do it here in this language where it says no new employees. Subcontracting does not involve actual employees of the county. Importantly, as Tracey pointed out, there is no prohibition on subcontracting. The employer is free to do so. More importantly, it's reasonable for the employer to subcontract out this work.

Where budgets are in crisis, we need to look for ways to save money. Hiring back employees in a full-time capacity at their high-wage rate is not cost-effective for us. We need the operational flexibility here because these folks that did the work are trained. They have special skills in this. Indeed, that's their overall function. They did the patching of walls. They fixed the floor moldings. Those are some things that the painting crew would not otherwise perform.

Then, the subcontractor brought the specialized skills not available to the laid-off painting crew. And, finally, as the union points out, certain cycles of work are appropriate for employees to be hired. However, this was a small, temporary assignment. It was not an ongoing kind of project that would have justified the employers rehiring of these employees, because it really was a *de minimis* project and a one-time event.

Howell Lankford: Green card means sustain the grievance. Red card means dismiss the grievance. What is your vote? It looks pretty close—even split.

Now we're going to take a look at the bargaining consequences of those two grievances. Regardless of what your decision was in these two cases, it will probably not surprise you to find that neither of the parties was very happy with it. Therefore, we find ourselves in the next round of negotiations with a couple of fix-it proposals.

The union proposes to replace the squishy skills and training standards for the new classification with the language that employee must meet the minimum qualifications for the position. So the paper-screening people have the last say in the appropriateness of the bump. The employer proposes to replace that squishy language with "You may bump only if the employee completed probation in the position they are bumping into, held the position within the last two years, and has all the qualifications presented in the job description."

We're going to make believe that this is a new form of interest arbitration. We are inventing it here. This is called last best offer issue-by-issue fly-on-the-wall. Based on what you have heard in the grievance arguments, how many people would give the union its proposed change?

Tracey Thompson: It's pretty close.

Howell Lankford: Same pattern for the second example. The union proposes to change the contract language to "no new employees (full-time, part-time, temporary) or third parties shall be hired until all laid off employees have been given back their jobs." The employer proposes to add "no new employee shall be hired until all laid-off employees have been given an opportunity to return to work in his or her former position for which ongoing work is available.

What is your vote? Red card for the employer proposal, green card for the union proposal. Looks like the audience votes in favor of the union proposal.

Unfortunately, we have a lot of questions and discussion still on the floor, but we have no more time on the clock. So, our thanks to Tracey and Todd for three rounds of spirited discussions, beginning with what the parties see at stake, in general, in decisions to send work out of the public sector, and then moving to looking at those principles in play in a contract grievance context, and, finally, looking at them again in interest arbitration.

From the union's point of view, these decisions always discount the inevitable detriment to the employees and are often made to avoid the public sector union. From the employer's point of view, shrinking public sector budgets and rising demand for service make partial privatization an attractive choice. I'm sure Todd would say "a compelling choice." And from the arbitrator's point of view, we end up with layoff and subcontracting contract grievances, and also with interest disputes in which the interest and welfare of the public is always a significant factor.

So, thanks again to Tracey and Todd, and thank all of you for your attention and comments.