BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DRIVERS, WAREHOUSE & DAIRY EMPLOYEES UNION, LOCAL NO. 75, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS

and

VILLAGE OF HOWARD

Case 28
No. 55949
MA-10124

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney John J. Brennan,** 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Drivers, Warehouse and Dairy Employees Union, Local No. 75, affiliated with the International Brotherhood of Teamsters, referred to below as the Union.

Peterson, Wieting, Calewarts, Duffy & Maxwell, by **Attorney Dennis M. Duffy**, 716 Pine Street, P.O. Box 488, Green Bay, Wisconsin 54305-0488, appearing on behalf of the Village of Howard, referred to below as the Employer, or as the Village.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the Employer agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed by Rick Kinney on behalf of the entire bargaining unit concerning the subcontracting of certain work. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on March 20, 1998 in Green Bay, Wisconsin. The hearing was not transcribed. The parties filed briefs by April 24, 1998.

RELEVANT CONTRACT PROVISIONS

ARTICLE 13. BARGAINING UNIT WORK

13.01. For the purpose of preserving work for the Employees covered by this Agreement, the Employer agrees that work customarily and ordinarily performed by regular Employees within the Bargaining Unit and that work hereafter assigned to

Employees providing bargaining unit Employees are available and qualified to perform the work. The only exception to the above will be that if the Employer desires, it may contract with private persons, firms, and/or corporations for the collection of dumpster refuse, providing such action will not cause the elimination of any bargaining unit job. From time to time issues may arise that the Village needs work to be done that either the Bargaining Unit cannot perform or are not available to perform. In these instances, the parties agree to discuss the issues prior to work being done.

13.02. It is understood that it is not the intent of this Article to disrupt any existing working arrangements of the Village.

. . .

ARTICLE 22. WAGES AND HOURS

. . .

22.05. It is understood that the previously established 4-10 hour day schedule for sealing and televising" (sic) may be utilized in a fashion consistent to that which has been in existence. . . .

ARTICLE 25. MANAGEMENT RIGHTS

25.01. Except as otherwise provided in this Agreement or as may affect the wages and hours and working conditions of Employees, the Union recognizes that the management of the Village is vested exclusively in the Employer. All power, rights, authority, and responsibilities customarily executed solely by management are hereby retained. Such rights include but are not limited to the following:

. . .

E. To plan, direct and control operations;
F. To determine to what extent any process, service or activity shall be added, modified or eliminated;
G. To introduce new or improved methods or facilities;

. . .

ISSUES

The parties stipulated the following issues for decision:

Did the Village have the right to subcontract the work of televising sanitary sewer mains without first bargaining with the Union?

If not, what is the appropriate remedy?

BACKGROUND

The grievance form, filed on December 8, 1997, states the alleged violation thus:

> The Village of Howard violated Article 13, Paragraph 13.01 contracting out work that bargaining unit employees have done in the past. Jetting & televising san. & storm sewers has always been done by the bargaining unit in the past.

Kevin Anderson, the Village Administrator, responded to the grievance in a letter dated December 19, 1997, which states:

. . .

> The grievance states that "bargaining unit employees have done in the past jetting and televising sanitary and storm sewers has always been done by the bargaining unit." The statement that this work has always been done by the bargaining unit is not true. Previously Robert Bartelt, Public Works Director, provided invoices to the bargaining unit showing where this work has been contracted out in the past. The working foreman has even scheduled contract sewer television crews in the past.
>
> Also, on this particular project the quality of the information we received from the camera is of critical importance. The Village is planning to resurface approximately 7,500 (feet) of road in areas where sewer lines are 35+ years old. Prior to resurfacing, our engineers must decide if the condition of the line is such that it will last another 25 years. If in their judgment it will not last that long, the Village will need to replace these sewers at a cost that could be as much as $480-$500,000.
>
> When making decisions of such financial magnitude, it is the responsibility of our engineers to use the best possible information that is available. The contractor we are using to televise these lines has video equipment which will provide color video of a higher quality than we have ability to preform (sic) in house. It would be irresponsible for the engineers to make as important . . . a decision as this with less than the best information available. Article 25(e), (f) and (g) clearly give the Village the right to proceed with this contacting (sic). . . .

The Union calculated that if the work involved the televising of 6,500 feet of sewer line, and if it was performed by unit employes, it would have cost $984.32. The grievance seeks that this amount be paid out to the two unit employes who would have done the work had it not been subcontracted.

The Disputed Work and the Necessary Equipment

Sometime around 1980, the Employer acquired a utility truck, referred to below as the Televising Truck, modified to permit the televising of sewer lines. The truck was a 1978 model that the Employer acquired from a vendor in Florida. The truck contains a monitor that is hooked to a

black and white video camera that can be placed in and moved through a sewer line to televise

its condition. The televised image is relayed to the monitor in the truck, which has the capacity to place the image onto videotape. The televising work done with this vehicle requires, typically, two employes. One must be available to place the camera into the sewer line and respond to problems within the line. The other monitors the film image, and can add verbal comments to the videotape to highlight any observed problems. Written reports are typically added to complete the process.

Televising sewer lines can serve a number of purposes. It can serve an ongoing maintenance function by permitting the observation of the line's condition to highlight any potential problem areas such as low spots, cracks, settling or blockages. It can serve a repair function, when a line becomes fully or partially obstructed. It can also serve a planning function. When street repair or resurfacing is contemplated, the condition of sewer lines becomes a significant consideration. If the line cannot be expected to last as long as the road surface, unnecessary destruction of road surface could result.

In the fall of 1997, the Employer was planning road resurfacing work for 1998. City engineers needed data on the condition of sewer lines to determine if sewer work would have to precede the resurfacing. Bartelt discussed televising work on roughly 2,300 feet of sewer line at Idlewild Court with Working Foreman David Fonder. Fonder understood Bartelt to be assigning Fonder's crew to do the work whenever they could find the time. Bartelt then discussed the work with an engineer, who told Bartelt that tapes developed by the Employer on a prior job on Lacona Street had been, in the engineer's opinion, of dubious quality. Bartelt then discussed the matter with Anderson. Anderson had reviewed the Lacona Street tape in 1996 and shared the engineer's concern with the quality of the tape. He authorized Bartelt to get bids from outside contractors to televise the lines that the engineers wished data for. Bartelt did so, and the Employer eventually contracted with Visu-Sewer Clean & Seal, Inc., to televise lines at six different locations within the Village, including Idlewild Court.

Fonder did not learn that the Employer had contracted with Visu-Sewer until their employes appeared at the Employer's garage and asked for assistance in getting the job started. Rick Kinney, another unit employe, filed the grievance after he had been summoned to the garage and instructed to assist Visu-Sewer employes.

Visu-Sewer ultimately televised 7,911 feet of Village Sewer line. They, unlike the Employer, use a color camera. Neither the camera nor the balance of the equipment in the Televising Truck has been updated since its purchase. Sometime in 1995, Fonder priced new color cameras for the Employer. The Village chose not to upgrade the equipment. Anderson stated that he believed the sporadic use of the equipment would not support significant capital expenditures. He stated his review of records for use of the equipment since August of 1994 indicated the Televising Truck averaged less than six miles of use per month, and that the generator needed to power its televising equipment averaged less than four hours of use per month.

It is undisputed that the Employer's contract with Visu-Sewer did not result in the loss of normal work hours by any unit employe.

Evidence Regarding Past Practice

Fonder has worked in the Village's Water and Sewer Department for roughly twenty-three years. He believed that televising sewer mains has been unit work since the purchase of the Televising Truck. Fonder acknowledged the Employer has contracted work related to sewer mains, but such work was, in his opinion, traceable to unique circumstances. For example, on one occasion an independent contractor televised the same span previously televised by unit employes. The persistence of a water problem prompted this sub-contract. Beyond this, Fonder acknowledged that independent contractors had been involved in new construction of sewer mains, televising work on laterals, and repairing cracks in pipes greater than twelve inches in diameter. Repair work on pipes greater than twelve inches in diameter is necessitated by limitations imposed by the Employer's equipment. Beyond this, Fonder noted that the Employer has had independent contractors do maintenance on sewer mains under a maintenance plan developed with significant input from unit members. Fonder could not recall the Employer's last use of the provisions of Section 22.05. Kinney testified that after the purchase of the Televising Truck, the Employer did not contract televising work unless there was an equipment breakdown.

Anderson testified that he searched Village records to determine the existence of contracts with outside vendors to televise Village sewer lines. He found invoices indicating that in May of 1989 an outside vendor televised roughly 400 feet of Melody Drive. In February of 1990, an outside vendor televised roughly 1,000 feet of Park Ridge Avenue. In June of 1996, Great Lakes TV-Seal, Inc., televised 1,173 feet of Lenwood Avenue from Melody Drive to Memorial Drive. In October of 1996, PTS Contractors, Inc., billed the Village for two and one-half hours of televising work on Rockwood Court. This work followed televising work by unit members, and was prompted by a customer complaint of a repeated sewer backup. Anderson added that Village records on such contracts are not systematically maintained, and these examples may not be the only invoices for televising work submitted by outside contractors.

Evidence Regarding Bargaining History

It is undisputed that the parties discussed subcontracting issues during the negotiations preceding the execution of the 1996-98 collective bargaining agreement. The Employer, at one point in those negotiations, proposed the elimination of Section 13.01. The specific issue then discussed by the parties was snow removal in outlying areas of the Village. The Union opposed the Employer's contracting of snow removal in outlying areas, and the Employer ultimately dropped its proposal to do so. The parties did not, during these negotiations, discuss televising or sealing work. Ultimately, the parties did agree to modify Section 13.01 by adding its final two sentences.

At some point after the execution of the 1996-98 agreement in May of 1996, the Employer considered the possibility of contracting garbage removal through Waste Management Incorporated. Anderson notified the Union's Business Agent, Michael Williquette, of this possibility and the parties discussed it. No agreement on the point ever resulted, and the Union voted in January of 1997 to reject any Employer attempt to limit the unit's performance of garbage collection. The Employer did not enter into a contract with Waste Management Incorporated for garbage collection.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Union's Brief

The Union notes that the Employer attempted to dramatically alter the scope of Sections 13.01 and 13.02 in the negotiations preceding the execution of the current bargaining agreement. The "end result of the negotiations with respect to the subcontracting dilemma" was that the Union agreed to the final two sentences of Section 13.01. Since this agreement, the Employer has twice attempted to contract out unit work. One attempt involved snowplowing and the other involved garbage collection. Each attempt was unsuccessful, and the Union contends that its unwillingness to permit the subcontracting prompted the Employer to decide "not to involve the Union in the process when making a decision on the televising of sewer mains."

Because the work at issue involves the televising of sewer mains, the Union asserts that there "can be no serious dispute" that the work "is bargaining unit work." Since the Employer does not have the equipment necessary to televise laterals, and since prior contracts have been for televising laterals, the Union contends that past contracts afford no guidance to the issue posed here. That the work was originally assigned to unit members underscores this conclusion.

Beyond this, the Union argues that: "Alleged advantages of a color camera, whether or not the current bargaining unit had the time to do the work, whether the Village's equipment was outdated, and any other related issue is irrelevant for purposes of this arbitration." These issues are precisely what the Employer should have discussed with the Union. Central to the grievance is whether the Employer had a duty to first bargain with the Union before executing the sub-contract.

Nor can the quality of the tape developed by the outside contractor be considered of any meaningful "assistance in an analysis of the 'meat' of the stipulated issue." The color tape was made from the camera, not from a remote monitor; the color camera had a water jet clearing its path; and the color tape, unlike Employer tapes, was not "a tape of a tape" selected, in all probability, for its lack of clarity.

Viewed as a whole, the record poses an interpretive issue turning on the language of Section 13.01 and relevant bargaining history. The arguments offered by the Employer do no more than demonstrate the need for the discussion "envisioned by the parties when they negotiated the last two sentences in Section 13.01." It follows, according to the Union, that the grievance should be sustained, and the Arbitrator should order "that the two employees who would have done the work be paid for the work they would have performed."

The Employer's Brief

After a review of the evidence, the Employer contends that it "has sporadically subcontracted the televising of sanitary sewer from 1989 through 1997." This establishes a "past practice consistent with Article 13.02" and "represents an existing working arrangement of the Village and modifies Article 13.01 with regard to Bargaining Unit work and the duty to bargain."

A review of the televising work done by the Employer establishes that it lacks the frequency necessary to establish it as "customarily and ordinarily performed" by unit employes. That unit employes use televising equipment to locate blockages does nothing to undercut this conclusion. In fact, the evidence shows that the "subcontracted work can be distinguished from the type of Bargaining Unit work that is customarily performed with the 1978 vehicle."

Beyond this, the Employer argues that unit employes "have not been available and qualified to perform the televising of extended runs of sanitary sewer main due to the equipment and technological limitations imposed by the Village's 1978 equipment." The enhanced technology available from contractors thus warrants a conclusion that this is not bargaining unit work.

Noting that it "has previously bargained in good faith on other related subcontracting issues for snow plowing and garbage trucks," and noting its past practice on the type of work questioned here, the Employer concludes that its decision not to bargain the disputed work was reasonable. That it has not laid employes off since it has contracted televising work underscores this conclusion.

A review of the evidence establishes, according to the Employer, that it has contracted televising work "for a very specific and limited purpose," and has done so for sound fiscal reasons and without harm to the unit. It follows that "(t)here is no duty to bargain within the context of Article 13.01" and thus that "the grievance should be dismissed."

DISCUSSION

The issues for decision are stipulated. The parties' arguments point to a number of agreement provisions, but the interpretive issue focuses on Section 13.01.

Section 13.01 establishes the scope of protection afforded bargaining unit work. Viewed in isolation, it establishes a rule and certain exceptions or clarifications to the scope of that rule. The rule is that the Employer will not assign work "to non-unit Employees" if the work is (1) "customarily and ordinarily performed by regular Employees within the Bargaining Unit" and is (2) work that "unit Employees are available and qualified to perform."

The scope of this rule is subject to exception and clarification under the terms of Sections 13.01 and 13.02. The second sentence of Section 13.01 excepts "the collection of dumpster refuse" provided a contract with an outside vendor "will not cause the elimination of any bargaining unit job." Beyond this, the final two sentences of Section 13.01 provide that if "the Village needs work to be done" and unit employes are unable or unavailable to perform it, "the parties agree to discuss the issues prior to the work being done." Section 13.02 provides a further exception by stating that the application of Article 13 should not "disrupt any existing working arrangements of the Village."

Only the first and the final two sentences of Section 13.01 can be considered posed for interpretation. The express exception stated in the second sentence of Section 13.01 plays no role in the televising work questioned by the grievance. Section 13.02 arguably applies if the existence of past contracts with outside vendors for televising work is considered an "existing" working

arrangement. If, however, an "existing" working arrangement refers to contracts in effect at the time of the grievance, then Section 13.02 arguably does not apply. Because the contention that Section 13.02 applies essentially restates the contention that the televising work does not constitute bargaining unit work within the meaning of Section 13.01, Section 13.02 need not be addressed to resolve the grievance. That the parties devoted more evidence and argument to Section 13.01 establishes it as the focus of the interpretive issue posed by the grievance.

Thus, the issue turns on whether the televising work performed by Visu-Sewer can be considered bargaining unit work under the first sentence of Section 13.01 and whether the final two sentences apply to it. As noted above, the rule stated in the first sentence of Section 13.01 turns on the operation of two elements. Only the first element can be considered in dispute. Fonder's and Kinney's testimony establishes that unit employes were "available and qualified to perform the work." The reference to qualifications refers to employes, not to equipment. The Employer's contention that outdated technology on the Televising Truck made its employes unqualified to do the work is unpersuasive. That contention focuses on the first element of Section 13.01.

The first element poses the fundamental difficulty of applying Section 13.01 to the grievance. The evidence supports each party's claim concerning the applicability of the first sentence of Section 13.01 to the work performed by Visu-Sewer. The Union accurately notes that Section 22.05 establishes that "sealing and televising" constitutes bargaining unit work. Beyond this, Bartelt's assignment of the Idlewild Court work to Fonder underscores that the televising work then contemplated could be performed by unit employes. Fonder's and Kinney's experience with the Televising Truck further underscores this point. Televising can, then, be considered "customarily and ordinarily performed by regular Employees within the Bargaining Unit."

The interpretive difficulty posed is that the evidence also supports the Employer's claim that the work does not fall within the scope of Section 13.01. The invoices submitted by the Employer establish that televising work has been contracted out since the Employer purchased the Televising Truck. Beyond this, it is apparent that televising work is something other than a "customarily assigned" duty. Section 22.05 cannot establish that "sealing and televising" work is exclusively unit work, since sealing work is limited by the equipment available to unit employes. Pipes wider than twelve inches in diameter cannot be sealed with Village equipment. This underscores the Employer's contention that Section 22.05 cannot establish the existence of unit work if appropriate equipment is unavailable. Finally, the evidence does support the Employer's contention that the quality of an outside vendor's equipment can have a bearing on the contracting of work. The repetition of televising work through an outside vendor on Rockwood Court after unit employes had televised the lines would indicate questions concerning the quality of the operation of the Televising Truck can impact the decision to use an outside vendor.

In sum, the record establishes with certainty only that televising work may or may not be unit work depending on a number of factors. The difficulty is to isolate what type of televising work should be considered unit work and what type of televising work should be considered available for assignment to outside vendors. The record does indicate that work with the Televising Truck is often triggered by blockages. It also indicates that the Televising Truck has not been exclusively used for "diagnostic" work of the type posed here. The Union asserts that work on sewer mains as opposed to laterals provides the distinguishing factor. This does establish a

potentially useful guide, but fails to establish that the parties have themselves agreed to the guide. Nor will the record support my enforcing this upon them. The record is silent on whether the work contracted by the Employer since the purchase of the Televising Truck is restricted to laterals. The Idlewild Court work originally assigned to Fonder involved roughly 2,300 feet of line, but the record is silent on whether all of this line was a main. Similarly, Fonder's or Kinney's testimony cannot be read to establish that the Televising Truck is never used on a lateral. The grievance form itself does not distinguish between televising work on mains versus laterals. There is, then, no reliable basis to enforce on the parties the not yet agreed upon distinction between main and lateral lines as the basis to distinguish unit from non-unit work.

This conclusion makes it impossible to conclude the work performed by Visu-Sewer falls within the application of the rule established in the first sentence of Section 13.01. The Union has demonstrated an arguable, but not a definitive claim to this work.

This conclusion does not, however, exhaust the application of Section 13.01. The final two sentences address "issues" arising when "the Village needs work to be done that . . . the Bargaining Unit cannot perform." The Employer initially assigned the Idlewild Court work to the unit, and then contracted that work with Visu-Sewer after concluding the Televising Truck could not produce the quality it desired. This conduct establishes conflicting and arguable claims to the work.

This poses the interpretive issue whether the final two sentences apply only if the "issues" covered by them concern "bargaining unit work" which unit employes are not available or capable of performing. The Employer contends that because the work was not bargaining unit work, Section 13.01 imposed no duty on it to discuss the disputed work. I do not believe the final two sentences can be read this narrowly. The first of those sentences refers to "issues," and this general reference is broad enough to encompass not just proven, but also arguable claims to work. More significantly, the sentence refers generally to "work to be done" not narrowly to "bargaining unit work to be done." The final sentence does not mandate that the "work being done" be done by unit employes. Thus, reading the sentences broadly brings disputes on work to discussion without imposing on either party a duty to agree. The two sentences, read together, seek to promote discussion rather than after the fact litigation to resolve disputes over work. Reading the sentences as narrowly as the Employer does would defeat this purpose. In sum, the Employer's decision to remove the disputed work from the unit and assign it to Visu-Sewer posed an "issue" regarding "work the Bargaining Unit cannot perform" and thus brought the work squarely within the scope of the final two sentences of Section 13.01.

Those sentences establish the parties' agreement "to discuss the issues prior to the work being done." The Employer did not, however, notify the Union of its decision or indicate any willingness to discuss the matter prior to "the work being done." This conduct constitutes a violation of the final two sentences of Section 13.01.

This poses a difficult issue regarding remedy. The Union seeks monetary relief, and such relief could be appropriate. This record does not, however, support this request. At best, the record establishes the Union's arguable claim to the work. A monetary remedy presumes a proven claim. Further considerations weigh against a monetary remedy. The Union argues forcefully that the work done by Visu-Sewer is not qualitatively better than the work the unit could have done. This

may be true, but the record establishes that the Employer acted in the good-faith belief that it could secure qualitatively better work from Visu-Sewer. Article 25 places such decisions, subject to other agreement provisions, in the Employer's hands. Beyond this, the contract posed here did not result in any demonstrable harm to the unit. The unit lost no straight time work, and there is no evidence that the decision denied the unit overtime. Thus, there is no evidence establishing conduct undercutting contract language.

Rather, the record establishes that the Employer's violation was procedural in nature. The Union's arguable claim to the work should have prompted a discussion prior to Visu-Sewer's performance of the work. Since the merit of the underlying claim remains at issue, there is reason to believe that the discussion concerning what is appropriately considered bargaining unit televising work can productively occur now as it should have occurred last fall. Thus, the Award entered below requires the Employer to discuss, as Section 13.01 requires, the issue of what constitutes bargaining unit televising work with the Union upon the Union's request to do so.

AWARD

The Village did not have the right to subcontract the work of televising sanitary sewer mains without first bargaining with the Union. The work contracted to Visu-Sewer has not, however, been proven to be "work customarily and ordinarily performed by regular Employees within the Bargaining Unit" within the meaning of the first sentence of Section 13.01. Because the Union has shown an arguable claim to the work, however, the Employer's and Union's conflicting positions constitute "issues" within the meaning of the final two sentences of Section 13.01. The Employer's failure to "discuss the issues prior to work being done" is a violation of Section 13.01.

As the remedy appropriate to the Employer's violation of the final two sentences of Section 13.01, the Employer shall, upon request by the Union, meet to discuss how to distinguish between televising work which must be assigned to the unit and televising work which need not be assigned to the unit under Section 13.01.

Dated at Madison, Wisconsin, this 18th day of June, 1998.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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