BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 140	Case 30 No. 51384 A-5272
and	
SPARTA MANUFACTURING COMPANY	

Appearances:
Mr. Kevin D. Lee, Secretary-Treasurer/Business Manager, Laborers' International Union of North America, Local 140, AFL-CIO, 1920 Ward Avenue, Suite 10, LaCrosse, WI 54601-54656, appearing on behalf of Local Union No. 140.
Ms. Shari LePage Locante, Gleiss, Locante & Gleiss, Attorneys at Law, 111 South Co

ARBITRATION AWARD

Laborers' International Union of North America, Local Union No. 140 (Union) and Sparta Manufacturing Company (Company) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances by an impartial arbitrator appointed by the Wisconsin Employment Relations Commission (Commission) from its staff. On August 8, 1994, the Union filed with the Commission a request to initiate grievance arbitration. The Company concurred with said request. On September 27, 1994, the Commission designated James W. Engmann, a member of its staff, as the impartial arbitrator to resolve the dispute existing between them. A hearing was held on October 4, 1994, in Sparta, Wisconsin, at which time the parties were the afforded the opportunity to present evidence and to make arguments as they wished. The hearing was not transcribed. The parties made closing arguments and requested a bench decision. The arbitrator declined to issue a bench decision; the parties then requested an expedited award, to which the arbitrator agreed with the understanding said award would be brief. On October 6, 1994, the Company requested the opportunity to brief the issues of law in this matter and, if the Union did not object, requested the arbitrator to establish a briefing schedule. The Union did object. No briefs were submitted. Full consideration has been given the evidence and arguments of the parties in reaching this decision.

STATEMENT OF THE FACTS

Bags in the bag house catch contaminants and, periodically, they have to be replaced. The Maintenance Department has done this work since the bags were installed in 1974. The job is scheduled on a weekend when no production is

scheduled as the bags cannot be changed during production. Maintenance employes have always received overtime for this work, including double-time for any work on Sunday. If not enough maintenance employes are available to do the job on any particular weekend, laborers are brought in to supplement the maintenance employees. Maintenance employes supervise the work, and the laborers are paid at maintenance rates.

In late May 1994 (all dates after this are 1994 unless otherwise stated), the Company became aware that the bags in the bag house needed to be replaced. The Company made the decision to wait until a new fan arrived before they changed the bags. They did so because some bags would be damaged in the installation process and, in this way, the bags would only have to be changed once. The fan had been ordered but had not yet arrived; indeed, it had not arrived by Friday, June 24.

On that date, the Company received word that it was going to be inspected by the Environmental Protection Agency (EPA) on Wednesday, June 29. The Company knew that if the bags were not changed prior to the inspection, the Company would be cited for a violation of the Environmental Protection Act by the EPA.

Saturday, June 25, was scheduled as a production day, and the Company determined that this could not be changed. This meant that installation of the bags could not begin until after production shut down on Saturday, leaving less time than usual for the bags to be replaced.

The Company determined that the maintenance crew could not get the job finished in time for production to begin on Monday. The Company did not consult with the maintenance employes or the Union; instead, it contracted with Bassett Mechanical to do the job.

The job was done by Bassett Mechanical on Sunday, June 26. The Union grieved the matter, and said grievance went through the process established by the parties without being resolved. Said grievance is properly before this arbitrator.

PERTINENT CONTRACT LANGUAGE

ARTICLE II RECOGNITION AND UNION SECURITY

Section 2. Recognition

> The Union shall be the sole representative of all employees in collective bargaining with the Employer except the following:
>
> Executives, salesman, office, clerical employees, watchmen and guards, and supervisory personnel.

. . .

ARTICLE IX GENERAL PROVISIONS

Section 1. Management

Subject to the provisions of this Agreement, the management of the plant, property and business of the Company, the direction of the working force, including the right to determine who shall be hired, promoted, demoted, transferred and/or assigned to jobs, to suspend, discipline and discharge employees for cause, to increase or decrease the work force, and to determine the products to be handled, produced or manufactured and the methods, processes and means of production or handling shall be vested exclusively in the Company. Suspensions, discipline and discharge shall be subject to the grievance and arbitration procedures provided in Article III hereof. Any employee who is promoted, demoted or transferred by the Company contrary to his own desires shall not suffer any loss of seniority as a result of such promotion, demotion or transfer.

. . .

ARTICLE XI DURATION OF AGREEMENT

This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event an entire operation or any part hereof is sold, leased, transferred or taken over by sale, transfer, lease, assignment, receivership, or bankruptcy proceedings, such operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof. It is understood by this paragraph that the parties hereto shall not use any leasing device to a third party to evade this contract.

This Agreement shall be binding upon the parties, their successors and assigns, and shall continue in full force and effect until February 28, 1995, and from year to year thereafter, and shall be subject to amendment or termination only if either parties notifies the other party in writing of its desire to amend or terminate the same, ninety (90) days prior to February 28, or on the same day and month of any subsequent year.

ISSUE

The parties stipulated to framing the issue as follows:

Did the Company violate the collective bargaining agreement by subletting the replacement of bags in the bag house to Bassett Mechanical on June 26, 1994?

If so, what is the appropriate remedy?

POSITION OF THE PARTIES

The Union argues that Union employes have done this work since the bags were first installed in 1974, that it is their work, that the maintenance crew

could have done the job, that the Company assumed without even asking that the Union employes could not do the job, that the Company violated the agreement, and that, therefore, the maintenance employes should receive the pay they would have received but for the Company's subletting this work to Bassett Mechanical.

The Company argues that Article 4, Section 1 of the agreement gives the Company the right to sublet work in this situation, that there is no definition of maintenance work or language limiting subcontracting in the agreement, that the Company was facing an emergency situation, that there was not enough time for the maintenance employes to do this work, that not enough maintenance employes were available to do the work, that the Company had to go outside the Company to get the job done, and that, therefore, the Company did not violate the agreement.

DISCUSSION

While the Company is correct that Article 9, Section 1, reserves the right of the Company to "determine who shall be . . . assigned to jobs," this language cannot be viewed in a void but must be seen in the context of the agreement as a whole.

And while the Company is correct that no language defines maintenance work or specifically limits subcontracting, many arbitrators have held that the recognition, seniority, wage, duration and other such clauses of the agreement do limit the Company's right to subcontract.

The standard for determining whether these clauses have been violated is one of reasonableness and good faith. I find that the Company failed to meet this standard.

The Company made three decisions which has brought the parties to this forum. First, it decided not to replace the bags in the bag house on a non-production weekend in late May, a time when the maintenance crew could have done the job. This was not a decision based on the environmental issues involved; indeed, the bags needed to be changed for the protection of the environment but the Company chose to delay the changing.

No, this was a business decision. The Company was going to install a new fan when it arrived. Since some bags would be damaged in the process of installing the fan, the Company decided to wait to change the bags until the fan was installed, thereby saving the Company the money of replacing bags twice. On its face, this may not have been an unreasonable business decision, at least in the short term.

Second, when the Company learned on Friday, June 26, that it would be inspected by the EPA on Wednesday, June 29, it knew that Saturday, June 27 was a scheduled production day; thus, the Company needed to make its second decision. Normally, the maintenance crew has the entire weekend to change the bags. The only way that could occur in this situation was to cancel the Saturday production day.

Again, the Company made a business decision and determined that the losses in terms of productivity from such a cancellation would be too great. Therefore, the Company decided not to cancel the Saturday production day. And, again, on its face, this was not an unreasonable business decision, indeed, it was one that the Union would probably agree with as such a cancellation would impact on the wages of its members as well.

Third, the Company had to decide how it was going to get the bags

replaced in the bag house. The Company had some concerns as to whether the maintenance crew could get the job done in the time available. The Company determined that it needed to be guaranteed that the bags would be replaced in time for production to begin on Monday. Bassett Mechanical provided the Company with that guarantee.

Again, this was a business decision; it was not a labor relations decision for the Company never consulted with or even advised the Union of its concerns but, instead, the Company went forward and sublet the work to Bassett Mechanical. And that decision is one that is subject to attack as being unreasonable and in bad faith.

That decision was a different kind of business decision, not one based on saving the money of replacing the bags after installation of the fan, the business decision that guided decision number one above. This business decision was that it was better to have to replace the bags that to receive a citation and resulting fine from the EPA for violating the environmental protection laws.

The Company argues that, because of the pending EPA inspection, this was an emergency situation. It was not. There was no more danger to the plant, the equipment or any of the employes in this situation than if there was no forthcoming inspection. The danger was that the Company would be cited and fined for an environmental violation by the EPA.

While this brought some urgency to the situation, since the Company did not want to be cited or pay the accompanying fine or, possible, receive the resulting publicity, this was not an emergency situation.

And it was an urgency caused by its own doing, by its own decisions. If the Company had decided to replace the bags in May, the surprise inspection by the EPA would not have been a matter of concern. It is not reasonable for the Company to violate the environmental protection laws in order to save itself some money by not having to replace the bags twice, work that would have gone to the Maintenance employes, and then to contract out the work when it is about to be caught.

As to the Company's arguments that there was not enough time for the maintenance employes to do this work, that not enough maintenance employes were available to do the work, and that the Company had to go outside the Company to

get the job done, I am not convinced. The Union proved that it has done this work in the past and the Company did not rebut this by showing that the Maintenance employes could not get the job done.

And, indeed, this is where the bad faith comes in, for the Company never brought this matter to the Union's attention, instead choosing to make this decision in the void. The Company did not know if the employes were available, for it never talked to them.

On the other hand, the Union did prove that the Company has never subcontracted out this work in the past, that maintenance employes have a long history of installing bags in the bag house, that they have been paid overtime for doing this work on weekends in the past, and that they were not paid for the work this time.

Therefore, for the reasons stated above, the Arbitrator issues the following

AWARD

1. That the Company violated the collective bargaining agreement by subletting the replacement of bags in the bag house to Bassett Mechanical on June 26, 1994.

2. That the appropriate remedy is for the Company to make the maintenance employes whole at the overtime rate for the number of hours the employes would have worked but for the subcontracting, based upon the number of hours worked by the subcontractors.

Dated at Madison, Wisconsin, this 14th day of October, 1994.

By James W. Engmann /s/
James W. Engmann, Arbitrator