BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MILWAUKEE & SOUTHEAST WISCONSIN DISTRICT COUNCIL OF CARPENTERS OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA	Case 26 No. 44470 A-4683
and	
OSCAR J. BOLDT CONSTRUCTION COMPANY	

Appearances:
Mr. Gary M. Williams, Attorney-at-Law, 12065 West Janesville Road, Post Office Box 4
Wisconsin Chapter, Associated General Contractors of America, Inc., 4814 East Broadway, Madison, Wisconsin 53716, by Mr. Paul D. Lawent, for the Employer.

ARBITRATION AWARD

Milwaukee & Southeast Wisconsin District Council of Carpenters (hereafter, the Union or the Carpenters) and Oscar J. Boldt Construction Company (hereafter, Boldt or Employer), are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in Madison, Wisconsin on January 9, 1991. Transcript of the hearing was received February 5, 1991. Briefs were filed, the last of which was received April 2, 1991.

ISSUE

The parties stipulated to the following statement of the issue:

> Did the Oscar J. Boldt Construction Company violate the collective bargaining agreement with the Milwaukee and Southeast Wisconsin District Council of Carpenters by subcontracting out certain work to a nonsignatory of the contract?

The parties further stipulated that if a violation is found the remedy shall be back pay and fringe benefits pursuant to Section 5.4, and that the arbitrator shall retain jurisdiction over the matter of remedy for thirty days.

BACKGROUND

The Union and Boldt are signatories to a collective bargaining agreement. In connection with a building project at St. Mary's Hospital in Madison, Wisconsin, Boldt subcontracted certain work including the installation of certain materials for soil retention and excavation to Terra Engineering and Construction Corporation (hereafter, Terra), a subcontractor which is not a signatory to the collective bargaining agreement.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

ARTICLE V

GRIEVANCES AND ARBITRATION

Section 5.1. All grievances, disputes or complaints arising under this Agreement must be filed within ten (10) days of the incident giving rise to the grievance and shall first be submitted to an authorized representative of the District Council who in turn shall immediately present the same to the representative of the Employer. The parties shall attempt to dispose of the grievance, dispute or complaint within forty-eight (48) hours. If the matter is not disposed of within the applicable period of time, the same shall be referred to the Wisconsin Employment Relations Commission with a request that it immediately appoint an arbitrator.

. . .

ARTICLE XIV

SUBCONTRACTING

Section 14.1. (a) It is agreed that any work sublet and to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work and when a portion of said work to be sublet is under the jurisdiction of this agreement, the work shall be sublet to a subcontractor signatory to an agreement with the Greater Wisconsin Carpenters Bargaining Unit, or any of its affiliates.

ARTICLE XV

JURISDICTION AND JURISDICTIONAL DISPUTES

SECTION 15.1. JURISDICTION.

This Agreement covers all job classifications that have been assigned to the Carpenters by the United Brotherhood of Carpenters and Joiners of America, the Building and Construction Trades Department of the AFL-CIO (Exhibit B attached hereto) and as assigned to the Carpenters as found in Agreements and Decisions Rendered Affecting the Building and Construction Trades Department, AFL-CIO, as stated in the current copy of the "Green Book", and as assigned to the Carpenters by National Jurisdictional Agreements (not printed in

Green Book) Revised June, 1974 as compiled by the Associated General Contractors of America, Inc.

POSITIONS OF THE PARTIES

The Union

The Union insists the disputed work meets the standard of "piledriving" as customarily used in the industry: namely, the definition of piledriving used by the Department of Industry, Labor and Human Relations for making prevailing wage determinations. It also points to a book, Construction Estimates and Costs in which the author, Harry Pulver, states that sheet piling and bearing piling are both species of piledriving. According to the Union, neither the contract that Terra had with the Laborers International Union of North America Local Union No. 464 (hereafter, "Laborers") which lists "sheeting" as under the work jurisdiction of the Laborers, nor the decision of the National Labor Relations Board (herein, "NLRB") which awarded the work to Laborers is dispositive of this case. The Union cites a court case for the proposition that construction contractors frequently enter into conflicting collective bargaining agreements. Finally, the Union asserts that Boldt's evidence regarding instances of sheet piling work being awarded to the Laborers does not constitute a past practice in derogation of the contract provision.

The Employer

Citing an arbitration award regarding a dispute between other parties, the Employer asserts this dispute is one that should properly be regarded as a jurisdictional dispute and as such is governed by the results of the NLRB 10(k) proceeding. Arguing in the alternative, the Employer asserts that if the arbitrator does not defer to the NLRB proceeding, the grievance should be denied because the subcontractor, Terra, has performed this work for some time by utilizing Laborers. Finally, the Employer insists the work in question was sheeting work, which is distinct from the piledriving referred to in the contract, and as such was not covered by the subcontracting provision.

The Employer asserts the Union case is not supported by any of the Union's own documents. The Employer insists its exhibits demonstrate that Laborers have performed the disputed work in the past and that the industry recognizes a difference between sheeting and piling.

DISCUSSION

A. Requested Deferral to 10(k) Proceedings

The undersigned must reject Boldt's contention that this arbitrator should defer to the NLRB proceeding pursuant to sec. 10(k) of the National Labor Relations Act. The arbitration award cited by Boldt, Matt S. Connell, Inc. (Cohen, 1990) 1/ involved a collective bargaining agreement with a provision for resolving jurisdictional disputes by utilizing the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry. The

1/ Boldt's counsel provided both the Arbitrator and Union counsel with copies of this unpublished award.

arbitrator in that case deferred the dispute to that body, not to the NLRB proceeding. There is no evidence the instant parties have agreed to resort to such a body, and the undersigned further notes that in the cited case, the dispute was referred to that forum, not a 10(k) proceeding.

In Hutter Construction Co. v Local 139 2/, the court found that despite 10(k) proceedings in a closely-related jurisdictional dispute, the Union was entitled to pursue a remedy in arbitration because it had a separate and distinct contractual claim. Similarly, in this case, the Union is claiming that Boldt violated Article XIV of the contract when it awarded the work to a subcontractor who was not a signatory of the contract. That contractual claim must be resolved in the manner the parties agreed to in Article V - Grievances and Arbitration. Consequently, the undersigned finds it improper to defer this dispute to the 10(k) proceeding.

B. The Merits

Having determined this matter is properly in the arbitration forum, the undersigned turns to the merits of the case. The parties agree that the disputed work was sublet to a subcontractor that was not, at that point in time, a signatory to an agreement with the Greater Wisconsin Carpenters Bargaining Unit, or any of its affiliates. The parties' disagreement regards whether the disputed work was under the jurisdiction of the collective bargaining agreement.

As set forth above, Section 15.1 - Jurisdiction provides that the agreement covers classifications as set forth in Exhibit B. Exhibit B does not clarify the matter, for it lists wage rates for Carpenters, Piledrivers and Millwrights, but does not define or describe those classifications. The Union asserts piledrivers' work includes the work which was performed on the St. Mary's Hospital project and Boldt asserts the contrary.

The explicit language of the contract offers no resolution of this question. Furthermore, Union witness Ron Lemon testified that the term did not appear in any greater detail in any earlier contract. Not only is there no explicit definition of the term, neither party points to any contract language from which an implied definition can be inferred.

Resort to the facts of the case and consideration of basic categories of work is no more helpful. The parties agree that there is a difference between bearing piling, the piles that are driven into the ground to support a building or structure, and sheet piling, the piles which are used to retain soil or soil and underground utilities. Likewise, the parties agree that the work at St. Mary's was sheet piling. The parties also agree that the Union does not hold a claim to sheet piling which is used in municipal utility construction, that is, sheet piling which holds the soil and streets in place for utility work, but is not related to the construction of a building or other structure. But that agreement on basic categories does not lead to agreement on the whether the Union's jurisdiction covered the work in dispute: the installation of sheet piling used to hold the street and utility in place and also protect workers at a building excavation. The Union insists the work of installing either bearing piling or sheet piling under these circumstances is within the jurisdiction of the Union whereas Boldt insists only the work of installing bearing piling is within that jurisdiction.

2/ 862 F.2d 541, 129 LLRM 3034 (7th Cir., 1988) See also the case cited therein, Carpenters Local 33 289 NLRB 167, 129 LRRM 1311 (1988).

The Union asserts that industry standards should be used to resolve this question whereas Boldt asserts its position is supported by past practice and industry practice.

Boldt seeks to establish a past practice by relying on Employer's Exhibit 5 and the related testimony of Terra's President Gary Zimmerman. That evidence includes many instances of projects in which Terra was a subcontractor to a general contractor who was a signatory to an agreement with the Union. In all of those instances, Terra used laborers to perform the work despite the general contractor's contractual obligations to the Carpenters. Countering this evidence, however, the Union points out that this list of projects does not include any project in which Boldt was the general contractor. The Union argues those instances cannot therefore create a past practice in derogation of Section 14.1 in the contract between the Union and Boldt.

Since the parties did not address the legal question of whether a past practice can be established between the two instant parties by the actions of other parties who are signatories to an industry-wide contract, and since the dispute can be properly decided on other grounds (see below), the undersigned reaches no conclusion regarding the asserted past practice.

Disregarding any weight Employer's Exhibit 5 may have in establishing a past practice, in the opinion of the undersigned, that evidence does demonstrate the industry practice and standard. It is evidence that, at least in the Dane County area, the industry practice includes using laborers for such work. On the other hand, there was evidence of some instances of Carpenters performing such work in Madison prior to 1973. Consequently, the industry standard is uncertain, but it can be concluded with assurance that the disputed work does not come within the exclusive jurisdiction of the carpenters.

In reaching this conclusion, the undersigned has considered what weight should be accorded to Union Exhibits 1 and 2. Union Exhibit 1 is the document which is relied upon, in part, for the determinations regarding prevailing wage statutes made by the Labor Standards Bureau, Construction Wage Standards Section, Wisconsin Department of Industry, Labor and Human Relations. The paragraph headed "Carpenter (piledriver)" includes the following sentence:

> . . .In "Piledriving" operations, handles wood, metal, sheetpiling, steel H-beams, concrete, or pipe, fastens them to cable of wench or piledriver, shifts timber piles with cant hook, cleans or points pile with axe or shovel. May drill pilot holes. . .

Union Exhibit 2 is a book entitled Construction Estimates and Costs. In Chapter 4, "Piling and Bracing" the following paragraph is found:

> **1. Kinds of Piles.** The two types of piles in general use are sheet and bearing piles. Sheet piles are used for bracing in trenches and excavation, retaining walls, and bulkheads. Their main purpose is to retain earth in place or to keep out water or earth as the case may be. Bearing piles are used for supporting loads. The materials commonly used for piles are wood, steel and concrete.

Neither of these two documentary sources have as their primary purpose

the determination of the industry practice regarding work assignment and as such, they cannot overcome the evidence of Employer's Exhibit 5 which demonstrated that work similar to the disputed work, has been assigned to workers not covered by the agreement.

C. Summary

Inasmuch as Section 14.1 covers subcontracted work, this dispute is an appropriate matter for arbitration.

Since the agreement itself does not address, either explicitly or implicitly, the question whether the disputed work is within the jurisdiction of the Carpenters, the undersigned has examined industry practice and concluded that the Carpenters do not have exclusive jurisdiction over this work. Consequently, the installation of sheet piling under the circumstances described above cannot be said to be under the exclusive jurisdiction of the Carpenters and could properly be sublet to a subcontractor who was not a signatory of the agreement.

In the light of the record and above discussion, the Arbitrator issues the following

AWARD

1. The Oscar J. Boldt Construction Company did not violate the collective bargaining agreement with the Milwaukee and Southeast Wisconsin District Council of Carpenters by subcontracting out certain work to a nonsignatory of the contract.

2. The grievance is denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 1st day of November, 1991.

By Jane B. Buffett /s/
Jane B. Buffett, Arbitrator