BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

AFSCME LOCAL 1412

and

APPLETON AREA SCHOOL DISTRICT

Case 66
No. 53156
MA-9261

Appearances:
Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, by Mr. Bruce F. Ehlke, on behalf of the Union.
Godfrey & Kahn, S.C., by Mr. James R. Macy, on behalf of the District.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "District", are privy to a collective bargaining agreement providing for final and binding arbitration before a three-member panel. Pursuant thereto, I was chosen as Chair of the panel and Mr. William G. Bracken and Mr. Rick Badger were respectively chosen by the District and Union to serve on the panel. Hearing was held in Appleton, Wisconsin, on April 3, 1996. The hearing was transcribed and the parties thereafter filed briefs and reply briefs which were received by June 5, 1996. Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUES

Since the parties were unable to jointly agree on the issues, I have framed them as follows:

1. Is the grievance arbitrable?

2. If so, has the District violated the contract by assigning custodial, electrical, and maintenance work to outside contractors for work performed at its newly-opened North High School and, if so, what is the appropriate remedy?

BACKGROUND

The District since at least 1972 has subcontracted out custodial, maintenance, and electrical work at some of its facilities relating to roof repair, floor refinishing, tuck pointing, blacktopping, snow removal, lawn maintenance, electrical and plumbing work, and custodial cleaning. Such subcontracting consisted of individual work assignments and never encompassed an entire school.

The Union never grieved any such subcontracting.

The District in the 1995-1996 school year for the first time subcontracted out all of the custodial, maintenance, and electrical work for an entire building -- its newly-constructed North High School. The outside contractor, Johnson Controls, under that agreement provides about six (6) full-time and nine (9) part-time cleaners; three (3) building engineers; and two (2) maintenance personnel. The District estimates that it will save about $160,000 in costs through its subcontracting arrangement, a figure disputed by the Union.

No existing bargaining unit employes have been laid off or had their regular hours reduced because of that subcontracting. If that work were not subcontracted, some bargaining unit employes could have had more promotional opportunities, some could have earned more overtime, and some additional bargaining unit positions could have been created at North High School.

Earlier, the parties in 1982 agreed to the following Letter of Understanding:

> During the course of negotiations leading to a settlement between Union Local 1412 and the Appleton Area School District, the parties agreed to construct this letter of understanding to address two items as follows:
>
> 1. Management will continue the existing duties and responsibilities for Roland Captain as Painter, James Rank as Desk Refinisher/Maintenance, and LeRoy Kuse as Truck Driver so long as those individuals are desirous of remaining in those specific positions, and so long as they perform the duties and responsibilities in a responsible and satisfactory manner.
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> 2. The Union recognizes that the Board of Education has a right in contracting for matters relating to the school system operation and that the right of contracting or subcontracting is vested solely in the Board. This right to contract or sub-contract shall not be used for any purpose or intention of undermining the Union nor to discriminate against any of its members, nor shall any employee be laid off or reduced in pay rating or hours as a direct and immediate result of work performed by an outside contractor.
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> . . .
>
> This letter of understanding was explained to the Board of Education at the same time the terms of the contract agreement for 7-1-82 through 6-30-83 were explained to the Board of Education.

> Their approval of the contract included an understanding of this letter of understanding.
>
> . . .

In this connection, Union Staff Representative Gregory N. Spring testified that a former School Board Member told him in 1982 that "we won't be dealing with [you] for that much longer because we're subcontracting"; that that marked the first time that he became aware of this issue; that the Union then presented a subcontracting provision in the then-ongoing contract negotiations; and that the parties subsequently agreed to the aforementioned 1982 Letter of Understanding which has been incorporated into all subsequent contracts as part of the Management Rights proviso.

Spring added that the Union agreed to the 1982 Letter of Understanding because he assumed that it only related to custodial work in order to address an earlier adverse arbitration award issued by Arbitrator Joseph B. Kerkman which covered custodial work, and that it was never intended to cover electrical or other maintenance work.

He further testified that the District in 1983 presented the following subcontracting language (Union Exhibit No. 1), which was ultimately rejected by the Union:

> "Subcontracting. The parties to this Contract recognize that the right of contracting and/or subcontracting for matters relating to the operation of the Employer's business is vested solely in the Employer. The Employer agrees, however, that no present bargaining unit member shall be laid off or reduced in pay rating or hours as a direct and immediate result of work performed by an outside contractor."

He further stated on cross-examination that the Union in the 1983 negotiations unsuccessfully proposed contract language (District Exhibit No. 1), stating "the present number of bargaining unit employes will not be decreased as the result of subcontracting." He explained: "We had attempted in some areas to make it more stricter than what we got, yes."

The Union subsequently proposed in the contract negotiations leading to the present contract that the subcontracting language be deleted from the contract. The Union ultimately dropped that proposal when the District refused to agree to it.

Custodian Charles Broeren testified on behalf of the Union that if the work at North High School were not subcontracted, he "probably" would have bid on the second shift engineer position for that school. He also testified about the grievance he filed protesting the use of outside custodial help at East High School and a second step grievance step held with Assistant Superintendent/Business Services Donald D. Schlomann relating to the grievance during which

time he asked Schlomann why District employes could not compete with Johnson Controls' bid. Schlomann then reportedly told him it "doesn't matter [i.e. whether the District's contract with Johnson Controls costs the same as using bargaining unit employes] as long as - if it costs the same, if I don't like what they're doing next year, I can tell them to get fucked."

On cross-examination, Broeren stated that Schlomann's remarks related to the Johnson Control contract and his ability to terminate and re-negotiate it.

Engineer David Hinkens also testified for the Union and said that he could have been promoted earlier to his Engineer I position but for the subcontracting and that he preferred to work the first shift at North High School if given the opportunity to do so. He, too, filed a grievance and attended a second step grievance step where Schlomann supposedly said he was "sick and tired" of the Union and its bickering.

Former Director of Administrative Services Kenneth W. Johnson, now retired, testified via telephone that he attended the 1982 negotiations as the District's chief negotiator; that the parties then agreed to the 1982 Letter of Understanding, ante, relating to subcontracting; and that said letter was never intended to be limited to custodial work. He added that "not to the best of my recollection" did the Union subsequently ever claim that that agreement only covered custodial employes. He admitted on cross-examination that he drafted the language of the 1982 Letter of Understanding; that Spring then agreed to it; and that said language was intended as a response to meet the Union's concern.

Daniel Kostner, the Supervisor of Buildings and Grounds, testified about the District's past use of outside contractors and stated that no prior grievances had ever been filed over such work. On cross-examination, he agreed that outside electricians were used for "overflow" work; that the District's prior plumber transferred to another position and that that is why his position is still vacant and why the District uses outside plumbers; and that about 25 percent of all snow removal is contracted out and represents overflow work that bargaining unit members cannot perform. He further stated that "administrative time" was one of the reasons motivating the hire of an outside contractor at North High School.

Assistant Superintendent for Business Services Schlomann testified that the District was unable to increase its taxing authority over the $25,000,000 referendum it took to build North High School because of revenue controls. He added that North High School had about $1,500,000 in fixed or operational costs; that the District asked the Union to submit a proposal on how it could fully staff North High School at a reduced cost; and that the Union refused to do so. He further testified that his remarks to Broeren centered on contracting out at East High School and that his remarks "had nothing to do with our decision to contract or not contract at North High School." He also said that he had no recollection of any conversation with Hinkens and that, moreover, he would not have made the comment attributed to him.

Part 1, Section C, of the present contract states:

> **C. MANAGEMENT RIGHTS RESERVED**
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> . . .
>
> **The Union recognizes that the Board of Education has a right in contracting for matters relating to the school system operation and that the right of contracting or subcontracting is vested solely in the Board. This right to contract or subcontract shall not be used for the purpose or intention of undermining the Union nor to discriminate against any of its members, nor shall any employee be laid off or reduced in pay rating or hours as a direct and immediate result of work performed by an outside contractor.**

The Union filed the instant grievance on March 24, 1995, wherein it claimed, inter alia, that the District's subcontracting violates Part 1, Section C, of the contract.

In support thereof, the Union argues that the grievance is arbitrable because there is no merit to the District's assertion that it failed to give proper notice of its need to reschedule the original January 9, 1996 hearing date. The Union on the merits claims that the subcontracting at the North High School violates the contract because the initial 1982 Letter of Understanding was only intended to cover custodial work; that the District itself drafted that language; that "higher level bargaining unit positions were protected against an expansion of the subcontracting beyond the custodial work"; that the parties' use of the word "purpose" in said Letter shows that the parties then agreed that the bargaining unit could not be harmed by the use of non-custodial subcontracting; and that the District's subcontracting at North High School represents a "radical change in the long-established interpretation and application of the subcontracting provision. . ." It also contends that its recent inability to obtain contract language expressly prohibiting subcontracting of electrical and maintenance work did not constitute a waiver because such language is already in the contract, and that, furthermore, it was justified in refusing to bargain over that change. As a remedy, it requests a make-whole order and a cease and desist order directing the District to no longer subcontract that work.

The District, in turn, contends that the grievance is not arbitrable on the ground that the Union failed to give proper and timely notice under the Commission's Rules for its need to reschedule the January 9, 1996, hearing. It further asserts that the grievance is without merit because Part 1, Section C, gives it the right to engage in subcontracting in clear and unambiguous language; because there is a 24-year history of such subcontracting; and because it has honored all of its contractual obligations, including its obligation not to discriminate against the Union or its

members. It also claims that the Union is attempting to gain in arbitration what it was unable to obtain at the bargaining table and that the Union has waived any rights it may have had because it agreed to the present contract after it learned about the District's subcontracting plans.

I find that the grievance is arbitrable because the confusion over the Union's request to reschedule the January 9, 1996, hearing was partly arbitrable to the fact that I was out of the country and in London, England, at that time and thereby unable to make sure that the proper lines of communication were followed. Given that highly unusual situation, it is unfair to penalize the Union by refusing to hear its grievance. In the future, however, the Union is required to give the District early notice that it wishes to postpone a hearing and that an attorney will be representing it in any such proceeding.

As for the merits of the grievance, Part 1, Section C, of the contract clearly and unequivocally gives the District the right to subcontract any and all services because it states that the District "has a right in contracting for matters relating to the school system operation and that the right of contracting or subcontracting is vested solely in the Board." This proviso goes on to list only two caveats to this unfettered right: (1), the District cannot layoff any employes or reduce their pay or hours as a direct result of such contracting out; and (2), the District cannot undermine the Union or discriminate against any of its members.

The Union agrees that no bargaining unit personnel have been laid-off or had their hours reduced as a result of the subcontracting at North High School. Hence, the first caveat is not present here. The Union's case thus rests entirely on its claim that the District's subcontracting has undermined the Union and discriminated against its members because it has reduced their work opportunities.

The Union's claim, however, suffers from a fundamental flaw: almost all subcontracting by definition reduces the overall work and promotional opportunities of bargaining unit members. That, after all, is what subcontracting is all about since the amount of available bargaining unit work is automatically reduced in such situations. It also is a given that employers ordinarily want to subcontract out unit work because it may be cheaper than having bargaining unit employes perform it. This does not represent any attempt to either undermine the Union or discriminate against its members. It, instead, reflects only the economic reality of what happens when bargaining unit work, in whole or in part, is subcontracted out.

The Union over the years has accepted this economic fact of life because the District since at least 1972 has subcontracted out maintenance, electrical, and custodial work in its various facilities and because the Union has never grieved such subcontracting out.

It is true that such prior subcontracting was on a limited basis and that the District before the 1995-1996 school year never attempted to subcontract out all such work at a given school. But, that is a matter of degree -- one which is clearly encompassed by the broad subcontracting

language in Part 1, Section C, of the contract which states that all work can be subcontracted provided only that it does not violate either of the two caveats provided for therein.

The Union nevertheless asserts that Part 1, Section C, only refers to custodial work and that it therefore does not cover electrical, maintenance or any other non-custodial work.

The problem with this claim is that the language on its face is not limited to custodial work. Instead, it by its very terms covers all work. Accordingly, that clear and unambiguous contract language governs rather than the subjective state of mind which Union negotiators may have had when they first agreed to the 1982 Letter of Understanding which has been incorporated in all subsequent contracts and which is now found in Part 1, Section C. That being so, the District could reasonably assume that the agreed-upon language means just what it states, i.e., that all subcontracting is permissible provided only that the District complies with the two aforementioned caveats. In this connection, I credit the testimony of former Director of Student Services Johnson who testified that the Union in those negotiations never said that such language was limited to custodial work.

To rule otherwise would in effect mean that a party's private subjective statement of mind in negotiations takes precedence over the clear and unambiguous contract language parties ultimately agree to. Such a result must be rejected because it is well-recognized that "the clear meaning of language must be enforced even though the results are harsh or contrary to the original expectations of one of the parties." How Arbitration Works, Elkouri and Elkouri, p. 349, (BNA, Fourth Edition, 1985).

In light of the above, it is my

AWARD

1. That the grievance is arbitrable.

2. That the District has not violated the contract by assigning custodial, electrical and maintenance work to outside contractors for work at its newly-opened North High School.

3. That the grievance is therefore denied.

William G. Bracken /s/
I concur.

Richard Badger /s/
I dissent.

Dated at Madison, Wisconsin, this 19th day of September, 1996.

By Amedeo Greco /s/
Amedeo Greco, Chair, Arbitration Panel