BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS GENERAL LOCAL UNION NO. 200

and

TEWS COMPANY, INC.

Case 26
No. 55671
A-5626

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorneys Scott D. Soldon** and **Christine Aubin**, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, WI 53212, appearing on behalf of the Union.

Mr. R. E. Loesch, Director of Human Resources, LaFarge Corporation Construction Materials Group, U.S. Regional Office, 6715 Tippecanoe Road, Building C, Canfield, OH 44406, appearing on behalf of the Employer.

ARBITRATION AWARD

Teamsters General Local Union No. 200, hereafter Union, and Tews Company, Inc., hereafter Employer or Company, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union requested, and the Employer concurred, in the appointment of a Wisconsin Employment Relations Commission Staff Arbitrator to hear and decide the instant dispute. The undersigned was so appointed. The hearing was conducted in Milwaukee, Wisconsin, on February 5, 1998. The hearing was transcribed and the record was closed on April 13, 1998, upon receipt of post-hearing written argument.

ISSUE

The Union frames the issue as follows:

> Did Tews violate the contract by subcontracting Local 200's bargaining unit work to third party non-Union vendors?

If so, the Union requests that the Arbitrator retain jurisdiction in the event the parties are unable to agree on the appropriate remedy.

The Employer frames the issue as follows:

Did the Company violate the parties' collective bargaining agreement when it purchased Portland Cement from Lone Star Cement for its Western Yards operations in 1997?

The Arbitrator frames the issue as follows:

1. Did the Company violate the subcontracting provision of the parties' collective bargaining agreement when it purchased Portland Cement from Lone Star Cement delivered FOB the Western Yards?

2. Did the Company violate the subcontracting provision of the parties' collective bargaining agreement when it hired Halverson Trucking to haul bulk cement from the LaFarge silo at Jones Island to the Western Yards?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 2

SCOPE OF OPERATIONS COVERED

2.1 This Agreement shall cover all work performed by employees of the Employer employed in the classifications of work covered by this agreement. This shall not be construed to negate or invalidate any collective bargaining (sic) between the Employer and a bona fide union covering work outside the geographical jurisdiction of the Union, on the effective date of such agreement. The jurisdiction of the Union is Milwaukee, Ozaukee, Washington and Waukesha Counties.

. . .

ARTICLE 31

GRIEVANCE PROCEDURE

31.1 Should differences arise between the Employer and the Union, or between the Employer and any of its employees, either individually or collectively, as to the meaning and application of the provisions of this Agreement, an earnest effort shall be made to settle such differences at the earliest possible time by the use of the following procedures:

. . .

ARTICLE 32

32.1 It is agreed that the following six (6) cardinal points form a part of this Agreement:

. . .

c. That there shall be no restriction on the use of any raw or manufactured material.

. . .

ARTICLE 33

SUBCONTRACTING

33.1 The parties recognize that the Employer may hire additional trucking when his own equipment and his own employees are fully employed.

. . .

BACKGROUND

Tews Company, Inc., is in the business of manufacturing and supplying ready-mix concrete and building materials and operates approximately one dozen plants throughout southern Wisconsin. Local 200 represents various classifications of employes, including Bulk Cement Drivers who are stationed at Tews' garage facility in downtown Milwaukee. The Bulk Cement Drivers haul to various Tews plants and customer locations.

In the Spring of 1997, Tews entered into an agreement with Lone Star Cement Company under which Lone Star would supply Portland cement to Tews. The purchase price included delivery terms FOB the Tews' Western Yards ready-mix plants. Lone Star delivered this Portland cement to the Tews' Western Yards via Schwerman Trucking. Tews' Western Yards lie outside of Milwaukee, Ozaukee, Washington and Waukesha counties.

In April of 1997, individual Bulk Cement Drivers Erwin Smith, Jerry Kubricky, and Gregory Slotke grieved the use of Halverson Trucking to haul cement from the LaFarge silo on Jones Island, Milwaukee, to the Tews' Western Yards during time periods in which certain Bulk Cement Drivers represented by Local 200 were told that no work was available.

In May of 1997, Local 200 Business Representative Rick Schermerhorn incorporated these grievances into a class action grievance. The class action grievance alleged that subcontracting the delivery of bulk cement during a time in which Local 200 Bulk Cement Drivers were on layoff constituted a continuing violation of the collective bargaining agreement.

As a remedy to this group grievance, the Union demanded that the Employer stop violating the contract and make the Bulk Cement Drivers whole for all losses due to the violation. The grievance was denied and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Union

Tews' agreement with Local 200 clearly and unambiguously restricts the Company from subcontracting Local 200's bargaining unit work unless its "own equipment and its own employees are fully employed." The contract's clarity is illustrated by the 1991 Joint Committee Decision awarding a Local 200 driver lost pay and pension benefits for work performed by an outside driver when the Union driver was laid off.

Tews presented no evidence to contradict the Union's witness evidence that, for over 20 years, Local 200 drivers have always hauled to the Western Yards. The 1994 grievance settlement mandates that, with one limited exception, Local 200 drivers would haul all bulk cement directly to the Hartland Yard. As both parties testified, during the most recent contract negotiations, the letter of understanding was not discussed and Tews never objected to the practice of using only Local 200 drivers to haul directly to Tews' facilities.

Local 200 has never allowed Tews to subcontract work while Local 200 drivers were not fully employed. Tews flagrantly and repeatedly violated the agreement by hiring outside

drivers to perform bargaining unit work at a time in which Tews was telling its own drivers that no work was available. Almost one-third of Tews' Local 200 drivers have been forced to quit because the drivers, in essence unemployed, could no longer feed their families.

Arbitrators have no power to modify the terms of a collective bargaining agreement by releasing an employer from a promise on the basis that the promise is financially burdensome. The agreement's "no subcontracting" language does not allow using business judgment or economic hardship as a defense to a grievance protesting subcontracting.

The arbitrator should sustain the grievance. The arbitrator should order Tews Company to cease and desist from subcontracting Local 200 bargaining unit work and direct that Tews make whole all employes who were improperly denied bargaining unit work.

Employer

Due to severe shortages of Portland cement, business necessity required Tews to buy Portland cement from Lone Star. Lone Star would not agree to supply Portland cement under any conditions other than delivery FOB at Tews' Western Yards.

The clear and unambiguous language of the parties' collective bargaining agreement does not limit management's right to obtain materials for use in its ready-mix concrete products. Article 32 provides the Company with the ability and unrestricted right to obtain any raw or manufactured material it needs in the operations of its business and production of its products.

The Company can obtain materials from any source and under any conditions required to maintain its operations. The Company is not restricted by the parties' agreement to obtain materials only from sources where it is picked up or transported by employes of the Company.

As set forth in Article 2, the jurisdiction of Local 200 is Milwaukee, Ozaukee, Washington and Waukesha Counties. The Western Yards are outside of this geographical area and another Teamsters Local represents employees of the Western Yards. The Union is seeking to use this arbitration hearing to expand its area of authority and representation to areas that are clearly outside the scope of the agreement.

The Anton and McClees grievances, which gave rise to the June 5, 1995, Letter of Understanding (LOU), involved a third party hauler hired by Tews. Inasmuch as this LOU applies to an unrelated matter that occurred in 1994; was only effective through May 31, 1996; was not renewed during contract negotiations for the current labor agreement; and was not included in the signed 1996-1999 labor master agreement, it is not controlling.

When the parties bargained their most recent collective bargaining agreement, the Union proposed language that would have eliminated the Company's ability to purchase any materials under any conditions from any source. This proposal was rejected and the subcontracting language was not changed.

The Company's decision to purchase Portland cement from Lone Star was based on legitimate and real concerns for the viability of its business; was made in good faith; was reasonable; and did not result in any subversion of the labor agreement or weakening of the bargaining unit. The subcontracting provisions of the labor agreement do not restrict this decision.

The Union is attempting to obtain through arbitration that which it could not obtain in negotiations. The grievance must be denied and dismissed.

DISCUSSION

The Union relies upon Article 33, Subcontracting, to argue that the Company has violated the parties' collective bargaining agreement. During the last bargain, the Union proposed to modify Article 33 as follows:

> 33.1 There shall be no subcontracting or outsourcing of bargaining unit work.

The Company rejected this modification and the Union withdrew this proposal. The provision, which remained unchanged, states as follows:

> 33.1 The parties recognize that the Employer may hire additional trucking when his own equipment and his own employees are fully employed.

The language of Article 33.1, on its face, addresses the "hiring" of additional trucking. In the instant case, the Company did not "hire" additional trucking. Rather, it purchased cement from Lone Star Cement under a purchase agreement in which the purchase price included delivery FOB the Company's Western Yards. Thus, the conduct of the Company is not in violation of the plain language of Article 33.1.

In the past, Local 200 drivers have been used to haul bulk cement from various suppliers to Tews plants. While it is evident that Tews has hired outside drivers to haul bulk cement from suppliers to its plants, it is also evident that the vast majority of such use occurred when Local 200 drivers were fully employed.

The record demonstrates that, on two occasions, the Union grieved the use of an outside trucker to haul cement at times in which one or more Local 200 drivers were not given work. On the first occasion, in 1991, the grievance was sustained by committee decision and the grievant received 5.5 hours of pay and one day's pension. On the second occasion, in 1994, the grievance was settled with the following:

BULK CEMENT LETTER OF UNDERSTANDING

BETWEEN

TEWS COMPANY

AND

TEAMSTERS "GENERAL" LOCAL UNION NO. 200

> This Letter of Understanding shall be made a part of the Labor Agreement in effect from June 1, 1992 through May 31, 1996, between Tews Company and Teamsters "General" Local Union No. 200.
>
> It is hereby mutually agreed to by the undersigned that all bulk cement delivered to all Tews Company plants, regardless of their location, will be hauled by employees of Tews Company who are members of Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, with the following exceptions: Loads from Illinois Cement hauled directly from Illinois Cement plant located in the state of Illinois, to the Tews Company, Hartland Yard. Be if (sic) further understood that insofar as the delivery of cement is concerned this Letter of Understanding supersedes the geographical jurisdictions described in Article 2, SCOPE OF OPERATIONS COVERED, of the Agreement.
>
> In the event that all of Tews Company bulk cement hauling equipment is being utilized, Tews may hire outside contractors as necessary.

The June 5, 1995 "Bulk Cement Letter of Understanding," by its terms, was made part of the labor agreement that was in effect from June 1, 1992 through May 31, 1996. The parties negotiated and reached a contract settlement on the successor June 1, 1996 through May 31, 1999 agreement without either party referring to the "Bulk Cement Letter of

Understanding." An LOU involving the rate of pay for Local 200 members performing plant engineer duties, which had been attached to the prior collective bargaining agreement, was discussed and agreed to by the parties during the negotiation of the June 1, 1996 through May 31, 1999 agreement.

After the parties had reached a settlement on the successor agreement, Union Business Agent Rick Schermerhorn asked the Company to sign another copy of the "Bulk Cement Letter of Understanding" and the Company refused, advising Schermerhorn that this LOU had not been renegotiated. Schermerhorn then advised the Company that he believed that all provisions of the labor agreement are carried forward into the next labor agreement unless the provision was altered in negotiations.

The "Bulk Cement Letter of Understanding," by its terms, expired with the June 1, 1992 through May 31, 1996 labor contract. There was no mutual agreement to incorporate this LOU into the successor labor contract, or to otherwise extend its terms beyond May 31, 1996. Since this LOU was not in effect at the time that the Company purchased Portland Cement from Lone Star, its terms are not binding upon the Company.

The evidence of the parties' past practice does not indicate that the Company previously purchased cement to be delivered FOB the Company's Western Yards, or that the parties had mutually agreed that such a delivery violated any provision of the collective bargaining agreement. Neither the evidence of the parties' past practices, nor the evidence of bargaining history, demonstrates that the parties intended Article 33.1 to be given any meaning other than that reflected in the plain language of the agreement.

The subcontracting language contained in the parties' collective bargaining agreement does not preserve all bargaining unit work. Rather, it preserves work opportunities for current bargaining unit members.

The record demonstrates that Lone Star would not sell to the Company under any condition other than delivery FOB the Company's Western Yards. The record further demonstrates that, due to the shortage of Portland Cement, the Company did not have an alternative source for this cement. The "hauling" of the cement purchased from Lone Star is not work which was available to any Local 200 driver.

It is not evident that Tews' purchase agreement with Lone Star was a contrivance to deprive Local 200 drivers of work opportunities and it did not deprive any Local 200 driver of a work opportunity. Tews did not subcontract work in violation of the collective bargaining agreement when it purchased Portland Cement from Lone Star with a delivery FOB the Western Yards.

The evidence of past practice persuades the undersigned that the parties have mutually recognized that hauling bulk cement from the LaFarge silo on Jones Island to the Western Yards is bargaining unit work. In April of 1997, the Company hired Halverson Trucking to haul bulk cement from the LaFarge silo on Jones Island to the Western Yards. According to Union Exhibit #15, on May 14, 1997, the Company advised the Union that it had stopped using Halverson to perform this work.

Under the provisions of Sec. 33.1, the Company is not contractually entitled to hire Halverson to perform this work unless its own equipment and its own employes are fully employed. At times, Halverson performed this work when Local 200 drivers and Company equipment were not fully employed. Accordingly, the Company has violated the subcontracting provision of the parties' collective bargaining agreement.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Company did not violate the subcontracting provision of the parties' collective bargaining agreement when it purchased Portland Cement from Lone Star Cement delivered FOB the Western Yards.

2. The Company violated the subcontracting provision of the parties' collective bargaining agreement by hiring Halverson Trucking to haul bulk cement from the LaFarge silo at Jones Island to the Western Yards in the Spring of 1997, during times in which Local 200 drivers and Company equipment were not fully employed.

3. In remedy of this contract violation, the Company is to immediately make whole all employes in the Bulk Cement Drivers classification represented by Local 200 who were available to work and had Company equipment available to perform work, but were not offered work, during times in which Halverson Trucking was hired by the Company to haul bulk cement from the LaFarge silo at Jones Island to the Western Yards.

4. The undersigned will retain jurisdiction for a period of forty-five days for the sole purpose of resolving any disputes with respect to the remedy.

Dated at Madison, Wisconsin, this 4th day of September, 1998.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

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