

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

ST. FRANCIS EMPLOYEES LOCAL 133,
AFSCME, AFL-CIO, DISTRICT COUNCIL 48

and

CITY OF ST. FRANCIS

Case 95
No. 54874
MA-9815

Appearances:

Ms. Carolyn H. Delery, Podell, Ugent, Haney & Delery, S.C., Attorneys at Law,
611 North Broadway Street, Milwaukee, WI 53202, appearing on behalf of the
Union.

Mr. Ralph Voltner, Jr., City Administrator/Treasurer, City of St. Francis,
4235 S. Nicholson Avenue, St. Francis, WI 53207, appearing on behalf of the
City.

ARBITRATION AWARD

The Union and City named above are parties to a 1996-1997 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to hear a grievance involving the subcontracting of snow removal. The undersigned was appointed and held a hearing on May 6, 1997, in the City of St. Francis, at which time the parties were given an opportunity to present their evidence and arguments. The parties waived briefs in lieu of oral arguments, and the record was closed upon the conclusion of the hearing.

ISSUE

The parties stipulated that the following issue is to be decided by the Arbitrator:

Did the City of St. Francis violate the collective bargaining agreement by subcontracting out the snow removal of the City-

owned walkway known as Elizabeth Avenue? If so, what is the appropriate remedy.

BACKGROUND:

About two years ago, the State of Wisconsin built a large and unique pedestrian walkway or bridge in the City of St. Francis and turned it over to the City to maintain it. The bridge will eventually go over the Lake Parkway, which has not been built yet. Ever since the bridge went up, the City has hired a subcontractor to remove snow. That is the source of this grievance.

The Union filed its first grievance in December of 1995. The Union and the City were in contract negotiations and brought the issue to the table. The City told the Union that it was in the midst of a contract with the subcontractor, and the Union agreed to not disrupt that contract. The City was to give the Union its intentions for the following winter season, the 1996-97 season. The Union filed another grievance in December of 1997 over the use of the subcontractor to remove snow from the bridge.

The City has a highway crew that plows snow, shovels and blows snow from sidewalks, and salts streets and sidewalks. They have removed snow from the City streets and sidewalks and bridges over railroads for at least the last 30 years. There are eight employees in the Department of Public Works (DPW) who work in snow removal on two-man crews, splitting up the wards at their own discretion. When the streets are done, the crews work on the sidewalks and bridges. The City wants the streets cleared first in order to give police and fire protection to the community. Then the work on the sidewalks, corners for bus routes and bridges can be cleared. In light snows, the sidewalks and bridges can be handled by salting, without the crews having to use snow blowers or shovels. The bridges – except for the one in question – go over railroad tracks. The crews usually blow the snow over the side of the bridge. The subcontractor on the pedestrian bridge uses the same kind of equipment and methods of snow removal. When the freeway goes under the bridge, the snow will not be dumped over the side of the bridge, and whoever is removing it then may need some special equipment to clear the bridge.

The City has subcontracted out other work, such as snow removal on the sidewalks in the early 1980's, snow removal on the streets in exceptionally heavy snows in the late 1970's and the removal of graffiti from bridges throughout the community. The sidewalks were contracted out when the DPW employees were not able to get that job done in a timely fashion. The streets were contracted out when heavy equipment was needed to remove snow.

The City has an ordinance that requires the snow to be removed within 24 hours after the end of a snowfall. The City has imposed this requirement on the subcontractor also.

Union member and Chief Steward David Janiszkeski noted that the crews can usually do the sidewalks within their eight hour shifts. Once the streets are done, the City has a priority list for sidewalk shoveling, which starts at the Highway Department building and continues to a bridge over a railroad, known as Bollivar bridge. The City could put the pedestrian bridge first on its

priority list and have the crew do that one first. The two bridges are not far apart.

There are three grade schools and a high school east of the pedestrian bridge, and the school hours start between 8:00 and 8:15 a.m. and end between 2:45 and 3:15 p.m. The City would like to have the pedestrian bridge cleared before school children start using it. However, children as well as elderly people use all the streets, sidewalks and bridges in the City. The City believes that the subcontractor can generally start clearing the bridge before City crews can get to it, even though it only requires that it be done in the 24 hour period after a snowfall.

The City has had two employees consistently refuse to respond to calls for overtime to remove snow. Last winter, the City called crews out about 50 times, and two employees came in less than three times. One of the two employees was Janiszski, who was injured in 1996 and off work for several months. By January 1, 1997, he had no phone and told his supervisory that he would work if notified but someone would have to stop and knock at his door. The supervisor apparently thought that it would be unfair to others to give personal notice to Janiszski. Occasionally, other employees are not available also. The lack of available employees means that the job can take longer to finish.

The City has mandatory overtime for office employees in Section 17.05 of the contract, but it does not have mandatory overtime for the DPW employees. The City has sought to get mandatory overtime for DPW employees during contract negotiations.

The DPW employees have worked on the pedestrian bridge to sweep it and clean trash off it. Employees have also removed graffiti from street signs, but not from buildings. The Union is not aware of any citizen complaints about getting snow removal in time for school children or any other people, although City Engineer Jack Schultz testified that there have been complaints from citizens. The public usually calls the Police Department which tries to explain the procedure that the City has 24 hours to clear the snow pursuant to the ordinance. The Union kept track of times that its members saw the subcontractor working on the pedestrian bridge, and the subcontractor did not always have the bridge cleared before children started to use it.

The City pays the subcontractor \$45.00 per hour to do the work. If DPW employees did the work on overtime, it would cost the City more, although it would cost the City less than it pays the subcontractor if the employees did the work on straight time. The City is limited in its ability to add personnel because it is under state budget constraints that limit increases to the increase in the Consumer Price Index.

THE PARTIES' POSITIONS:

The Union contends that the main issue is that there is a past practice of 30 years of City employees plowing snow and removing it from the streets, sidewalks and bridges. The only exceptions were for emergencies, and for a normal snow season, the City has not contracted out the work until recently. The Union argues that while the City attempts to justify its actions on the

basis of economic reasons, lack of manpower or safety, none of those reasons stand up to the facts. City employees have always been able to keep up with the sidewalks and have been in compliance with the 24 hour rule. As for the safety issue, the Union notes that children might be using the bridge at times when the snow is not removed by the subcontractor, and all the sidewalks are used. Additionally, the 24 hour rule applies to the subcontractor. The City could simply make the pedestrian bridge a priority to be done first. The Union also does not see any economic advantage and does not know that overtime would be required to get this bridge done.

As to the effect on the Union and the integrity of the bargaining unit, the Union submits that the City is trying to get something that it cannot get in negotiations. It is trying to get a foot hold in subcontracting which could be spread to other areas resulting in a loss of work or overtime to employees. The work does not require any special skills, there are properly qualified employees available, and the City has the equipment and facilities to do the work. The Union contends that the City did not act reasonably or in good faith. It asks for a cease and desist order and monetary damages in the amount paid to the subcontractor to be paid to the Union treasury.

The City disputes that a past practice applies, and points out that this is a unique pedestrian bridge, and that since it was built, the DPW crews never removed snow on it. The subcontractor has only worked on the bridge to remove the snow. While the subcontractor must clear the bridge within 24 hours, the bridge has been cleared long before that in reality, and the bridge has been safe for travel in an appropriate period of time. Since the bridge is close to the schools, it is used by school children. The City's priority list in having the Bollivar bridge cleared first by the DPW crews shows that safety is an important factor. The City has not capriciously denied the Union employees any overtime. It offered to mediate this dispute and offered to settle it. The City has tried to use common sense, good judgment, in accordance with its management rights.

DISCUSSION:

The collective bargaining agreement states in Section 1.01:

The Union recognizes the prerogatives of the City to operate and manage its affairs in all respects in accordance with its responsibilities and powers of authority which the City has not officially abridged, delegated or modified by this Agreement, and such powers or authority are retained by the City.

Also, Section 3.03 states:

Contracting and Subcontracting: The Union recognizes that the City has statutory rights and obligations in contracting for matters relating to municipal operations. The right of contracting and subcontracting shall not be used for the purpose or intention of undermining the Union, nor to discriminate against any of its members. This section will not affect past practices of the City regarding contracting and subcontracting.

Section 3.03 of the contract is right on point. The Union failed to mention this section of the contract and argues that the City is trying to get something in arbitration that it could not get in negotiations. However, the opposite is true. The City already has language giving it the right to subcontract that it obtained through negotiations, and the Union may not prohibit the City from subcontracting in arbitration where the City has that right in contract language, at least without showing that the City's right to subcontract has been used to undermine the Union or discriminate against Union members.

While the Union argues that the City lacks justification for contracting out the snow removal of the pedestrian bridge, or that its stated reasons lack merit, the burden is not on the City to justify its use of a subcontractor. The burden is on the Union to show how the contracting out in question undermines the Union or discriminates against its members. The only potential harm to the Union members is a loss of overtime, and that does not undermine the Union. The Union has no guarantee of overtime in snow removal and it is uncertain whether the snow removal on the bridge would entail overtime at all. Janiszkeski stated that if Union members were losing overtime because of the subcontractor, it would be a minimal amount. There is no undermining of bargaining unit work where no one is laid off and bargaining unit members have not been reduced in hours. It seems as if the City has more work than available manpower, and the ability to add regular staff is often a problem for a municipal employer.

The Union urges the Arbitrator to look at factors that many arbitrators have used over the years to determine the validity of contracting out where the contract is *silent* regarding this issue. This contract is not silent, and those traditional factors do not apply in this case. It would be improper for the Arbitrator to be judging this case on those factors where the contract language has spoken on this issue. This decision must be confined to the contract language at hand, specifically Section 3.03.

There could be a valid argument that Section 3.03 is ambiguous, in that it may not be clear what the parties meant by the sentence: "The right of contracting or subcontracting shall not be used for the purpose or intention of undermining the Union, nor to discriminate against any of its members." Assuming for the sake of argument that such language lacks clarity, the parties could argue over the past practice of snow removal. However, the past practice must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. That is the traditional standard to find a binding past practice. In this case, the practice is not unequivocal. The City has contracted out snow removal work in the past. While the Union argues that the situations involved emergencies, the record does not show just what kind of emergencies those would be. Anyone who lived in Wisconsin during the late 1970's (including this Arbitrator) recalls the extraordinary heavy snow seasons in 1978 and 1979. However, anyone who has lived in Wisconsin for any period of time (including this Arbitrator) knows that snow fall is rather unpredictable, and averages are made up

of years of light snow falls and years of heavy snow falls, as well as snow falls that range within those averages. It is hard to say what a normal winter is in this area. Certainly the snow falls in the late 1970's created much stress on manpower and equipment. But every snow fall that requires a plowing operation creates its own emergency situation – one that has to be tended to immediately. No one points out how that subcontracting of snow removal from sidewalks in the 1980's was also under such emergency or stressful conditions. The claim of past practice does not meet the standards to find a binding past practice to help interpret any ambiguous language.

Without showing that the contracting out of snow removal of the pedestrian bridge has undermined the Union or discriminated against its members, the City has the clear right under Section 3.03 of the collective bargaining agreement to contract out the work, and there is no violation of the contract.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin this 19th day of May, 1997.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator