BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between CITY OF OSHKOSH, and OSHKOSH CITY EMPLOYEE UNION LOCAL 796, AFSCME, AFL-CIO	Timeliness of grievance dated 9-8-93 regarding bus driving subcontracting Case 213 No. 49934 MA-8109

Appearances:

Mr. Gregory N. Spring, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1121 Winnebago Avenue, Oshkosh, Wisconsin 54901, appearing on behalf of the Union.

Ms. Lynn Lorenson, Assistant City Attorney, City Hall, 215 Church Avenue, Oshkosh, WI 54901, appearing on behalf of the City.

ARBITRATION AWARD

At the joint request of the Union and City noted above, the Wisconsin Employment Relations Commission designated the undersigned Marshall L. Gratz as Arbitrator to hear and decide a dispute concerning the above-noted grievance, arising under the parties' 1991-1992 Working Conditions Agreement (herein, Agreement).

Pursuant to notice, on December 21, 1993, the Arbitrator convened a hearing on the matter at the Oshkosh City Hall. The proceedings were not transcribed, however, the parties agreed that the Arbitrator could maintain a cassette tape recording of the testimony and arguments for the Arbitrator's exclusive use in award preparation. At the hearing the parties agreed to bifurcate the hearing and determination of the procedural arbitrability of the grievance from the merits of the grievance, such that this Award deals only with procedural arbitrability.

Following the parties' presentation of evidence and arguments concerning arbitrability, the Union summed up its position orally on the record. The City submitted a brief on January 15, 1994 to which the Union had a right to reply. On February 2, 1994, the Arbitrator was advised that the Union had decided not to submit a reply brief but that the parties jointly requested that award preparation be put on hold pending results of the parties' settlement discussions scheduled for February 24. The Arbitrator was then informed on March 1, 1994 that the grievance was not settled and that the Arbitrator should consider the timeliness portion of the case fully submitted. Accordingly, the record regarding the timeliness issue was closed as of March 1, 1994.

STIPULATED ISSUES

At the hearing, the parties authorized the Arbitrator to decide the following issues:

1. Is the grievance properly before the Arbitrator?

2. If so, the parties agree the merits will be arbitrated in this proceeding at a later date.

PORTIONS OF THE AGREEMENT

ARTICLE I

MANAGEMENT RIGHTS

Except to the extent expressly abridged by a specific provision of this Agreement, the City reserves and retains solely and exclusively, all of its Common Law, statutory, and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Union.

The Union also recognizes that the City has the right to subcontract work, provided no bargaining unit employes are laid off or have their hours reduced due to the subcontracted work. The right to subcontract work shall also not be used to undermine the Union or to discriminate against any of its members. Employees required to bump or post out of positions which have been subcontracted shall retain their seniority rights in the Department where the subcontracting occurred. The Employer agrees to bargain the impact of subcontracting on affected employees.

. . .

ARTICLE X

NORMAL WORK WEEK, NORMAL WORK DAY
AND NORMAL WORK SCHEDULE

Transit employees shall work in accordance with present mutually agreed-upon schedule. Selection of the runs shall be made semi-annually unless requested in writing by not less than seventy (70) percent of the total employees affected. Each driver shall make

his/her "selection" on the order of his/her division seniority. . . .

. . .

ARTICLE XVIII

GRIEVANCE PROCEDURE

Both the Union and the City recognize that grievances and complaints should be settled promptly and at the earliest stage and that the grievance process must be initiated within 10 work days of the incident or knowledge of the incident. A grievance shall be defined as a dispute which involves the interpretation, application or compliance of the provisions of this Agreement. All grievances which may arise shall be processed in the following manner:

Step 1. The aggrieved employee shall present the grievance orally to his steward. The steward and/or the aggrieved shall attempt to resolve the grievance with the immediate supervisor, who may call higher level supervisors into the discussion. If it is not resolved at this level within five (5) work days, the grievance shall be processed as outlined in Step 2.

. . .

ARTICLE XXVI

MAINTENANCE OF BENEFITS

The City will not change any benefit or condition of employment, which is mandatorily bargainable except by mutual agreement with the Union.

ARTICLE XXVII

13C AGREEMENT

The parties hereto recognize that they have heretofore entered into a 13C Agreement as required by the U.S. Department of Labor for transit employes and that said agreement will remain in force together with the provisions of this contract.

BACKGROUND

The City operates a municipal transit bus system as one of its municipal functions. The Union represents the bus drivers as a part of a bargaining unit consisting of non-supervisory, non-professional employes in a variety of City departments and occupations.

The grievance referred to in ISSUE 1, above, was initiated on September 8, 1993. In it, Union President Michael O'Brien asserted, "the City sub-contracted the Industrial Park Run out to private sector." The grievance went on to assert that the City thereby violated Articles I, X, XXVI, and XXVII. The relief requested in the grievance was "to give work lost by Union employes back to transit department."

In the City's initial response to the grievance, Transportation Director Mark Huddleston stated,

> The City of Oshkosh notified the Union on July 28, 1993 that the Industrial Park Run would be sub-contracted as of August 30, 1993. A copy of this notification is attached. The Union did not initiate the grievance process within the limits established under Article XVIII of the Union's working agreement with the City of Oshkosh. Therefore, this grievance is denied.

The grievance was similarly denied at the subsequent pre-arbitral grievance steps and ultimately submitted to arbitration as noted above. The notification referred to in Huddleston's grievance response was a memorandum from Huddleston to Union Steward Larry Gauger dated July 28, 1993, which read as follows:

> This letter is to notify you that the Industrial Park Run will be sub-contracted effective August 30, 1993. The Common Council will act on this matter at the August 19, 1993, Council meeting. If you have any questions, please feel free to contact me.

The day before Huddleston sent that memorandum to Gauger, the quarterly posting of available runs and trippers for selection by seniority by bargaining unit bus drivers went up. That posting offered employes the opportunity to select from among eleven morning runs, eleven afternoon runs and, in addition, two morning "trippers" and three afternoon "trippers". With one minor exception not material to this dispute, each of the runs constitutes a 6.4 hour, 6 day-per-week work opportunity, which constitutes the present mutually agreed-upon schedule referred to in Article X of the Agreement. The "trippers" consist of extra work opportunities that occur regularly either in the morning or in the afternoon and which consist of two hours of work each. Bargaining unit employes select the run they wish to work by seniority. At the same time an employe selects a run, the employe may also select a "tripper" if there is one available that does not conflict with the run the employe has selected to work during that quarter.

In addition to "trippers", bargaining unit bus drivers are also offered from time to time an

opportunity to work "doubles" to cover for absentees on another scheduled run occurring outside the hours of that employe's own selected run.

The "Industrial Park Run" referred to in the grievance actually consisted of an A.M. "tripper" and a P.M. "tripper". Both runs and "trippers" are identified on the selection opportunity memo posted by management quarterly by numbers and letters that represent specific routes and times known to the bargaining unit generally. The selection memorandum posted on July 27, 1993, unlike previous such memoranda, did not offer the letter and number combinations representing either the morning or the afternoon Industrial Park "trippers". Thus, when compared with the selection memorandum posted in November of 1992, the July 27 memorandum contained the same number of runs, but one fewer morning "tripper" and one fewer afternoon "tripper" with the Industrial Park Run "trippers" being those eliminated. The intervening selection memorandum which had been posted in March contained the 22 runs but only 1 morning and 1 afternoon "tripper", namely the Industrial Run "trippers" because the other "trippers" are scheduled only during the school year and not during the summer months.

On August 19, 1993, the City's Common Council, acting in open and publicly noticed session, accepted a private contractor's bid to provide transportation service to the Industrial Parks and directed City officials to enter into an appropriate agreement for that purpose.

The runs selected from those posted on July 27, 1993, became effective on August 30, 1993. It was as of that date that the subcontractor's personnel began performing the Industrial Park morning and afternoon "trippers" previously performed by bargaining unit employes.

At the hearing, Union Steward Larry Gauger testified that he did not submit the grievance in July because at that time no bargaining unit driver had lost any hours as a result of subcontracting. Gauger further stated that because the first loss of hours of work to bargaining unit employes occurred on the first day of school, August 30, 1993, he considered it as of that date that the City had committed a violation of the Agreement.

City Transit Coordinator Rex Cass testified that based on his general review of pay sheets, no bargaining unit driver has lost work on account of the Industrial Park trippers being subcontracted. In that regard, Cass noted that the bargaining unit was working the same number of regular runs such that -- with a minor exception not relevant to this proceeding -- each of the bargaining unit drivers is working a 38.4 hour schedule consistent with the mutually agreed-upon schedule referred to in Article X of the Agreement. Cass acknowledged that the selection sheet contains two fewer "trippers" and hence, four fewer hours of extra work than was previously available. He asserted, however, that "trippers" and driving doubles as a bundle of work has always varied and that to his knowledge, the individuals who may have lost the opportunity to work a "tripper" could have taken advantage of other opportunities for working overtime by driving doubles. When Cass looks generally at the pay sheets, therefore, he states that he has seen no overall reduction in hours worked as a result of the subcontracting of the Industrial Park "trippers". Cass further noted in that regard that there had been at least 3 or 4 occasions since August 30 of 1993 on which all of the regular drivers had been offered and turned down a double.

Cass also acknowledged that there was no occasion in his memory in which a posted "tripper" had not been selected when it was made available on the selection memorandum posted by management.

Cass noted that the number of "trippers" has varied dramatically over the years, but acknowledged on cross-examination that the previous eliminations of "trippers" had resulted in the service involved not being provided at all.

POSITION OF THE EMPLOYER

The grievance was not "initiated within the 10 work days of the incident or knowledge of the incident" as is required by Article XVIII. It is undisputed that the Union's transit steward was notified in writing on July 28, 1993, that the Industrial Park driving would be subcontracted effective August 30, 1993. It is also undisputed that the bargaining unit was made aware that this would result in two fewer "trippers" being available because the July 27, 1993 selection memorandum did not offer either of those Industrial Park "trippers" whereas they had been previously offered on the memorandums from which selections were made in the various previous quarters. It was also undisputed that the City Council awarded the subcontract at its August 19, 1993, meeting to which reference was specifically made in Huddleston's July 28, 1993, memorandum to Gauger.

Thus, the Union knew by August 19, 1993, if not earlier, that the previously available Industrial Park "trippers" were eliminated from the work available to the bargaining unit due to subcontracting. By that time, if not earlier, the Union had no reasonable expectation that those hours would be available or be replaced by other hours. By failing to initiate the grievance within 10 work days of August 19, the Union has rendered the grievance fatally untimely. The Union's failure to timely grieve also led the City to enter into the subcontract in detrimental reliance on the fact that the Union had raised no objection in the face of the City's multiple good faith notifications regarding its intentions to contract out the Industrial Park trippers. On those bases, the Arbitrator should answer ISSUE 1 "no" and end the proceeding by denying the grievance as procedurally non-arbitrable.

The City also asserted at the hearing and in its brief that the subcontracting of the Industrial Park work did not result in a layoff and did not reduce any bargaining unit employes' hours of work. The City asserts that the evidence adduced at the hearing establishes that no such layoff or reduction of hours occurred. The subcontracting involved here did not affect the selection of regular runs, so it could not have resulted in a reduction in hours within the meaning of the Agreement because the Agreement does not protect additional or overtime hours from subcontracting. For that reason, as well, the grievance should be denied.

POSITION OF THE UNION

The City has the burden of affirmatively establishing that the grievance was not timely filed, and the City has failed to sustain that burden.

The question presented by ISSUE 1 is when did the incident constituting the alleged violation occur? The facts clearly show that it occurred on August 30, 1993, and no earlier. Under the language of Art. I, it is not necessarily a violation of the Agreement for the City to subcontract work previously performed by bargaining unit personnel. The Union must show something more, for example, that bargaining unit employes have either been laid off or have had their hours reduced due to the subcontracted work. The Union could not know for certain that bargaining unit employes' hours were reduced due to subcontracted work until employes of the subcontractor actually performed the work previously performed by bargaining unit employes such that bargaining unit employes lost hours of work on account of the subcontracting. The Employer could have provided other work opportunities to bargaining unit employes that would have avoided any reduction of bargaining unit employes' hours of work due to the subcontracted work. Only on August 30, 1993, did the Union know that bargaining unit employes were experiencing a reduction in hours due to the subcontracting of the Industrial Park driving. The grievance was filed well within the 10 work day time frame following August 30, 1993, and it was therefore timely filed under Article XVIII.

The Union does not agree with the City's assertion that no bargaining unit employes' hours have been reduced due to the subcontracting, but that is a matter to be addressed in the merits portion of this proceeding. At this point, the Union does note, however, that the Agreement contains not only the subcontracting language in Article I, but also the Maintenance of Standards language in Article XXVI that are cited as having been violated by the City in this matter.

DISCUSSION

Article XVIII requires that "the grievance process must be initiated within 10 work days of the incident or knowledge of the incident."

It is noted by Elkouri and Elkouri in How Arbitration Works, (BNA, 4 ed., 1985) at 194 and awards cited at Note 187, that arbitrators have "held that doubts about the interpretation of contractual time limits or as to whether they have been met should be resolved against forfeiture of the right to process the grievance." Accordingly, the Arbitrator finds it appropriate in this case to interpret the parties' time limit language broadly in favor of allowing grievances to reach determination on the merits, rather than narrowly in favor of a forfeiture of such a determination.

The evidence clearly establishes that the Union was put on notice more than 10 work days prior to the date on which the grievance was filed both that the City intended to subcontract the Industrial Park work previously performed by bargaining unit personnel, and that, as a result, the morning and afternoon "trippers" associated with that Industrial Park driving would no longer be available to bargaining unit employes effective on and after August 30, 1993. The Union had reason to know from the posted memorandum for selection purposes that the subcontracting referred to in Huddleston's subsequent memorandum and approved in the City Council's August 19 meeting reduced the "trippers" being offered to employes.

Nevertheless, it was not until August 30, 1993, that the City's subcontracting resulted in work previously performed by a bargaining unit employe being performed instead by the subcontractor's personnel. In other words, the subcontracting could not have had an actual impact on bargaining unit employes' hours of work until August 30, 1993 at the earliest. In the Arbitrator's opinion, it would be an unreasonably narrow interpretation of the word "incident" in Article XVIII to require the Union to grieve the anticipated impact on bargaining unit personnel before that impact could have actually been experienced by any bargaining unit employe. Especially so where, as here, the Agreement expressly reserves a right to subcontract subject to stated limitations one of which reads, "provided no bargaining unit employes are laid off or have their hours reduced due to the subcontracted work."

The City's contention that the grievance was untimely filed is an understandable response, especially when it is noted that the grievance on its face refers to the City's having subcontracted the work without specifying which employes lost what hours. Nonetheless, the Arbitrator is not persuaded that the grievance has been initiated in violation of the Article XVIII time limit. The Agreement as written simply does not protect the City from the risk that timely grievances about subcontracting can be filed within 10 days of the time the subcontractor's employes first perform the work in question, even where the City has given the Union the sort of notice of its intentions and actions that it gave in this case.

Accordingly, the Arbitrator has concluded that the grievance was timely filed. The City's contentions that the record shows that the subcontracting in question did not result in a layoff or in a reduction in hours relate to the merits of the case as to which the hearing has not yet been completed.

The Arbitrator will await contact from the parties regarding how and when the hearing on the merits will be completed.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the STIPULATED ISSUES noted above that:

1. The grievance is properly before the Arbitrator.

2. Accordingly, the merits will be arbitrated in this proceeding at a later date.

Dated at Shorewood, Wisconsin
this 15th day of June, 1994 by Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator