BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1752-E, AFSCME, AFL-CIO

and

THE SCHOOL DISTRICT OF BEECHER-DUNBAR-PEMBINE

Case 30
No. 56866
MA-10441

(Elementary Aide Grievance)

Appearances:

Mr. David A. Campshure, Staff Representative, Wisconsin Council 40, on behalf of the Union.

Godfrey & Kahn, S.C., by **Mr. Robert W. Burns** and **Mr. John A. Haase**, on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "District", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Pembine, Wisconsin, on January 14, 1999. The hearing was transcribed and the parties there agreed that I would retain my jurisdiction if the grievance is sustained. Subsequent to the hearing, the Union by letter dated May 19, 1999, submitted a report "from an independent source regarding the financial status of the . . ." District. The District by letter dated May 20, 1999, objected to its receipt. I returned the report, unread, because "no provision was made at the hearing relating to possible receipt of post-hearing exhibits and because the record at that point was closed. . ." The parties subsequently filed briefs and the District filed a reply brief that was received by June 7, 1999. The Union did not file a reply brief.

Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

> Did the District violate the collective bargaining agreement when it eliminated two bargaining unit aide positions prior to the 1998-1999 school year and, if so, what is the appropriate remedy?

BACKGROUND

The District by letters dated July 29, 1998, informed teacher aides Constance Geib and Lila Dal Santo - who assisted elementary teachers in regular classrooms - they would be laid off for the 1998-1999 school year. Both exercised their contractual bumping rights which ultimately led to the layoffs of teacher aide Verna Adams and custodian Linda Erno.

District Administrator Daniel A. Nylund testified that the District decided to layoff two teacher aides because of the District's declining enrollment and financial condition, one that also caused the District to lay-off a CESA 8 aide, to not replace a retiring teacher, to eliminate a nursing position, and to take other cost-cutting measures. The District had employed three full-time CESA 8 special education aides in the prior 1997-1998 school year.

The District for the 1998-1999 school year, as it did since 1988, continued to use a "Green Thumb" volunteer who was paid by the government and not by the District. But for limited recess duty, that person did not perform any of the duties formerly performed by Adams or Erno. The District for the 1998-1999 school year assigned some of the laid-off aides' duties to classroom teachers, including recess duty.

The District for the 1998-1999 school year employed two CESA 8 special education aides in a subcontracting arrangement with CESA 8. They were paid less than what the laid-off aides here were paid and they continued to perform the work they had performed in prior years. They did not perform any of the work previously performed by Adams or Erno. The District has had such a subcontracting arrangement with CESA 8 since about 1988. Adams and Erno were qualified to perform the work performed by the CESA 8 aides in the 1998-1999 school year.

Dal Santo testified without contradiction that she asked Nylund why the CESA 8 aides had been retained and why she had been slated for layoff and that he replied: "They come cheaper."

Nylund acknowledged that no work had been eliminated because of the layoffs. He said that teachers were performing some of the aides' classsroom duties and some of the aides' recess duties. Neither he nor any other District witness claimed that the laid-off aides could not perform the duties being performed by the CESA 8 aides. Hence, when asked on cross-examination about this issue, Nylund replied: "So I would guess that the work that they're doing [i.e. the CESA 8 aides] is somewhat similar. That I, you know, don't know for sure." The record elsewhere establishes – through the combined testimony of Dal Santo and Geib whose testimony I credit – that bargaining unit personnel can perform the duties of the CESA 8 aides. Indeed, Geib herself had once worked as a CESA 8 aide for the District.

POSITIONS OF THE PARTIES

While conceding that the District otherwise followed the correct order of layoffs, the Union contends the District violated Article XXII of the contract when it laid off Adams and Erno because the layoffs were "a direct result of the District's decision to continue its contracts with CESA 8 and the Green Thumb program". It thus argues:

> "The fact that the CESA aides and a Green Thumb employe were working in the District prior to the elimination of the two bargaining unit aide positions does not mean the unit aides were not laid off as a result of the subcontracting."

The Union maintains that the District merely shifted various assignments around in an effort to circumvent Article XXII and that the District's financial difficulties are overstated and do not excuse its actions. As a remedy, it seeks a traditional make-whole remedy that includes reinstatement and backpay and an order barring the District from subcontracting bargaining unit work if bargaining unit employes are on layoff.

The District, in turn, contends that the grievance is without merit because its layoff decision represented "a legitimate exercise of its management rights"; because its subcontracting arrangement "did not cause the District to lay off any employee"; because its employment of a Green Thumb individual "does not invalidate the layoffs"; and because its use of teachers to perform certain work was proper since teachers had performed such work in the past and since no additional teachers were hired to perform it for the 1998-1999 school year. The District further contends that its layoffs did not violate the subcontracting proviso; and there is no evidence supporting the Union's claim that its layoffs were aimed at hurting the Union and the teachers; and that its layoff did not violate Article VI(5) of the contract dealing with layoffs.

DISCUSSION

This case partly turns on Article XIX of the contract, entitled "Managerial Rights", which states:

> 1. During the course of negotiations, which preceded the execution of this Agreement, the parties discussed matters pertaining to custodial and maintenance operations, supervision of the work force and managerial prerogatives. Pursuant to these negotiations the parties agreed that all functions of management to run its operations and to direct its employees, are retained by the School District. This would include scheduling work hours in a manner which is deemed most advantageous to the School District.
>
> 2. Nothing contained in this Article shall be construed as divesting an employee of any right granted elsewhere in this Agreement or the Wisconsin Statutes.
>
> 3. The Employer agrees that it will exercise the rights enumerated above in a fair and reasonable manner, and further agrees that the rights contained herein shall not be used for the purpose of undermining the UNION or discriminating against its members.

As the District correctly points out, this language gives it wide latitude in running its affairs. Hence, when the District determined it was facing financial difficulties, it was entitled to deal with that problem.

However, its right to do so is not absolute because this language expressly cautions: "Nothing in this Article shall be construed as divesting an employee of any right granted elsewhere in this Agreement or the Wisconsin Statutes." Elsewhere, Article XXII of the contract, entitled "Subcontracting", states:

> "The District has the right to subcontract work, provided that no present employee[s] shall be laid off or suffer a reduction in hours as a result of subcontracting or by the use of volunteers and/or teachers."

Subcontracting has been defined as:

> "making an agreement to have another person . . .do construction, perform service, or manufacture or assemble products that could be performed by payroll unit employes." This definition underscores two features of subcontracting that are most significant in labor relations and arbitration. The

> first is that a subcontract is an agreement that operates independently and potentially in derogation of a collective bargaining agreement. The second is that a subcontract leads to the performance by persons outside the bargaining unit of work that might otherwise be performed by employes within the unit. (footnote citations omitted).

See *Labor and Employment Arbitration, Vol. 1*, Bornstein, Gosline, Greenbaum 25.01[1] pp. 25-2. (Matthew Bender, 1999).

Here, since the District used CESA 8 aides during the 1998-1999 school year to "perform service" that "could be performed by payroll unit employees", its action led "to the performance by persons outside the bargaining unit of work that might otherwise be performed by employes within the unit." That is why it constitutes subcontracting as that term is commonly understood.

Arbitrator David Crawford addressed subcontracting in AMERICAN SUGAR REFINING COMPANY, 36 LA 409, 414 (1960), when he stated:

. . .

> The power to subcontract is the power to destroy. Obviously the Company cannot recognize the Union as exclusive agent for its unit employees, agree upon terms of employment, and then proceed arbitrarily to reduce the scope of the unit or to undercut the terms of the Agreement.
>
> Thus contracting out cannot be used as a *device* for undermining the status of the recognized exclusive agent by farming the unit jobs out to contractors. Nor can contracting out be used (even unwittingly) as a device for securing better prices than those agreed upon, and thereby indirectly undermine the status of the recognized exclusive agent by placing it in the position of having to agree to cut contract terms in order to persuade the Company not to subcontract the jobs of the represented employees. (Emphasis added).
>
> Beyond this the specific facts underlying the subcontracting must demonstrate the existence of compelling logic or economies of operation (other than the wage bill) and the consideration of the Union status and the integrity of the bargaining unit. The basis for management's decision to subcontract is especially important where permanent and regular jobs are being contracted out inasmuch as the size of the bargaining unit is being reduced, and more especially if a substantial portion of the unit jobs are being farmed out.

The Common Law of the Workplace, St. Antoine, Ed., (BNA, 1998), at 114, also recognizes that lower wage costs cannot be used as a justification for subcontracting since it states: "Merely paying lower wages for the same work is generally not considered a reasonable justification."

Arbitrators Saul Wallen addressed the importance of protecting bargaining unit work in NEW BRITAIN MACH. CO., 8 LA 720, 722 (1947) when he stated:

. . .

> "Job security is an inherent element of the labor contract, a part of its very being. If wages is the heart of the labor agreement, job security may be considered its soul. . .The transfer of work customarily performed by employes in the bargaining unit to others outside the unit must therefore be regarded as an attack on the job security of the employees whom the Agreement covers and therefore on one of the contract's basic purposes."

. . .

The aforementioned arbitrable authority establishes one underlying truth: unless expressly stated otherwise, a subcontracting proviso by its very nature is meant to protect bargaining unit employes from being laid off or having their hours reduced if any bargaining unit work for which they are qualified to perform is being performed by non-bargaining unit employes.

The District asserts that since the two CESA 8 special education aides retained for the 1998-1999 school year did not perform any of the work formerly performed by the laid-off aides in the prior 1997-1998 school year, the CESA 8 aides did not cause the layoffs and that its subcontracting arrangement with CESA 8 is not prohibited under the contract.

This might be a valid argument if the CESA 8 aides were employed when the language in Article XXII was first agreed to because that might signify that the parties then understood that bargaining unit employes could be laid-off when CESA 8 aides were retained, provided only that the latter did not perform any of the identical work formerly performed by the laid-off aides.

But the record establishes, via District Administrator Nylund's testimony, that the CESA 8 aides and the Green Thumb volunteer were first hired in about 1988 and that the subcontracting language in Article XXII was agreed to in about 1983, before the CESA 8 aides and Green Thumb volunteer were hired. (See Joint Exhibit 4 which is an excerpt from the parties' 1983-1984 contract.) That being so, Article XXII's intent must be ascertained by what was meant at that time.

The record is barren of any evidence showing that non-bargaining unit personnel then performed any bargaining unit work. In addition, there is no bargaining history supporting the very narrow contract interpretation the District advances here. Hence, the subcontracting language in Article XXII must be given its ordinary meaning which means that it was then agreed to by the parties in order to protect bargaining unit employes from being laid-off in the face of any subcontracting involving non-bargaining unit personnel.

Indeed, the language agreed to for the 1983-1984 contract – which is now contained in Article XXII of the current contract – provided even greater job security on this score than the prior contract because the language in the prior 1982-1983 contract stated:

> "The District has the right to subcontract work, provided that jobs historically performed by members of the bargaining unit shall not be subcontracted and provided further that no present employees shall be laid off or suffer a reduction of hours as a result of subcontracting. It is further agreed that the use of volunteers and/or teachers shall not reduce the bargaining unit's work."

When this former language is compared to the language now contained in Article XXII and which is set forth above at p. 4, we see that the latter drops all reference to the phrase "historically performed by members of the bargaining unit." Hence, bargaining unit work is now protected even if it has not been historically performed by bargaining unit employes.

If the parties wanted the much narrower prohibition now advanced by the District, they would have agreed to contract language stating in effect:

> "The District has the unfettered right to subcontract any present and/or future bargaining unit work, provided only that no present employes will be laid off or have their hours reduced if any such subcontracting involves the identical work they have been previously performing."

This, in essesnce, is what the District is claiming Article XXII now means. But, Article XXII does not state that. It, instead, recognizes a much broader principle: the District is free to subcontract work only if bargaining unit members are not laid-off and/or do not have their hours reduced when any such subcontracting is taking place. If their economic security is jeopardized in that fashion, no subcontracting can occur under Article XXII. That being so, we thus must determine whether the laid-off employes here were prevented from doing work that they otherwise could have performed but for the subcontracting.

Well, if the two CESA 8 aides were not employed in the 1998-1999 school year, it must be assumed that the laid-off employes would have performed their work because: (1), it was bargaining unit work; and (2), they were qualified to work in that capacity – a point not disputed by the District. But for the CESA 8 aides, Adams and Erno thus would have performed the bargaining unit work performed by the CESA 8 aides and they thus would not have been laid-off. Indeed, the District acknowledges in its Reply Brief, at p. 2: "The District is not asserting that the use of CESA aides could not have caused the layoffs because the retention of the CESA aides preceded the layoffs." Hence, the subcontracting resulted in their layoffs.

The District nevertheless claims in its Reply Brief, at p. 2:

> "the 10 year gap of time between its decision to use CESA aides and a Green Thumb employe and the time of its decision to layoff aides suggests there is no cause and effect relationship between the two decisions."

The District offers no suggestion as to what constitutes a sufficient "gap" for Article XXII to have any meaningful effect for bargaining unit employes. Is a one-year "gap" sufficient? If so, what difference does it make whether employes are laid off in 1984 or 1999? The result in both instances remains the same: bargaining unit employes are out of work while non-bargaining unit personnel are employed to perform work they are fully qualified to perform. The critical factor here is not when a "gap" occurs, but rather, what the intent of the parties was in agreeing to the language in 1983 when there were no CESA 8 aides or Green Thumb volunteers on the scene. This preservation of bargaining unit work hence has no expiration date. I therefore find that the District violated Article XXII when it eliminated two bargaining unit aide positions prior to the 1998-1999 school year.

To rectify that contractual violation, the District shall make Adams and Erno whole by immediately offering them their former or substantially equivalent positions and by paying to them a sum of money, including all benefits and seniority, that they otherwise would have earned had they not been laid off, minus any monies they received because of their layoff. In addition, the District is hereby prohibited from subcontracting any bargaining unit work if there are any qualified bargaining unit employes on layoff status who can perform that work. Before any such subcontracting can take place, qualified laid-off employes must first be recalled.

If the District again violates the contractual subcontracting proviso, it must make whole any affected employes by paying to them all wages and benefits they would have earned had they been hired for said work. See *How Arbitration Works*, Elkouri and Elkouri, pp. 756-757 (BNA, 5th Ed., 1997).

In light of the above, it is my

AWARD

1. That the District violated Article XXII of the contract when it eliminated two bargaining unit aide positions prior to the 1998-1999 school year and when it thereafter used a subcontracting arrangement to perform bargaining unit work the laid-off aides were qualified to perform.

2. That to rectify that contractual violation, the District shall make whole Verna Adams and Linda Erno in the fashion described above and it shall immediately offer to reinstate them to their former or substantially equivalent positions.

3. That the District is prohibited from subcontracting any bargaining unit work if there are any qualified bargaining unit employes on layoff status. Before any such subcontracting can take place, qualified laid-off employes must first be recalled. If they are not recalled, they shall be made whole in the fashion described above.

4. That to resolve any questions that may arise over application of this Award, I shall retain my jurisdiction indefinitely.

Dated at Madison, Wisconsin this 30th day of August, 1999.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

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