BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

WISCONSIN ELECTRIC POWER COMPANY
Milwaukee, Wisconsin

and

LOCAL UNION NO. 2150, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Case 48
No. 50720
A-5197

Appearances:

Ms. Lynne English, Company Attorney, 231 West Michigan Street, Milwaukee, WI 53203, appearing on behalf of the Company.

Mr. Scott Soldon, Attorney at Law, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 155 North Rivercenter Drive, Suite 212, Milwaukee, WI 53212, appearing on behalf of the Union.

ARBITRATION AWARD

The parties jointly requested that the Wisconsin Employment Relations Commission designate the undersigned Marshall L. Gratz to serve as impartial third arbitrator on an Arbitration Board also consisting of Company-appointee Charles E. Prentice and Union- appointee Timm A. Driscoll, to hear and determine a dispute concerning the above-noted grievance under the grievance arbitration provisions of their September 25, 1992 through August 15, 1995 Northern Manual Unit Labor Agreement (herein Agreement).

The parties presented their evidence and arguments to the full Arbitration Board at a hearing held at the Company's Headquarters in Milwaukee, Wisconsin, on May 5, 1994. After a transcript of the hearing was distributed, the parties submitted post-hearing briefs by July 20, 1994, marking the close of the record. Following further Arbitration Board deliberations, the Arbitration Board majority issues the following Award.

ISSUES

At the hearing, the parties authorized the Arbitration Board to state the issues upon

consideration of the parties' proposed formulations. The Union proposed, "Did the Company violate the labor agreement by assigning bargaining unit work to George Tutas while not treating him as an employee under the labor agreement? If so, what is the appropriate remedy?" The Company proposed, "Did the Company violate the labor agreement by contracting out work to George Tutas? If so, what should the remedy be?"

The Arbitration Board majority frames the issues as follows:

1. Did the Company violate the Agreement by assigning annual fire extinguisher inspection work and/or minor maintenance work to George Tutas without treating him as an employe under the Agreement?

2. If so, what is the appropriate remedy?

PORTIONS OF THE AGREEMENT

ARTICLE I
JURISDICTION

Section 1.1

The Union shall be the sole representative for collective bargaining on all matters related to wages, hours, and working conditions for the Company's employees who are or may become engaged in the operation and maintenance of thermal, hydro or engine-powered electric generating plants and the operation, maintenance and construction of transmission and distribution facilities; also employees engaged in such related and supporting occupations as are set forth in Exhibit "A" attached to this Agreement.

ARTICLE II
ALL UNION AGREEMENT

Section 2.1 . . .

(a) Except as otherwise expressly provided in the Agreement, the Company reserves to itself the exclusive right to determine who and how many persons it will employ, the manner in which they shall do their work, the way they shall deport themselves while on the Company's property, and the character of organization required for the most effective performance of the work. Except in emergencies, the Company agrees to notify the

Union when in need of additional employees in occupations covered by this Agreement and the Union shall have a right to present competent candidates for employment who are residents of the community in which the need exists. Should the Union fail to furnish workers with necessary qualifications within forty-eight (48) hours, the Company may employ workers who are not members of the Union. Employment shall be on the basis of qualifications and in accordance with the company's selection procedures and standards, but the persons employed, if not members of the Union, shall become members in accordance with paragraph (b) of this Section. A new employee is considered on probation during the first ninety (90) calendar days of employment and during this period, continued employment is at the sole discretion of the company. Such probationary period may be extended at the request of the Company for additional periods of thirty (30) days each by written mutual agreement of the Union.

(b) Subject to the provisions of paragraph (g) of this Section, all persons hereafter employed by the Company within said unit shall as a condition of continued employment, apply for membership in the Union within thirty (30) days after they commence work. The Company agrees to deduct each month from the wages of each Union member who signs a properly executed Check-Off Authorization and Assignment (Exhibit "B"), the monthly equivalent of his/her Union membership dues as set forth in the bylaws of the Union and in accordance with the type of membership which has been selected by each member, and, by the last day of each month, remit the total of such deductions to the Financial Secretary of the Union . . . .

(c) The Union agrees it will accept into membership any employee who may, by operation of this Section be required to apply for such membership without discrimination . . .

(d) Any present or future employe within said unit who now is or may hereafter become a member of the Union, shall as a condition of continued employment, remain a member of the Union "in good standing". The Union agrees that it will be diligent in its attempt to solicit membership and to keep its members in good standing and that only upon failure of such diligent efforts shall the employee be deemed not "in good standing". . . .

. . .

(g) The following types of employees are to be exempt from the provisions of this Section except that those in groups (g-1), (g-2), (g-3), (g-4), and (g-5) may be required, by the Union, as a condition of employment, to secure from the Union, a provisional working card after thirty days' employment:

(g-1) Students employed for their vacation periods.

. . .

(g-5) All other temporary employees.

. . .

ARTICLE VI
COOPERATION

. . .

Section 6.2

The Company agrees that it will cooperate with the Union in its efforts to promote harmony and efficiency among all of the Company's employees, and to this end agrees to actively promote and maintain an effective and continuing program of safety and job training.

. . .

ARTICLE IX
MANAGEMENT

Section 9.1

The right to employ, promote, discipline, and discharge employees and the management of the property and business are reserved by and shall be vested in the Company, except as modified by the terms of this Agreement. It is agreed, however, that promotions shall be based on seniority, ability, and qualifications. Ability and qualifications being sufficient, seniority shall prevail.

Membership in the Union shall in no way prejudice an employee's qualifications for promotion to fill any position. Should an employee be promoted to a position above the grade of Crew Leader or Group Leader, he/she shall be given a withdrawal card by the Union upon the employee's request. The Company shall have the right to determine how many persons it will employ or retain, together with the right to exercise full control and discipline in the interest of good service and the proper conduct of its business.

(a) Should an employee be promoted to a position above the grade of Crew Leader or Group Leader, he/she shall discontinue to do work with tools normally done by Union members, except in emergency or for the purpose of training.

Section 9.2

The Company agrees it will not contract out any work which will result in lay-off for lack of work of any employee covered by this Agreement during the period of the Agreement.

. . .

BACKGROUND

The Company is a public utility engaged principally in the generation, transmission, distribution and sale of electric energy. The Company serves customers in southeastern Wisconsin, east central and northern portions of Wisconsin, and portions of the Upper Peninsula in Michigan. This case involves the Company's Northern Manual Unit, which is one of seven bargaining units represented by the Union for many years. Those units are covered by six separate agreements with the Company, of which the Agreement is one.

George Tutas retired effective June 1, 1993 after some 18 years of employment in the Northern Manual bargaining unit, working out of Company buildings in Iron Mountain, Michigan. Since 1982 he has been employed as a Building Maintenance Worker working most recently out of the Company's Wolverine Service Center in Iron Mountain. Tutas' work in that position involved general maintenance duties performed at various Company facilities throughout the Iron Range Region (herein Region). The Region is geographically spread 150 miles east and west of Iron Mountain and some 100 miles north and south of there. The Region's only other service center is located at Land o' Lakes, Wisconsin. In 1987, Tutas was trained and obtained the necessary certification to perform annual inspections of the fire extinguishers throughout the Region. The Company had previously contracted out that annual inspection work to Interstate

Valve Weld of Marinette, Wisconsin. The Company has at all material times contracted out its five-year fire extinguisher inspections.

Tutas retired with a Company pension effective June 1, 1993. In documents dated June 28 and June 30, 1993, the Company issued "Contract Award" documents to Tutas, each of which covers the period July 1, 1993 through December 31, 1995.

The first contract award provides that, in return for a flat rate of $7,200 per year (plus $13.50 for recharging any extinguisher that has been discharged), Tutas would perform the annual fire extinguisher inspection, maintenance and recharge for the Company throughout the Iron Range Region. Those payment figures were set forth on an undated bid handwritten by Tutas attached as part of the contract award. The contract award states that Tutas would provide the labor, material, tools and equipment necessary to perform that work except that the Company would provide, maintain and fuel a step van for Tutas' use and furnish "all materials from the store room for extinguishers." The document requires that the inspections be performed annually, leaving it to Tutas to decide when during the calendar year they are performed. It also provides the following regarding "Backcharges":

> Contractor shall provide all equipment, parts, material and labor necessary to correct manufacturing defects, and field errors caused by omissions or errors in the contractor's work, equipment, drawings or instructions. If the Contractor fails to take corrective measures promptly, to avoid delays in the project schedule, the Buyer will arrange for corrective work to be done, advise the Contractor of the schedule and pricing, and backcharge the contractor for the cost of the corrective work.

Tutas performed the calendar 1993 inspections prior to his retirement. He performed all of the 1994 inspections during roughly a 30-60 day period including most or all of April of 1994. In doing so, Tutas used the same Company step van and Company fire extinguisher inspection equipment and materials he used prior to his retirement. Since Tutas' retirement, the van has been refitted to enable it also to be used on a regular basis by Company fleet mechanics for on-the-road repairs, with only a portion of the truck dedicated to housing the fire extinguisher inspection equipment.

The second contract award provides that Tutas will perform certain maintenance on Company buildings and structures in the Region on a time and materials basis at $25.00 per hour. Tutas identified that as his "Building Maintenance rate" in a handwritten note dated June 29, 1993 and attached as part of the contract award. As of the time of the arbitration hearing, Tutas had worked about 25 hours on four separate dates under that contract award. As he did prior to his retirement, he used his own tools on those tasks except where special equipment was needed in which case he used Company equipment. The contract award does not guarantee either that Tutas

will be contacted or that Tutas must work when contacted by the Company about available tasks. On two occasions when Tutas was contacted, he said he was unavailable. In each instance the Company chose to wait until Tutas was available so that he could perform the tasks involved.

Both contract awards state that Tutas guarantees his work for a period of one year from the date of the Company's final acceptance of it. Regarding insurance, both contracts require "that a certificate of insurance be submitted . . . to provide evidence of worker's compensation insurance, employer's liability insurance with limits of at least $100,000, general liability coverage minimum limits of $1,000,000 per occurrence and automobile liability coverage with limits of at least $500,000." In that regard the record evidence suggests: that the auto insurance for which Tutas supplied a certificate had lower than the minimums specified in the contract award; and that Tutas did not supply any certificate of Worker's Compensation or employer's liability coverage.

Tutas submitted invoices for his work on maintenance projects, handwritten on printed forms, specifying the number of hours worked, the work performed and the amounts due. Those invoices were reviewed and signed by the Company supervisor responsible for Tutas' activities. For a time, that was done by Rick Knipfer, who had been Tutas' immediate supervisor prior to Tutas' retirement. After Knipfer left the Company, Roger Allen was the supervisor responsible for Tutas' activities. The Company paid Tutas in full without withholding FICA or other taxes. Tutas was issued the Form 1099-MISC the Company issues to contractors rather than the Form W-2 it issues to employes. The parties stipulated that after Tutas retired, the Company no longer counted him as an employe for Unemployment Compensation contribution tax purposes.

The Company learned that Tutas planned to retire on June 1, 1993 shortly after January 1, 1993. During the first quarter of that year, the Company decided that it would assign Tutas' duties to others rather than replace Tutas with another Building Maintenance Worker. Knipfer talked to Tutas about working for the Company on a contract basis following his retirement. Those discussions with Tutas probably began before his retirement became effective on June 1. Region Manager David Molinare's approval of the arrangement in concept occurred sometime prior to Tutas' retirement or shortly thereafter. The Company trained other of its bargaining unit personnel to assume some of Tutas' duties, and those duties have been split among various bargaining unit employes and certain contractors. The Company did not train any other personnel to perform annual fire extinguisher inspections, and it did not invite bids from other than Tutas to perform that work after June 1, 1993.

The Company has historically used a combination of bargaining unit and contracted for personnel to work Company-wide, including maintenance and custodial work in the Iron Range Region. A 1985 arbitration board chaired by arbitrator George Fleischli issued an award involving the Northern Manual Unit and a dispute regarding whether the Company, under the same language as now appears in Agreement Secs. 1.1, 1.2(a) and 9.2, had the right to contract out to a janitorial service park janitorial work previously performed by bargaining unit employes. The Union argued, in part, that the Agreement should be interpreted as reserving that work to the

bargaining unit. The Company countered that the Agreement covered only employes and not any particular work. The award denied the grievance, concluding that the specific language of Sec. 9.2 controlled and reserved to the Company the right to contract out as it did since no bargaining unit employe had been laid off as a result of the Company's decision to contract out the park maintenance activities. The parties' relevant past practice and bargaining history were described in that award as follows:

> The Company has a history of contracting out a variety of work relating to its operations. Some instances involved temporary work which bargaining unit employees did not have time to do. Others involved work regularly performed by both bargaining unit employees and outside contractors. Some involved work done exclusively and regularly by bargaining unit employees and then permanently contracted out.
>
> During the negotiations for the 1974 agreement, the union proposed for the six to seven units it represents language arguably prohibiting subcontracting. It then modified its position and proposed instead that all subcontracting be prohibited unless the contractor paid wages and benefits at least equivalent to bargaining unit wages and benefits. Finally, it proposed instead that Section 1.1, the jurisdiction clause, which existed in the contract in this case but not in the others it represents, be included in all of its contracts. The Union was not successful in these efforts. Section 9.2, the subcontracting clause, remained unchanged, as did Section 1.1, the jurisdiction clause, which was not incorporated into any other contract.

The Company presented limited testimony and documents confirming various of those same factual matters in the instant record, as well.

The grievance giving rise to this proceeding asserts that from "Early 1993 to present" the Company has been violating Agreement Art. II Sec. 2.1 (a)(b)(c)(d) and Art. VI Sec. 6.2, in that "WEPCO Iron Range region has employed George Tutas, a retired employee from the occupation Building Maintenance Worker, to continue to provide his services by continuing to perform regular duties of the building Maintenance Worker occupation." The remedy requested was: "1. George be provided with all back benefits and difference of wages between his contracted rate and the occupational rate of the Building Maintenance Worker. 2. George be recognized as a regular full-time employee of WEPCO since his date of rehire. 3. That his pension be discontinued because of his regular employee status. 4. That the company pay restitution to the union in the form of back dues Local 2150 would have collected since rehire to present."

The grievance was among several discussed between Company and Union representatives on January 5, 1994. It remained unresolved and was submitted to arbitration as noted above.

POSITION OF THE UNION

The Agreement affords the Company the right to legitimately subcontract in certain circumstances. However, in this case it has returned a retired Building Maintenance Worker George Tutas to perform work he performed prior to his retirement, in the guise of an "independent contractor." This Company subterfuge is contrary to the spirit of the Agreement and will erode the bargaining unit if allowed to continue. Citing, Pacific Gas & Electric (and IBEW Local 1245), U-717-86-1245 (Chvany, 1986). Thus, in W.R. Grace & Co., 91 LA 170, 175 (Taylor, 1988), the arbitrator found that although the language of the agreement permitted the company to subcontract,

> This employe performed the same duties in the same manner using Company equipment under the same supervision as the regular Sampler. . . . it was a method utilized by Management . . . to circumvent the collective bargaining relationship. . . . The company violated the spirit and intent of the Collective Bargaining Agreement in labeling this Employee a subcontractor."

He ordered the company to cease and desist such employment practices, making it clear that a right to subcontract is not a right to arbitrarily treat actual employees as subcontractors.

Tutas does not meet the criteria necessary to be considered an independent contractor. Those criteria include the permanency of the working relationship, the opportunity for profit and loss, any investment in material, the degree of control, and the individual's skill. Citing, United States v. Silk, 331 U.S. 704, 716 (1947) and Donovan v. Tehco, Inc., 642 F.2d 141, 143 (CA 5, 1981). The description of the pump operator supervisor held to be an employee in Tehco closely resembles Tutas' relationship with the Company:

> [Mr. Topsy] had no business organization; except for some hand tools, he supplied nothing but his labor; he supervised Tehco employees and was himself supervised, albeit loosely, but an admitted employee of Techo; he had no power to hire or fire workers assisting him on particular jobs. . . He could choose the job assignments he wanted. He could elect to be paid by the hour or by the job . . . he could work eighty hours one week and none the next. And although he did not work for others during this period, he was free to do so . . . The totality of the circumstances convinces us that Mr. Topsy was not an independent businessman in any meaningful sense.

Id. at 143.

Tutas' contracts are for 2.5 years, providing significant permanency and effectively continuing his long-running relationship as a Company employe. The Company made no effort to train any other employe to do annual fire extinguisher inspections or to seek bids from any other vendor when it learned shortly after January 1, 1993 that Tutas planned to retire. The Company was discussing among themselves and with Tutas the possibility of him staying on after his official retirement to become an independent contractor during the first quarter of 1993. Then, by June 30, following Tutas official retirement on June 1, 1993, two complete contracts between the Company and Tutas were allegedly negotiated, agreed upon, drafted and signed and Tutas returned to work for the Company under the guise of an "independent contractor," all without consulting or informing the Union.

Tutas is performing work different only in amount from that he performed prior to his retirement. He continues to perform fire extinguisher inspections and some general maintenance. He has taken on no new tasks not previously performed by him as an employe. The Wolverine Service Center continues to be the location out of which he performs that work. The Company has not yet used another vendor in those instances when Tutas has not been immediately available when contacted. There is no evidence that Tutas is being supervised any more actively now than he was as an 18-year veteran employe prior to his retirement. When there is maintenance work for him, he is called in by Roger Allen, who signs Tutas' time sheets and is responsible for his work activity. Tutas' arrangements with the Company expose him to no risk of loss or opportunity for profit. He has apparently made no investment in fire extinguisher inspection equipment, special tools or replacement parts. He continues to use a Company van and equipment to perform his work, and he uses his own hand tools as he did prior to retirement. The Company either supplies the replacement parts needed or reimburses Tutas for them when he purchases them as needed. He has no other clients and appears unable to accept other fire extinguisher inspection clients unless they could also provide him with the required equipment. It is not even clear that he purchased the necessary insurance.

The 1985 Fleischli award is not controlling here because it involved very different facts. There the Company hired two established contractors to do park janitorial and maintenance work on a day-to day basis; there was no previous employment relationship between the Company and the contractors, the Company did not appear to be the contractors' only client. The Union in that case never asserted that the contractors were actually employes, so that issue was never addressed by the parties or the arbitrators.

In this case the Company secretly arranged for Tutas' post-retirement services while he was still an employe, showing that it had a preconceived plan designed to circumvent the collective bargaining agreement. The record also shows that Local 2150 has lost 19 bargaining unit positions since 1991 and that other Iron Range employes may soon face layoffs because of the company's reorganization efforts. When Tutas retired, a temporary agency employe was hired to work full-time in the department that assumed some of Tutas' tasks. If the integrity of the

bargaining unit is to be at all protected, the Company must be required to uphold the spirit of the Agreement and must not be allowed to avoid its obligations merely by changing the manner in which it refers to an employe.

The Arbitrator should therefore sustain the grievance and order back benefits and wages for Tutas, stoppage of his pension, and that the Union receive back dues. In the alternative, the Arbitrator should order the work returned to the bargaining unit.

POSITION OF THE COMPANY

The Company has the right generally under Sec. 2.1(a) and specifically under Sec. 9.2 to sub-contract where, as here, it does not result in layoff for lack of work of any employee in the bargaining unit. Citing, Air Products & Chemicals, Inc., 81 LA 465 (Speroff, 1983). Although the term "contract out" in Sec. 9.2 is not defined in the Agreement, under any ordinary understanding of that term, George Tutas is a contractor, not an employe in disguise, so the Company's contracting arrangement with him does not violate the Agreement.

Tutas left the Company's employ when he retired, turning in his keys and identification badge. The Company and Tutas negotiated terms and pricing resulting in written documents describing both sides' obligations. Tutas is paid a set fee for fire extinguisher inspections and is paid on a time and materials basis for the maintenance work. While the latter involves an hourly rate, Tutas is still being paid on a "per job" basis. Tutas was required to furnish proof of auto liability insurance, which he provided. Tutas is paid as a contractor, not an employe, submitting invoices to the Company's Accounts Payable area, receiving a 1099 form rather than a W-2, and experiencing no withholding of income taxes or FICA. Also, Tutas has not been considered an employe for unemployment compensation contribution tax purposes since his retirement. Those factors all indicate that he is an independent contractor.

In Liquid Transporters, 99 LA 217 (Witney, 1992), the arbitrator applied a "right to control" test and found the employer had legitimately sub-contracted with a laid-off employee to perform maintenance work under language prohibiting subcontracting that directly causes the layoff of an employe. There, as here, the work was different from that performed by the laid-off individual prior to his layoff; the worker proposed the compensation terms which the employer accepted; the compensation terms were more akin to those of a contractor than to an employe's hourly wages; and the workers in both cases controlled their own schedule as well as the means and methods by which they performed the work.

The fire extinguisher inspection contract award gives Tutas complete control over when, during a 12 month period, he performs the tests involved. No Company employee supervises the details of this activity to any extent. As the Company has done with other contractors from time to time, the Company provides Tutas with the use of a Company van equipped with specialized fire extinguisher inspection equipment. It would not have been sensible to pay Tutas at a contract rate high enough to compensate him for obtaining his own equipment when the Company already had

the necessary equipment available which would otherwise have lain idle. Under the maintenance contract, Tutas is contacted when there is a project to be completed. He decides whether he is able to perform the work at the time requested, and he has twice deferred the work until he was available. There is no evidence that any Company supervisor exercised the type of control over the Tutas' performance of the work that typically characterizes the employer-employee relationship.

The fact that Tutas' contract awards relate to work that had previously been and could otherwise have been performed by bargaining unit personnel is irrelevant to a determination of his status as a contractor under the Agreement. The Fleischli award in 1985 involved the same unit and the same pertinent contract provisions. It held that past practice and bargaining history clearly establish that the Company is free to contract out such work at its discretion so long as it does not "result in the lay-off for lack of work of any employee covered by this Agreement during the period of the Agreement." In 1974, the Union sought unsuccessfully first to prevent work performed by unit employes from being assigned to anyone outside the bargaining unit and then to prohibit contracting such work out to firms paying pay below Agreement scale wages and benefits. Since 1952, when the subcontracting language was introduced into the Agreement, the Company has continuously contracted out work that would otherwise have been performed by bargaining unit employes. Work contracted out has included certain maintenance and/or janitorial work in the Iron Range Region.

The Company's exercise of its right to subcontract in this case has been reasonable, based on legitimate business considerations, and was not an attempt to subvert the Agreement or to seriously erode the bargaining unit. It did not make sense to hire another Building Maintenance Worker when the majority of Tutas' former duties could be performed by existing employees, especially in light of the anticipated sharing of maintenance duties between Iron Range Region and the Hydro operations. Indeed, the annual fire extinguisher inspection work had been contracted out prior to Tutas becoming certified to perform it in 1987. The Company could easily have assigned it to the same outside contractor who performs the five year inspections. The need for contracting out minor maintenance support is reasonable because there is not nearly enough work to justify a full-time position.

Tutas did not retire one day and return the next to perform the same job as he had before retirement. He is performing only a very minor part of his former job. His former job paid $18.65 per hour which is some $38,792 across 2080 hours per year. Unlike his former full-time position, he now works no set hours. He is rarely at the service center, let alone reporting there daily. He is not working alongside other unit employes performing the same type of work, and he is working for a set fee on a project basis with almost no supervisory control over his activities. Tutas is therefore working for the Company on a contract basis. He meets any "control" or other standard for independent contractor. Citing, G. Heileman Brewing Co. v. NLRB, 879 F.2d 1526 (CA7, 1989) and W. W. Grainger, Inc. v. NLRB, 860 F.2d 244 (CA7, 1988). He is not a camouflaged Building Maintenance Worker.

The grievance should therefore be denied.

DISCUSSION

In light of the Fleischli award and the evidence regarding past practice and bargaining history reviewed in that case (and re-presented in this record), the Agreement, by the specific language of Sec. 9.2, reserves to the Company the right to contract out work of the sort at issue in this case so long as contracting out that work does not "result in lay-off for lack of work of any employee covered by this Agreement during the period of the Agreement." That is true despite the fact that the work has been, at various times, and could otherwise be performed by Northern Manual Unit personnel.

The parties have stipulated that there have been no layoffs yet as a result of the Company's award of work to George Tutas since his retirement.

Hence, the question in this case, which was not addressed in the Fleischli award, is whether the work in question has been performed by an independent contractor or by an employe. If Tutas is an independent contractor, the Company is acting within its reserved rights to assign him the work as it has. If Tutas is an employe rather than an independent contractor, the Company's course of action at issue here would not fall within the purview of rights reserved in Sec. 9.2 and would be inconsistent with various Agreement provisions concerning wages and other conditions of employment of bargaining unit employes.

Published arbitration awards in which the validity of alleged subcontracting turned at least in part on whether the work was performed by an independent contractor or an employe include Continental Can Co., 29 LA 67, 72 (Sembower, 1956)("In scrutinizing subcontracting arrangements, arbitrators have shown an inclination to inquire whether certain arrangements are, in fact, dealings with independent contractors or merely new employer-employee relationships. It can hardly be gainsaid that to come within the inherent rights of management it must be, in fact, an independent contractual relationship, not employer-employee."); Pacific Laundry & Dry Cleaning Co., 39 LA 677, 683 (Tsukiyama, 1962); Consolidated Badger Cooperative, 48 LA 353, 362-3 (Lee, 1967); Taylor Publishing Co., 55 LA 817, 820 (Sartain, 1970); Ralston Purina Co., 78 LA 35 (E. Harrison, 1982); Empire Tractor and Equipment Co., 85 LA 348 (Koven, 1985); Hercules, Inc., 88-1 Par. 8234 (Marx, 1988); as well as the Liquid Transporters and W.R. Grace cases cited by the parties.

The arbitrators' decisional standards in those cases for determining employe or independent contractor status focused on whether the party for whom the work is being performed has the right to control the details of the performance of the work. In Continental Can, the arbitrator identified the applicable decisional standards as follows,

> The distinction between independent contractors and employees has

> been of great importance for a long time in many branches of law and is a particularly important facet of Agency law. So the principles are quite clear, and many authorities can be cited, but Black's Law Dictionary defines an independent contractor as "one who, exercising an independent employment contract to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work."

29 LA at 72. That same definition was quoted and used as the decisional standard applied in Ralston Purina. In Empire Tractor and Equipment Co., the arbitrator identified the "right to control test" as "the basic standard which arbitrators, the NLRB and the courts have applied to determine whether an individual is a bona fide independent contractor." He went on to identify that test by quoting the Black's Law Dictionary definition and by referring to NLRB v. Warner, 587 F.2d 896 (CA8, 1978) in which he Court stated,

> The Supreme Court has made it clear that the distinction between employees and independent contractors must be made by the application of general agency principles on a case by case basis. NLRB v. United Insurance Company, 390 U.S. 254, 256 (1968). Traditionally, this inquiry has focused upon "the nature and amount of control reserved by the person for whom the work is done." Minnesota Milk Co. v. NLRB, 314 F.2d 983, 986 (7th Cir. 1948). "It is the right to control which is the determining element." NLRB v. Phoenix Mutual Life Insurance Co., supra, 167 F.2d at 986; Azad v. United States, 388 F.2d 74, 76 (8th Cir. 1968); NLRB v. Cement Transport Inc., 490 F.2d 1024, 1027 (6th Cir. 1974). All of the incidents of the individual's relationship must be assessed and weighed with no factor being decisive. These factors include
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> > the right to hire and discharge persons doing the work, the method and determination of the amount of the payment to the workmen, whether the person doing the work is engaged in an independent business or enterprise, whether he stands to make a profit on the work of those under him, the question of which party furnishes the tools or materials with which the work is done, and who has control of the premises where the work is done. In addition . . . consideration must be given to other factors, such as whether the relationship is of a permanent character, the skill required in the particular occupation, and who designates where the work is to be performed.
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> Minnesota Milk Co. v. NLRB, supra, 314 F.2d at 765.

587 F.2d at 899-900. NLRB and federal court decisions to the same effect as those noted above were the standards applied by the arbitrator in Consolidated Badger Cooperative. In Liquid Transporters, the arbitrator considered a variety of factors but gave very heavy weight to the locus of the right to control the methods and means of performing the work in reliance on the following Black's Law Dictionary definition of independent contractor:

> It is very generally held that the right of control as to the mode of doing the work contracted for is the principal consideration in determining whether one employed is an "independent contractor" or servant. . . . If the employee is merely subject to the control or direction of the employer as to the result to be obtained, he is an independent contractor; if he is subject to the control of the employer as to the means to be employed, he is not an independent contractor.

99 LA at 225. In W.R. Grace, no general decisional standard was articulated, but the arbitrator's conclusion that the relationship was not "a true sub-contract as commonly defined within the industrial world" was based on the facts that, "[t]his Employee performed the same duties in the same manner using Company equipment under the same supervision as the regular Sampler. Actually no one knew that she was not a new, probationary Employee until she had been on the job over a month." 91 LA at 175. (emphasis supplied). The right to control was the decisional standard applied in the Variety Stamping Corp. and Pacific Laundry & Dry Cleaning Co. cases.

The nature of the case-by-case application of general common law agency principles is usefully described in the following excerpts from 41 Am Jur 2d Independent Contractors Sec. 5:

> Although it is apparent from an examination of the cases involving the independent contractor relationship, that there is no absolute rule for determining whether one is an independent contractor or an employee, and that each case must be determined on its own facts, nevertheless there are many well-recognized and fairly typical indicia of the status of an independent contractor, even though the presence of one or more of such indicia in a case is not necessarily conclusive. Such indicia are important as guides to the broader and primary question of whether the worker is in fact independent, or subject to the control of the employer, in performing the work. . . . [I]t has generally been held that the test of what constitutes independent services lies in the control exercised, the decisive question being who has the right to direct what shall be done, and when and how it shall be done. . . . It has also been held that commonly recognized tests of the independent contractor

> relationship, although not necessarily concurrent or each in itself controlling, are the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price, the independent nature of his business or his distinct calling, his employment of assistants with the right to supervise their activities, his obligation to furnish necessary tools, supplies, and materials, his right to control the progress of the work except as to final results, the time for which the workman is employed, the method of payment, whether by time or by job, and whether the work is part of the regular business of the employer.

Because legal distinctions between independent contractors and employes are drawn for a variety of purposes, the weight given to particular factors can vary somewhat from one legal context to another. Thus,

> . . . a person may be an independent contractor as to certain work, and a mere servant, employee, or agent as to other work for the same employer not embraced with the independent contract. Moreover, the relation of master and servant might be found not to exist between certain persons for the purpose of one legal problem, say, respondeat superior, and yet the relation might be considered to exist between the same persons at the same time for some other purpose, such as unemployment compensation.

41 Am Jur 2d at 739-40. For example, under the common law tort doctrine of respondeat superior the right to control performance was the element which determined whether the worker was a servant or an independent contractor. 37 ALR Fed 95, 109. However, as noted in the Donovan v. Tehco, Inc. case cited by the Union, the emphasis in applying the very broad Fair Labor Standards Act definition of "employee" to achieve the objectives of the statutory overtime-wage protections has been on "whether the individual whose status is in doubt is in 'economic reality' an independent businessman." 642 F.2d 141 at 143 and notes 3 and 7. 1/ Accordingly, such determinations under the FLSA have focused heavily on the five factors referred to by the Union. In contrast, determinations of whether workers are employes for FICA

1/ While many of the circumstances regarding the pump operator supervisor in the Techo case are similar to Tutas' situation, it is not clear that the situations are entirely parallel. Tutas does not supervise others on behalf of the Company. Nor is Tutas "supervised", "loosely" or otherwise, with regard to how he performs his work. The Court's brief recitation of facts leaves in doubt whether Topsy was "loosely" supervised with respect to how he performed his work for Techo and whether Topsy's work was as limited in overall amount as Tutas'.

and FUTA tax purposes have, instead, emphasized a realistic application of traditional common law rules. 37 ALR Fed 95, 108 citing, United States v. W.M. Webb, Inc., 397 US 179 (1970).

As noted above, when the issue has been addressed by grievance arbitrators in subcontracting cases, they have utilized the traditional common law principles with its focus on the right to control the details of the performance of the work. However, because "[w]hat is important is that the total factual context is assessed in light of the pertinent common-law agency principles" NLRB v. United Insurance Co., above, 390 U.S. at 258, it is also appropriate to consider each of the economic factors referred to by the Union, as well.

In this case, as often occurs, the relevant factors do not all point toward the same conclusion. However, when all of the factors are weighed, the Arbitration Board majority is satisfied that Tutas is properly viewed as an independent contractor with respect to his work under each of the contract awards and under both viewed together.

Several indicia tend to show that Tutas is an employe. Both contract awards were entered into shortly after Tutas' retirement. Each involves only work that was performed for many years by Tutas as an employe of the Company prior to his retirement, and the inspection award provided the Company with continuous uninterrupted performance of annual inspections by Tutas. Tutas' post-retirement work for the Company has been performed entirely by him personally. He appears to have no right to hire a helper or substitute. The work is done entirely on premises owned and controlled by the Company. Tutas provides only his labor and the tools he used during his pre-retirement employment by the Company. The Company provides all materials and other tools and equipment needed, including specialized extinguisher inspection/recharge equipment. Without equipment such as the Company supplies, Tutas could not perform annual inspections for any other customer. Indeed, Tutas does not appear to have held himself out to perform any work for other than the Company. Tutas' post-retirement work relationships with the Company both cover a rather substantial time period, 2.5 years, effectively assuring him of two separate rounds of annual inspections. The recurrent need for annual inspections and the Company's rescheduling of two maintenance projects to meet Tutas' needs both reflect a continuing rather than transient working relationship, as well. Tutas' apparent insurance noncompliances undercut the contract award insurance requirements and raise questions about how aggressively the Company would enforce other award requirements with negative financial implications for Tutas. The Company controls whether and when it offers maintenance projects to Tutas, and Tutas is paid by the hour for that work. His earnings from post-retirement work for the Company are unrelated to any investment he has made in equipment or materials. He has no opportunity to profit from employment of others or to increase his earnings by being a better manager. The extent to which the Company has actually exercised supervision of the details of Tutas' work has not been shown to be any different from Tutas' last years as a veteran bargaining unit employe.

On balance, those considerations are outweighed by the following indicia that tend to show that Tutas is an independent contractor. The work is being performed based on written contact

awards entered into between the Company and Tutas. Tutas enjoys very broad discretion and control regarding when, how and (regarding minor maintenance) whether he performs the work. The work he performs is not routine in nature. It requires skills, experience and training that distinguish Tutas from unskilled employes. Tutas has been free to exercise those skills in accordance with his own judgment without specific directions or limitations imposed by Company supervisors or by the terms of the contract awards. Tutas' compensation was established bilaterally, rather than by the Company alone. He is paid a single contract price for the annual inspections when they are completed and a piece rate per extinguisher recharged. He is paid for maintenance work on a time and materials basis, again only upon completion of the assigned project. His compensation comes to him in the same form the Company uses with its other contractors, free of withholding, on a 1099-MISC rather than a W-2, and the Company has not included him among its employes for Unemployment Compensation purposes since his retirement. Tutas' compensation involves none of the paid leave and other fringe benefits that he enjoyed prior to his retirement from bargaining unit employment. His post-retirement work for the Company has involved only a small fraction of the kinds of work he performed prior to retirement; the maintenance work has been minimal and sporadic; once the inspection work is completed for a year, it involves no further work by Tutas; and, taken together, the work involved is far from the regular full-time year-round work Tutas performed prior to his retirement. The annual inspection work had been performed by an outside contractor prior to 1987, and the Company has always contracted out its 5-year fire extinguisher inspections. Tutas provides and uses his own hand tools in the performance of both contract awards, and his skills and tools would enable him to perform a variety of maintenance functions for others if he were so inclined. The maintenance contract award does not assure that Tutas will be offered any particular number of projects and does not require Tutas to accept maintenance work when it is offered by the Company. Neither of the awards limits Tutas' rights to work for others if and when he is so inclined, but both provide that Tutas guarantees his work for one year and the annual inspection award also subjects Tutas to possible backcharges for failure to correct deficiencies in his performance of the annual inspections.

In sum, Tutas' freedom from control as to when, how, and in some cases whether he will work for the Company, coupled with the various other factors discussed above, establish, on balance, that Tutas is an independent contractor under the traditional common law decisional standards applied by arbitrators in cases of this kind.

It follows that, in the circumstances of this case, the Company acted within its Agreement Sec. 9.2 right to contract out the work at issue in this case. Accordingly, the grievance has been denied.

DECISION AND AWARD

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

1. The Company did not violate the Agreement by assigning annual fire extinguisher inspection work and/or minor maintenance work to George Tutas without treating him as an employe under the Agreement.

2. No consideration of a remedy is necessary or appropriate, and the subject grievance is denied.

Dated at Shorewood, Wisconsin this 22nd day of December, 1994.

By Marshall L. Gratz /s/
Marshall L. Gratz, Third Arbitrator

Dated: 12-6-94 I concur: Charles E. Prentice /s/
Charles E. Prentice, Company-appointee

Dated: 12-14-94 I dissent Timm A. Driscoll /s/
Timm A. Driscoll, Union-appointee