BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MILWAUKEE AND SOUTHERN WISCONSIN CARPENTERS DISTRICT COUNCIL	Case 9 No. 50297 A-5164
and	
ROWLEY-SCHLIMGEN, INC.	

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Ms. Naomi E. Eisman, appearing on behalf of the Union.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Mr. Jack D. Walker, appearing on behalf of the Employer.

ARBITRATION AWARD

Milwaukee and Southern Wisconsin Carpenters District Council, hereinafter referred to as the Union, and Rowley-Schlimgen, Inc., hereinafter referred to as the Employer, were parties to a collective bargaining agreement which provided for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the Employer, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide grievances over subcontracting. The undersigned was so designated. Hearing was held in Madison, Wisconsin, on March 28, 1994. The hearing was transcribed and the parties filed briefs and reply briefs, the last of which were exchanged on July 7, 1994.

BACKGROUND:

The Employer sells office furniture, floors, desks, work stations and chairs, and to a lesser extent, floor coverings, wall coverings and window coverings. In the past, the Employer sold office products and demountable walls but no longer sells either of these two products. 1/ At one period in time, the Employer employed six to eight employes to install demountable walls and when it terminated the demountable wall business it had one and one-half employes. 2/

1/ Tr. 119.

2/ Tr. 121.

According to Edward Rowley, the Employer's CEO, the Employer signed an agreement with the Union to cover the demountable wall installers. 3/ The last contract between the Union and Employer was for the period 1990-1993. 4/ The Employer had also been party to a series of contracts dating back to June 1, 1982. 5/ Each of these contracts had language in them restricting the subcontracting of work as follows:

ARTICLE XIV

SUBCONTRACTING

3/ Tr. 122, 125.

4/ Ex. 1.

5/ Exs. 2, 3, 4, 17A and B.

> 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. 6/

The Employer sells carpeting but has subcontracted its installation for the past 17 - 18 years and has not used its employes to install carpeting. 7/

The Employer was of the opinion that carpet installation was not covered by its contract with the Union. 8/ No grievances were filed regarding the subcontracting of carpet installation until June 20, 1991. 9/ In 1987 and 1988, the Employer had a contract covering floor work at Madison Area Technical College. 10/ The general contractor on the MATC project was J. H. Findorff & Sons, Inc., who wanted Union employes on the job and instructed the Employer to put floor installers on the Employer's payroll but the installers were not the Employer's employes but were employes of the subcontractor. 11/

On June 20, 1991, the Union filed a grievance over the Employer's subcontracting carpet installation on a project in Madison, Wisconsin, at Greenway Cross. 12/ The parties met on the grievance on June 25, 1991, and the Employer indicated that it was getting out of the demountable wall business and denied the grievance on subcontracting on a number of grounds and the Employer formally responded to the grievance on July 5, 1991. 13/ On August 22, 1991, the Union filed a second grievance involving subcontracting carpet installation at Physician's Plus Jackson Clinic. 14/ The Union requested arbitration and the Employer refused and the Union filed suit to compel arbitration. 15/ The Union filed additional grievances in March and May, 1992, on carpet installation subcontracted by the Employer at Capital City Distribution and Cottage Grove School, respectively, and on September 1, 1992, the Union filed an amendment to the June 20, 1991 grievance alleging a continuing violation by

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6/ Ex. 1.

7/ Tr. 86, 129.

8/ Tr. 125.

9/ Tr. 127, Ex. 5.

10/ Tr. 106.

11/ Tr. 111-113, 117-118, 145.

12/ Ex. 5.

13/ Ex. 27.

14/ Ex. 6.

15/ Exs. 9 and 10.

subcontracting carpet installation to a non-signatory contractor. 16/ The Union prevailed in its suit to compel arbitration and the parties stipulated to proceed to the instant arbitration.

ISSUES:

The Union's statement of the issues is as follows:

> Whether or not the Employer violated the labor agreement effective June 1, 1990 through May 31, 1993, by subcontracting its floor and carpet laying work to a non-signatory subcontractor?
>
> And if so, what shall the remedy be?

The Employer stated the issues as follows:

> 1. Was the grievance dated June 20, 1991, filed within ten days of the date the Employer subcontracted carpeting work on the Greenway Tower Office?
>
> 2. Was the grievance dated August 22, 1991, filed within ten days of the date the Employer subcontracted work at the Physician Plus Office?

16/ Ex. 5.

3. If the grievances are found to be timely, has the Employer breached the contract?

A. Does the contract cover carpeting work?

B. Is the Union estopped from asserting either of those violations by virtue of its acquiescence and the practice of subcontracting to non-signatory employes?

If a breach is found, what is the appropriate remedy?

The undersigned frames the issues as follows:

1. Are the grievances timely?

2. If so, did the Employer violate the contract by subcontracting floor and carpet installation work to a non-signatory subcontractor?

3. If so, what is the appropriate remedy?

PERTINENT CONTRACT 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", (sic) 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.

. . .

EXHIBIT B

TRADE AUTONOMY

. . .

B. Our claim of jurisdiction, therefore, extends over the following divisions and subdivisions of the trade:

. . .

. . .; Wood and Resilient Floor Layers, and Finishers; Carpet Layers; . . .

UNION'S POSITION:

The Union contends that the Employer is signatory to the 1990-93 contract which prohibits it from subcontracting work under the contract's jurisdiction to a non-signatory subcontractor. It submits that the Employer knew and understood this as it had previously been signatory to no less than seven

contracts and in 1987-88, Findorff required the Employer to put the subcontractor's employes on its payroll to avoid violating the subcontracting clause.

The Union contends that the June 20, 1991 grievance is continuing. It points out that it filed a second grievance protesting the subcontracting and later amended its initial grievance to expressly protest the Employer's continuing violation of the subcontracting clause. It argues that it did not need the amendment because the initial grievance itself protested violation of the subcontracting clause and merely referred to the current project for administrative purposes. The Union asserts that throughout the litigation, the Employer continued to violate the subcontracting clause by continuing to subcontract flooring installation to a non-signatory subcontractor. The Union claims that the wrongful assignment of work is a continuing violation citing a number of arbitration decisions supporting its position. It maintains that given the Employer's position, it would be futile to continue to file grievances and petitions to compel arbitration. It notes that from March, 1992 to May, 1993, the Employer subcontracted at least 298 projects. It takes the position that this is an on-going dispute over the subcontracting clause and not merely the dispute over which the initial grievance was filed.

The Union contends that the Employer breached the contract because floor installation is construction work under the Union's jurisdiction and subcontracting this work to a non-signatory subcontractor is in direct violation of the subcontracting clause. It seeks payment of contractual wages to members on the out-of-work list as well as corresponding payments to the Union's fringe benefit trust funds.

EMPLOYER'S POSITION:

The Employer contends that the June 20 and August 22, 1991 grievances are time barred and the arbitrator has no jurisdiction over them. It submits that Sec. 5.1 of the contract requires grievances to be filed within ten days of the incident and the subcontracted installation of carpeting at the Greenway Cross Trade Center began on June 1, 1991, and the grievance was filed three weeks later. As to the Physician's Plus project, subcontracted installation began by August 7, 1991, yet no grievance was filed until two weeks later. The Employer points out that the agreement does not contain a "discovery" time bar but a ten-day limit. It submits that the provision is to provide some finality and certainty in operations and the grievances should be denied because they were not brought with the contractual time limits.

The Employer asserts that the arbitrator lacks jurisdiction over any grievances filed after July, 1991, because the agreement was terminated as of July, 1991. It notes that after that date there were no employes in the unit and no labor agreement and without employes or the business that employes worked at, the agreement ceases. It maintains that the arbitrator should find there is no jurisdiction over the grievances filed after the agreement was terminated.

The Employer points out that nothing in the agreement provides authority for the amendment of grievances or the filing of blanket grievances, therefore the Union's amendment of September 1, 1992, is not appropriate. The Employer argues that the Union's claim that it was neither practical nor necessary to file individual grievances is belied by its filing the amendment as well as two grievances in 1991 and another two in the spring of 1992. Additionally, it claims that blanket grievances are inappropriate because they hamper the defense of grievances.

The Employer denies that it violated the agreement, It insists that any restriction on the Employer's right to subcontract must be clearly spelled out in the agreement. It maintains that the language in the agreement shows no intent to restrict subcontracting of carpet installation. It argues that Sec. 14.1(a) is not well written as the "Greater Wisconsin Carpenters Bargaining Unit" is not defined making it uncertain as to the entity with which an agreement must be made. It also asserts the "work . . . under the jurisdiction of the agreement" may refer to geographic jurisdiction, unit jurisdiction or occupational jurisdiction or all three. It claims that the agreement when read as a whole is designed to prohibit subcontracting of bargaining unit work and bargaining unit must refer to a unit of the Employer's employes and the only employes in such a unit were demountable wall installers. It takes the position that this was the Employer's reasonable understanding upon which it acted for years. The Employer insists that this is not an 8(f) contract but a 9(a) agreement by virtue of the voluntary recognition agreement, thus the term "work" means bargaining unit work of demountable wall installation. It maintains that the Employer understood that it was signing a labor agreement for work done by employes in the demountable wall installing unit and nothing beyond that.

The past practice, according to the Employer, supports the interpretation that the agreement does not restrict the subcontracting of carpet installation. It submits that the Union was aware that the Employer used non-signatory subcontractors to install carpeting. It points out that Bob Wick was a non-signatory subcontractor for the Employer for the last 15 years and he was known by the Union's agents, yet no grievances were filed or complaints made to the Employer. It argues that where a past practice of subcontracting is frequent and of long standing, it does not violate the agreement.

The Employer alleges it had reason to believe that an interpretation of the agreement to cover carpet installation would violate Sec. 8(e) of the Act. It submits that the Union sanctioned the practice for many years and seeks to unilaterally discontinue it rather than bargain over its discontinuance.

The Employer argues that even if the language is clear on its face, it does not bar examination of past practice to understand the intent of the parties. It alleges that the intent of the parties is not fully revealed in the language of the contract as the geographic coverage is not what the contract facially states. Similarly, according to the Employer, the subcontracting and jurisdiction clauses must be understood in the context of the parties' past practice. It submits that the Union has failed to demonstrate that the Employer agreed to restrict its subcontracting of carpet installation. It seeks dismissal of the grievances.

UNION'S REPLY:

The Union contends that the grievances filed on June 20 and August 22, 1991, are timely because they protest unlawful subcontracting, a continuing violation, which was occurring when the grievances were filed. The Union submits that wrongful subcontracting is like the wrongful assignment of work which is clearly a continuing violation and a grievance filed when the

subcontracting was continuing is timely because each day the Employer committed a new violation. It asserts that the only limitation on the grievance would be the amount of back pay the Union can collect which would be limited to ten days before it filed the grievance.

The Union alleges that the failure to assert its rights against the Employer's improper subcontracting in the past does not constitute a waiver. It claims that the subcontracting clause unambiguously prohibits subcontracting and arbitrators have found, even where there has been a practice of subletting, that the subcontracting clause is still a bar. It maintains that the failure to grieve past instances of subcontracting does not preclude the Union from raising the issue now because of the unambiguous language. It submits that clear contract language must prevail even where, on the basis of equity, past practice should prevail.

The Union contends that the arbitrator's function is limited to interpreting the collective bargaining agreement. It asserts that the arbitrator has no authority to consider the Employer's claim that it had no employes in the unit and no labor agreement. It takes the position that the Employer was a party to a labor agreement with the Union in July, 1991, and whether or not it was repudiated is not an issue within the arbitrator's jurisdiction. It notes that an employer may not repudiate a pre-hire agreement during its term but must comply with it. It further points out that the Employer had the opportunity to raise substantive arbitrability issues in court and the arbitrator's jurisdiction is whether a contract violation occurred under Article 5 of the contract.

The Union insists that the subcontracting clause is clear and unambiguously prohibits subcontracting bargaining unit work to a non-signatory subcontractor. It submits the subcontracting clause poses an absolute ban on subcontracting all work within the contract's jurisdiction. It takes the position that instead of relying on the Employer's CEO's subjective understanding of the clause, the definition set forth in the contract explicitly covers persons engaged in carpet laying. The Union contends that the Employer's confusion over the "Greater Wisconsin Carpenters Bargaining Unit" is immaterial. It alleges that the Employer subcontracted its carpet installation to a non-signatory to the agreement with the Union, and the Employer thus violated the subcontracting clause.

The Union requests a make-whole remedy from June 10, 1991 until May 31, 1993, including back pay, dues and fringe benefit contributions.

EMPLOYER'S REPLY:

The Employer contends that the subcontracting clause in the parties' agreement is quite ambiguous and the evidence shows that the "work" referred to was the demountable wall installation for which the bargaining unit was established by the parties' agreement. In support of its argument, the Employer points to NLRB's refusal to issue a complaint over the failure to bargain about furniture deliveries. The Employer takes the position that Sec. 14 prohibits subcontracting bargaining unit work and Sec. 14.1(b) refers to resolving such situations by having the work done by members of the bargaining unit. It claims that the unit was demountable wall installers and nobody else. The Employer asserts that the 1987-88 occurrence with Findorff offers little insight into the meaning of Sec. 14 because this did not involve any discussion between the Union and Employer but was about Findorff's relationship with the Union and not the Employer's. It takes the position that it is absurd for the Union to claim that the Employer violated the clauses regarding referral of applicants for employment, wage rates and fringe benefits because there was no employment as the Employer subcontracted all the carpet installation. It claims that arguing that the Employer must go into the carpet installation business itself is a gross misreading of the recognition clause and of the labor agreement. It concludes that the Union failed to prove that the Employer agreed to restrict its right to subcontract in the manner claimed.

The Employer reiterates its arguments that the grievances filed in June and August, 1991, are time barred because they were not filed within ten days of the incidents giving rise to the grievances. The Employer denies that subcontracting should be deemed a continuing violation because the evidence failed to show it "recurs daily." It submits that the evidence fails to prove any carpet was installed after June 10, 1991, or after August 12, 1991. It insists that the use of the "continuing violation" theory would effectively gut the ten-day requirement because any violation that could be said to have an impact after its occurrence would be "continuing." The Employer distinguishes the cases cited by the Union as not supporting its claim that subcontracting should be deemed a continuing violation. It maintains that the duty of employes to file timely grievances is not relieved by the fact that the Employer claims no violation and/or claims the grievance is invalid. The Employer further argues that the September, 1992 grievance is time barred for the same reasons expressed in its brief in chief.

The Employer claims the agreement was terminated in July, 1991, and the arbitrator has no jurisdiction over the grievances filed thereafter because there were no employes in the unit and no labor agreement. The Employer asks that the grievances be dismissed for lack of jurisdiction or alternatively denied for lack of merit.

DISCUSSION:

Timeliness

The Employer contends that none of the grievances in this matter were timely filed. Article V, Sec. 5.1 of the parties' agreement provides, in part, as follows:

> "All grievances, disputes or complaints arising under this agreement must be filed within ten (10) days of the incident giving rise to the grievance . . ."

The grievance filed on June 20, 1991, alleged a number of violations of the

parties' agreement by the Employer's subcontracting the carpet installation at the Greenway Tower Office project. 17/ The grievance is very general and does not spell out what subcontracting it was alleging violated these various provisions. 18/ The Employer's answer to this grievance establishes that the Employer knew what the grievance was about and denied it for a number of reasons and also claimed it was not timely filed. 19/ "Incident" in this case is asserted by the Employer to be the start of the subcontract and here the start was on June 1, 1991, so the grievance was not timely. While it could be argued that the term "incident" includes not only when it occurred but when it was discovered because the Union couldn't be expected to file a grievance until it became aware of the subcontracting, the Union does not make this argument but insists that the subcontracting of carpet installation was a continuing violation and the grievance was timely filed. The undersigned agrees with the Union that the grievance is continuing. The Employer sold carpeting and subcontracted its installation on a regular basis. Although it may not have been repeated "daily," the frequency was such that a grievance did not have to be filed at the start of or within ten days of the start of each subcontract. The Employer had been put on notice that the Union was claiming it was violating the contract by the subcontracting and it was not required to file a grievance every time the Employer subcontracted this work.

In United States Steel Corp., 77 LA 77 (Helburn, 1981), the grievance procedure provided a time line from the occurrence or the date the employe first learned of the complaint. The arbitrator held that the assignment of bargaining unit work to supervisory employes was a continuing violation and a grievance could be timely filed each day the work was wrongfully assigned.

In Bechtel Civil and Minerals, Inc., 87 LA 153 (Beck, 1986), the arbitrator cited United States Steel, supra, in holding that subcontracting with a non-signatory subcontractor to transport materials to produce concrete was a "continuing" grievance and that each day the work was subcontracted constituted a separate new occurrence. The Employer has attempted quite strongly to distinguish these cases; however, the undersigned has not been persuaded by these arguments that the alleged subcontracting is not a continuous violation. Thus, the undersigned finds that the grievance is timely because the subcontracting is a continuous violation and a grievance protesting said violation may be filed at any time.

LACK OF JURISDICTION:

The Employer has argued that even if the June 20, 1991 grievance is timely, the undersigned has no jurisdiction over any other matters because the contract was terminated. The Union counters this argument by pointing out to the undersigned that his authority is confined to the interpretation and application of the terms of the contract and there is no authority to consider the Employer's claim that it repudiated the contract. Again, the undersigned is persuaded by the Union's arguments that he has jurisdiction only to interpret the contract and because the contract was in effect in June, 1991, the undersigned has jurisdiction to determine whether the Employer violated the parties' collective bargaining agreement.

17/ Ex. 5.

18/ Id.

19/ Ex. 27.

MERITS:

Turning to the merits of the case, the Union is essentially arguing that the contractual language is clear and unambiguous and prohibits the Employer from subcontracting floor and carpet installation to a non-signatory subcontractor and the plain language must be enforced despite the Union's failure to grieve past violations. The Employer argues that the language is ambiguous and past practice supports its interpretation that the subcontracting clause does not apply to the subcontracting of carpet installation.

Article XIV, Sec. 14.1(a) seems to appear clear on its face that bargaining unit work cannot be sublet to a non-signatory subcontractor. The issue presented here is whether the application of this language is limited to the demountable wall installation or also includes the installation of carpeting. The undersigned finds that it does not include the installation of carpeting. This conclusion is based on the 14 or 15 years that the Employer has subcontracted the work without a grievance or complaint being filed. Additionally, Edward Rowley testified that he understood the agreement only covered the demountable walls business and did not apply to carpeting work. The Voluntary Recognition Agreement dated February 19, 1991, supports this understanding because it recognizes the Union as the representative of a majority of the Employer's employes but none of the Employer's employes were engaged in carpet laying as it was always subcontracted out. There was no testimony by a Union official that at the time the parties entered into the agreement, the Union's intent differed from Mr. Rowley's.

In Vincent Metals, 98 LA 1152 (Berguist, 1991), the contract expressly covered the issue of subcontracting and stated:

> In the event contracted or leased trucks are used by the Company, they shall be driven by the Company drivers.

The arbitrator found that the Company did not violate this language by its use of cartage delivery or by an employe of a cartage company driving a Company truck. The arbitrator stated his rationale as follows:

> The above testimony is also consistent with the practice of the company since the inception of Section 24.06. During this entire period of time to and including the period covered by the grievances, the Employer utilized cartage companies, along with its own fleet of trucks and drivers, in making deliveries. At times it utilized them more than at other times and apparently the period covering the grievances was a little more than just recently, but not in excess of the amounts and percentages that have been used in the past. The Employer also on occasion over this period of time of some 20 years, used a cartage driver to drive a Vincent truck when needed.
>
> Not once during this 20 year period did the Union and employees grieve such use by the Employer, which in my opinion constitutes a concession by the Union that the Employer was not violating Section 24.06 by such use.

Given the Employer's practice of subcontracting work for 14 or 15 years without a grievance being filed, this constitutes a concession by the Union that Article XIV did not apply to carpet installation. Although the Union claims jurisdiction extended over carpet laying, the evidence here establishes that it failed to assert its claim of jurisdiction over the Employer's carpet laying operations for such a long period that such failure constitutes a disclaimer of jurisdiction over carpet laying. Additionally, the evidence establishes that there was no mutual agreement that carpet installation was within the Union's jurisdiction despite its claim of same under the contract.

The Union pointed out that in 1987-88, the Employer put employes of a subcontractor on its payroll which it argues establishes that the Employer recognized that the Union had jurisdiction over carpet laying and the subcontracting clause prohibited subcontracting such work to a non-signatory subcontractor. The evidence established that the Employer included the subcontractor's employes on its payroll at Findorff's request. 20/ It should be noted that the collective bargaining agreement was signed by Kenneth J. Kruska, Chairman of J. H. Findorff & Sons, Inc. on behalf of the Associated General Contractors and his relationship with the Union might be entirely different from that of the Employer. It was Findorff's decision and request to include employes of the subcontractor on the Employer's payroll in which the Employer acquiesced but it proves nothing as to the Employer's understanding of its obligations vis-a-vis its carpeting installation operation. Thus, with respect to the merits, the undersigned finds that the Employer has not violated the contract by subcontracting its carpet laying work to a non-signatory subcontractor.

20/ Tr. 111-113, 117-118, 145.

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

AWARD

The grievances are timely filed because the alleged violations are continuous. The Employer did not violate the contract by subcontracting floor and carpet installation work to a non-signatory subcontractor, and the grievances are therefore denied in all respects.

Dated at Madison, Wisconsin, this 4th day of October, 1994.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator