BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
HOTEL AND RESTAURANT EMPLOYEE'S UNION LOCAL 414	
and	Case 4 No. 43378 A-4569
PROFESSIONAL FOOD SERVICE MANAGEMENT	

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Mr. John J. Brennan, appearing on behalf of the Union.
Laser, Schostok, Kolman & Frank, Attorneys at Law, by Mr. Michael Lee Tinaglia, appearing on behalf of the Company.

ARBITRATION AWARD

The above captioned parties, hereinafter the Union and Company respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was transcribed, was held on March 14, 1990, in Oshkosh, Wisconsin. The parties filed post-hearing briefs which were exchanged on June 4, 1990 whereupon the record was closed. Based on the entire record, I issue the following Award.

ISSUE

The parties stipulated to the following issue:

> Does the collective bargaining agreement allow for the unilateral subcontracting of bargaining unit work?

PERTINENT CONTRACT PROVISIONS

> ARTICLE 1. UNION RECOGNITION
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> The Employer recognizes the Union as the sole collective bargaining agent for the employees covered by this agreement, and the Union agrees that the employees shall work for the Employer upon the terms and conditions set forth in this agreement.
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> ARTICLE 2. UNION JURISDICTION
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> The Employer recognizes the Union as the exclusive bargaining agent for all employees working for the Employer at the University of Oshkosh, (sic) Oshkosh, Wisconsin excluding all office clerical employees, guards, managers, assistant managers, casual employees, students and supervisors as defined in the National Labor Relations Act.
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> . . .
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> ARTICLE 6. UNION SECURITY
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> It shall be a condition of employment with respect to all employees of the Employer, who are within any job classification hereafter set forth and identified and in the bargaining group of the Union, that all said employees who are members of the Union in good standing on the effective date of this agreement shall remain members in good standing of the Union; further, that any of said employees who are not members of the Union on the effective date of the agreement shall, on or after the 31st day following the effective date of this agreement become and remain members in good standing in the Union. It shall also be a condition of employment that all such employees covered by this agreement and hired on or after its effective dates shall, on or after the 31st day following the beginning of such employment, become and remain members in good standing in the Union.
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> . . .
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> ARTICLE 8. SENIORITY
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> Seniority rights shall prevail based on length of service,

ability and qualifications. The Employer alone reserves the right to determine ability and qualifications. Seniority shall be defined as the length of service as of the employee's most recent hire date with the Food Service Department at the University of Wisconsin, Oshkosh, Wisconsin.

Seniority refers to both full time and regular part time employees.

An employee's seniority will be broken by the following:

1. Discharge for just cause.
2. Voluntary quit.
3. Absence from work due to layoff for a period of one year.
4. Failure to report to work within three (3) calendar days after receiving written notifications to return to work following layoff.
5. Failure to return to work in accordance with the terms of a leave of absence.
6. Absence from work for three (3) consecutive days without advising the Company.
7. Falsifying reason for obtaining Leave of Absence or engaging in other employment during such leave.
8. Receiving settlement for total disability.
9. Falsifying pertinent information on application of employment.

. . .

ARTICLE 13. MANAGEMENT RIGHTS.

The Right to employ, layoff, promote, transfer, assign work, schedule work, discipline and discharge employees for just cause is reserved by, and vested in, the Employer. The Employer shall have the right to dis-continue any department and reduce the personnel of any department. Employees shall observe the reasonable rules and regulations established by the Employer whether printed, posted or given orally, not inconsistent with the terms of this agreement. The Union agrees it will exercise due diligence in encouraging and insisting that its members observe such rules and regulations.

. . .

ARTICLE 22. MISCELLANEOUS

. . .

7. At no time will a student employee replace a regular full time or part-time employee replace a student employee (sic) on a permanent basis.

FACTS

The Company is in the business of contracting food services primarily in college and university accounts. In August, 1988, the Company entered into a contract with the University of Wisconsin - Oshkosh to run the food service operation. Shortly thereafter the Company negotiated a contract with the Union. The agreement is silent with respect to subcontracting. The food service operations involve three facilities: Elmwood Commons, Blackhawk Commons and Reeve Union. The Company employed about seventy five employes including five employes classified as Utility Worker II, which classification does essentially janitorial services at the Elmwood and Blackhawk Commons. The Utility Worker II's hours of work were from 6:00 p.m. until midnight and their duties included vacuuming and spot cleaning of carpeting, floor maintenance (i.e. sweeping, cleaning and mopping the floors), cleaning grills, fryers and steam kettles, cleaning hood filters and removal of garbage. The Company had three employes classified as Utility Worker II assigned to Blackhawk Commons in 1989, one of which (Donna Kiesow) quit in September. In October, 1989, the Company subcontracted the janitorial work at Blackhawk Commons. The Company offered the remaining two employes other positions or the opportunity to bump less senior employes. One employe, Michael Leuthold, bumped into Elmwood Commons as a janitor and the second employe, Troy Schlaak, took a layoff because the Utility Worker II position he held was his second job and the hours of other positions offered would interfere with his first job.

The Company had two Utility Worker II positions at Elmwood Commons and subcontracted those in January, 1990 and the employes were offered and accepted different positions.

The Company's rationale for subcontracting the Utility Worker II work was

that the floor cleaning was not satisfactorily done, the University had registered complaints about floor cleanliness, there were problems of absenteeism and a lack of supervision and subcontracting would not increase the cost for janitorial services above what it was presently paying. The Company also claimed it had received no complaints from the University about cleanliness after subcontracting. The Union filed the instant grievance over the subcontracting of the Utility Worker II duties.

UNION'S POSITION

The Union contends that although there is no express contractual provision prohibiting the Company's right to subcontract bargaining unit work, the recognition, wage, seniority and other clauses, when read as a whole, limit the Company's ability to subcontract. It argues that if the Company had complete freedom to subcontract, the clauses would have been negotiated into the agreement for no particular reason. It points out that in bargaining, the Company did not ask for changes in contract language and did not allege that the janitorial work was uneconomical, inefficient or that subcontracting was under consideration. The Union insists that the Management Rights clause does not expressly allow subcontracting and the Company's right to subcontract must meet certain standards of good faith and reasonableness.

The Union claims that the Company has not met these standards. It notes that there has been no past practice of subcontracting out the maintenance work. It argues that the justification offered by the Company is suspect as only hearsay was offered to support its assertion of complaints about cleanliness from the University, its absenteeism problem was not supported by any discipline for absenteeism and the lack of supervision argument went unexplained. It submits that the Company is now getting its cleaning services done much cheaper, saving $60.00/day, and that this must be inferred as the sole reason for subcontracting.

The Union notes that the bargaining unit lost one member and others were displaced. The Union contends that the type of work has always been performed by unit personnel, does not require highly skilled individuals and the Company has the required equipment and facilities to perform the work.

The Union insists that the Company cannot rely on the Management Rights clause where the subcontracting is used to obtain cheaper labor rates. It maintains that the only clear and undisputed benefit of the subcontracting was that it cost less money, yet the Union has lost five positions and one employe was laid off. It submits that the Company has not dealt with the Union in good faith by subcontracting and has violated the parties' agreement.

The Union further asserts that after the positions were eliminated, the Company used students to perform work formerly performed by unit members which violates Section 7 of Article 22. The Union asks that the grievance be sustained, the subcontracting terminated immediately and all Utility Worker II's returned to their former positions and be made whole.

COMPANY'S POSITION

The Company, referring to the absence of any express prohibition on subcontracting contends that it had the right, which it exercised in good faith, to subcontract the floor care work at Blackhawk and Elmwood Commons. The Employer acknowledges that some arbitrators apply standards of reasonableness and good faith to an employer's decision to subcontract and it argues that the record reveals that the Company acted reasonably and in good faith. It maintains that it has met all the factors arbitrators have considered in determining whether the subcontracting was done in good faith.

The Company claims that its decision to subcontract was based on sound business and economic justification. The Company states that the competitive bidding to provide dining service to the University requires it to be cost-efficient and provide quality services to a university which pays it from public coffers. It insists that product quality provides a good faith justification for subcontracting. It argues that the Utility Worker II's were not doing an adequate job and the University lodged complaints about the condition of the floors and carpeting. It submits that it had difficulty hiring employes who could work unsupervised and employe absenteeism was a problem.

The Company maintains that the subcontracting had little effect on the bargaining unit and individual employes. It points out that its main business is food service and floor care is merely peripheral to that function. It states that only five of seventy-five positions were affected and all employes were placed in other positions except one who elected to take a layoff.

The Company contends that the Union has failed to show that the Company has acted in bad faith. It points out that the subcontracting did not occur until over a year after it and the Union entered into the collective bargaining agreement. It notes that there was no evidence that the subcontract was a subterfuge to treat the subcontractor's employes as its own, there was no commingling of employes, and no evidence that the subcontracting was to

undermine the Union or to deprive employes of job opportunities.

The Company relies on the Management Rights clause as reserving to it the right to subcontract. Its argument is that the agreement contains no prohibition on subcontracting and under the theory of reserved rights, no limitation can be inferred on the Company's right to subcontract. It claims that the Union's argument of an implied prohibition flies in the face of Article 13's unequivocal declaration.

The Company points out that only a minority of arbitrators hold that the recognition clause, seniority and job classification wage rates imply a limitation on subcontracting and that the overwhelming majority of arbitrators have strongly rejected this concept.

The Company concludes that its rights, expressly reserved in Article 13, should be enforced and no limitations which are not contained in the agreement should be enforced and no limitations should be implied. It refers to the stipulated issue as excluding the application of any good faith inquiry as to the Company's conduct. It requests a finding that it could unilaterally subcontract and asks that the grievance be denied.

DISCUSSION

The parties' collective bargaining agreement does not expressly prohibit contracting out. However, there is substantial arbitral authority that the recognition, seniority and wage clauses limit the right to subcontract depending on whether it was reasonable and done in good faith. Each case must be evaluated on its own facts. A set of well defined standards have evolved in determining whether the subcontracting was reasonable and done in good faith, including past practice, reasonable business justification, effect on the bargaining unit and employes, type of work involved, availability of qualified employes, equipment and facilities and the regularity and duration of subcontracting. 1/

Some of these standards though are not applicable to the instant case. For instance, here there is no past practice on subcontracting, this was not a case of recurring subcontracting but was permanent, the type of work performed was identical before and after subcontracting and no special equipment or facilities account for the decision to subcontract. Given the foregoing, the elements applicable here are the effect on the bargaining unit and employes, the availability of qualified employes and business justification. These factors will be reviewed below.

Attention is focused first on the effect the subcontracting had on the bargaining unit and employes. In this regard it is undisputed that the subcontracting resulted in the loss of five bargaining unit positions in the seventy-five member unit. Although the Company offered employes the right to transfer to vacancies or exercise their right to bump less senior employes, one employe could not keep the hours he previously had and took a layoff. Thus, it must be concluded that there was an effect on the bargaining unit and an individual employe. As the number of positions contracted out, (five) compared to the total (seventy-five) or 6.7%, is not inconsequential, this factor must be weighed against the remaining factors in determining reasonableness and good faith. Although there was erosion of the bargaining unit, this alone does not establish that the Company subcontracted to undermine the Union or to discriminate against it nor does it appear that the subcontracting substantially prejudiced the integrity of the bargaining unit.

With respect to the availability of qualified employes, the Company's arguments are not persuasive. In this regard the evidence failed to prove that bargaining unit employes were any less qualified to perform the janitorial duties than those of the subcontractor. It does not appear from the record that the subcontractor had employes with any special qualifications to perform the duties that bargaining unit employes did not have.

Turning to business justification, the Union has argued that the subcontracting resulted in a cost savings and that this monetary factor was the sole business justification for subcontracting. Lower economic costs may be an appropriate business justification for subcontracting bargaining unit work, for example when an employer's economic survival depends on the cost savings generated by subcontracting. In such a case the economic justification outweighs the loss of bargaining unit work and consequent layoff of bargaining unit employes. However, economic survival was not demonstrated in this case; that is, the evidence failed to show that economic factors required the subcontract so that the Company would remain economically viable. Rather, the evidence established that the Company figured no cost savings in the subcontracting and if there were any due to lower labor costs, it was not a factor considered by the Company. A savings due solely to lower labor costs in the absence of a danger of financial collapse is given little or no weight in the balancing of the factors to be considered in determining the reasonableness

1/ Elkouri & Elkouri, How Arbitration Works, (4th Ed., 985) at 540-543.

or good faith of an employer. Here, any savings on the part of the Company would not support its subcontracting decision on the basis of business necessity or financial justification.

The business justification given by the Company in this case was not so much monetary as for other reasons. Here, it asserted that the employes did not perform their duties satisfactorily. In addition, high absenteeism and the inability of employes to work without supervision were also reasons for the decision to subcontract. The evidence was not convincing though with respect to absenteeism as no discipline solely for this offense was given and there was no showing that the amount of absences was different from the rest of the employes. It appears from the record that the root cause of the Company's problems was that no one was supervising the utility workers and they were expected to perform to certain standards on their own. The Company could have attempted to solve these problems by hiring a supervisor to supervise the utility workers at Blackhawk and Elmwood Commons. Having said that though, the Company's decision not to do so was within their business discretion. Another way to solve the problem was to contract out to a contractor who would provide the necessary supervision as well as perform the janitorial work. The subcontracting was akin to a change in operations whereby the Company no longer had to supervise the janitorial work but left that to the contractor. Therefore, the issue in the case is whether this provided sufficient business justification for the subcontracting which outweighs the loss of bargaining unit positions and the layoff of an employe. In short, does this decision meet the reasonable and good faith requirements.

A review of all the factors persuades the undersigned that the Company's actions met the good faith and reasonableness standard. The decision to subcontract the custodial work was based on reasonable business considerations. It was the lack of supervision of the janitorial work which was performed at hours which were different from those worked by most employes that appears to be the root cause of the problems enumerated by the Company. The Company could have hired supervision to correct these perceived deficiencies or contracted out. Its decision not to hire supervision but to instead contract out appears reasonable under the circumstances. Furthermore, its decision was not solely to obtain a labor supply at lower costs. Moreoever, the Company's efforts to place all the affected employes in vacancies to prevent layoffs demonstrated that it was acting in good faith. Inasmuch as the Company acted reasonably and in good faith, it having sound reasons to subcontract and given its efforts to mitigate the effects on employes, the undersigned finds that these factors outweigh the effect on the bargaining unit and unit employes. Therefore, in the context of this record, it is held that the Company's unilateral subcontracting of bargaining unit work (i.e. the custodial work) did not violate the parties' collective bargaining agreement.

Finally, attention is turned to the Union's assertion that after the custodial work was subcontracted, the Company used students to perform work formerly performed by unit members in violation of Article 22, Section 7. Even if such was the case however, this question was not part of the stipulated issue submitted to the undersigned for decision. That being the case, the undersigned declines to address this point and no opinion is rendered thereon.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 26th day of July, 1990.

By _____
Raleigh Jones, Arbitrator